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2024
National Conference on Special Needs Planning and Special Needs Trusts

November 21-22, 2024

STETSON LAW

Center for Elder Justice

Access and Justice For All®

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2024
National Conference on Special Needs Planning and Special Needs Trusts

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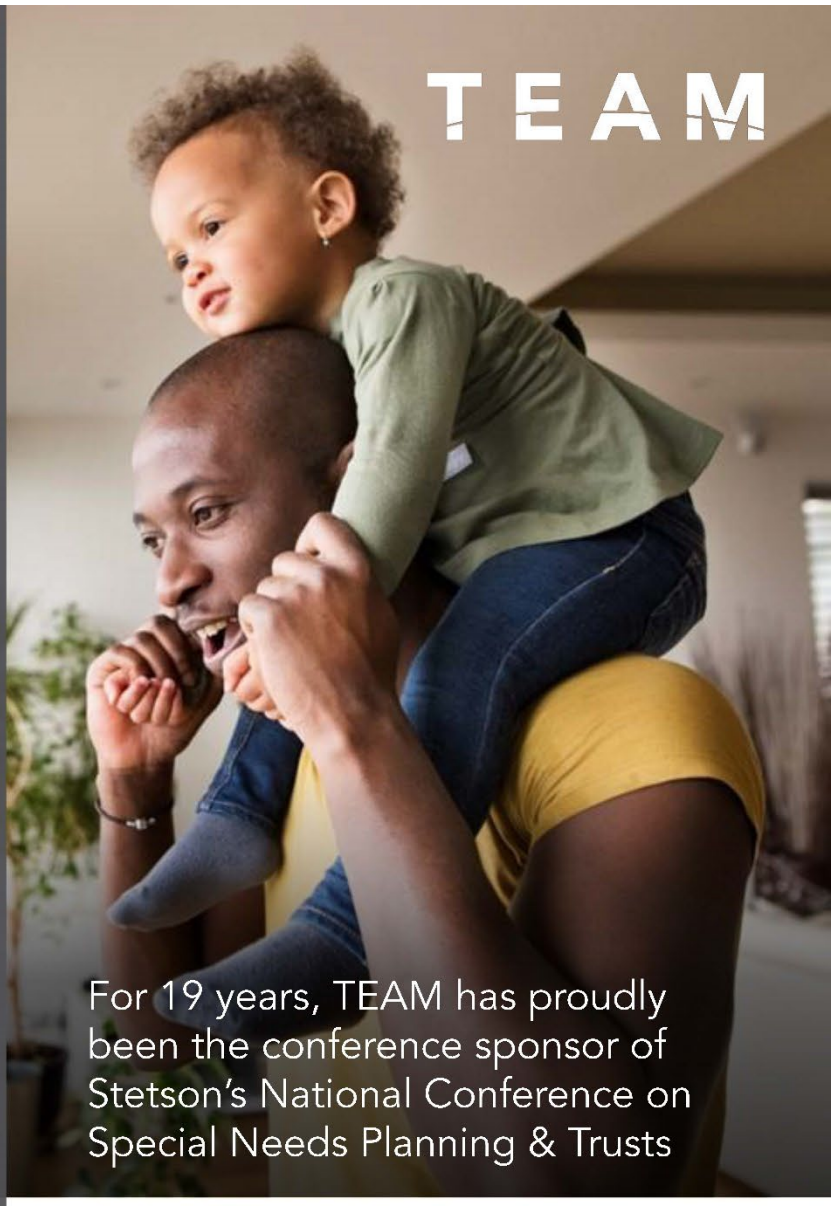

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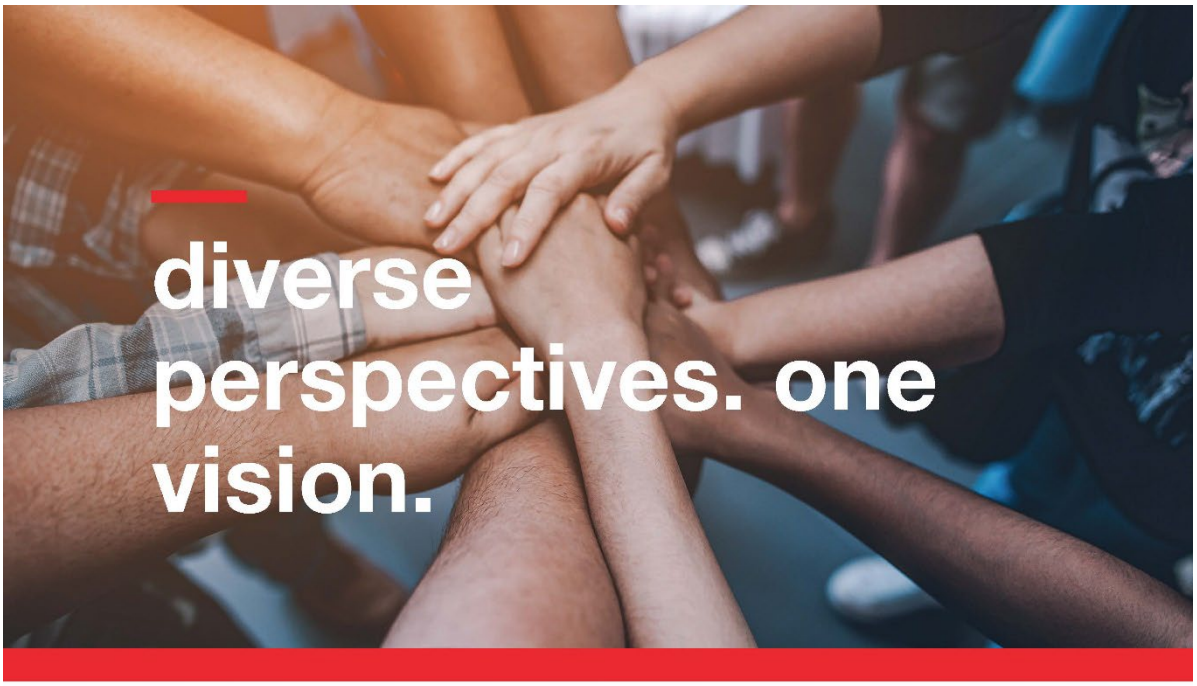

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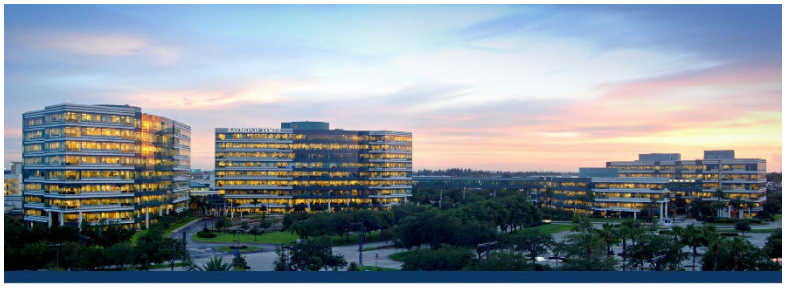

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– Tara Anne Pleat, CELA

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National Conference on Special Needs Planning and Special Needs Trusts

November 21, 2024

The Mission is Possible to Find Quality Residential Care

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Center for Elder Justice

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The Mission is Possible to Find Quality Residential Care

Presented by: Jim Caffry, Jim McCarten, and Mark Olson

Stetson Special Needs Planning and Special Needs Trusts Conference
October 17, 2024

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3 FATHERS

3 FAMILIES

3 JOURNEYS

ONE GOAL!

2

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About Us

James A. Caffry, Esq.
Caffry Law, PLLC
Waterbury, Vermont

- Father of young adult son with I/DD, ASD
- Special Needs Alliance, Member since 2007
- Riverflow Community, Inc., part of founding group

James M. McCarten
Senior Counsel
Lindsey & Lacy, PC
Peachtree City, Georgia

- Father of adult daughter with I/DD, ASD
- A "Tax Nerd" (per Kathryn)
- Special Needs Alliance, Member since 2009
- Practice in both Georgia and Tennessee
- Georgia Department of Behavioral Health and Developmental Disabilities Advisory Council, Region 6, Member since 2018
- Advocate with many Southeast disability organizations

Mark L. Olson
President & CEO
LTO Ventures

- Father of 2 disabled adult daughters
- Consultant & Project Manager
- 9 projects in 5 states (IN, OH, PA, TX, WI)
- Our own project - **Autumn Hills Village** in Boerne, TX
- Advocate - local, state, federal levels

3

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The Need

- **7.39 million** - Individuals in the U.S. with an intellectual or developmental disability (IDD) in 2019[1]
- **11%** - Live in a home of their own[1]
- **72%** - Live with a family caregiver[2]
- **24%** - Live with caregiver aged 60 or older[2]
- **497,354** on waitlists nationally (Texas: 311,532; 18 years for HCS waiver) (Georgia: 7,000+)[3]
- 5 million Direct Care Workers in 2022; **8.9 million more** needed by 2032[4]

[1] *In-Home and Residential Long-Term Supports and Services for Persons with Intellectual or Developmental Disabilities: Status and Trends Through 2019* report produced by the Residential Information Systems Project (RISP) of the University of MN
[2] Tanis, E.S., et al. (2023). *The State of the States in Intellectual and Developmental Disabilities*, Kansas University Center on Developmental Disabilities, The University of Kansas www.stateofthestates.ku.edu
[3] Kaiser Family Foundation Medicaid HCBS Waiver Program Survey, FY 2023
[4] PHI; https://www.phinational.org/policy-research/key-facts-faq

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Factors in the McCarten Housing Journey

- Safety
- Skills already acquired
- Skills we believe can reasonably be acquired
- Supports needed
- Social opportunities (employment is included here)

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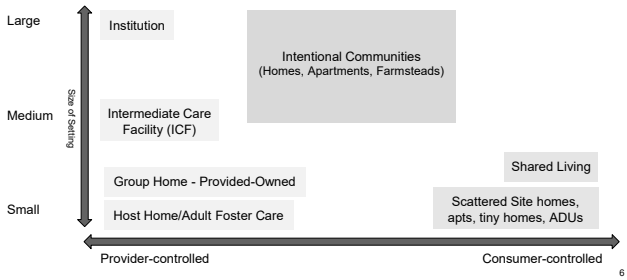
Range of Housing Options Today



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An Overview of Structural Choices (the legal structuring)

1. If the family or a trust is to own the home and there are roommates, whether employed or paying rent
   - Are tax benefits possible?
   - Want liability protection?
   - Then likely use an LLC.
2. Is nonprofit status beneficial?
   - Medicaid provider preference
   - No income tax is paid (an indirect government subsidy)
   - Access to tax deductible contributions
   - Access to Government and Foundation grants

7

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Tax Exempt Issues

1. Private Foundation vs. Public Charity status
   - Mission related revenues are treated as public support
2. Private Benefit/Private Inurement
3. Self-Dealing
4. The Intermediate Sanctions

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LTSS - Long-Term Supports and Services

- Resident Support Needs
  - 24/7, One-on-One, or High Behavioral Support
  - Moderate, Low, Drop-in, or No Support
  - Memory care
- LTSS Delivery Models
  - Provider-based, agency-based or self-directed rotational staffing
  - Host home / adult foster care
  - Shared living
  - Natural supports / circles of support
  - Remote monitoring
- Funding Options
  - Medicaid HCBS
  - Medicare or other insurance
  - Private pay

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Medicaid HCBS Waivers - *Fastest 3 minutes in sports*

- Waives certain Medicaid requirements to enable individuals with disabilities, elderly, medically fragile to access Medicaid funding for a range of supports
- SCOTUS 1999 decision - *Olmstead v L.C.* - deinstitutionalization mandate
- CMS Final Settings Rule - CMS-2249/2296-F - and guidance (2014 & 2019)
- Waivers are federal-state share: Settings Rule sets the floor, states can add
- Settings Rule - currently focused on opportunities, experiences, & outcomes
- Eligibility and waiver program differences vary widely across states:
  - Good: Wisconsin IRIS, Arizona IDLA
  - Problematic: Indiana CIH, Pennsylvania Comprehensive, Texas HCS

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Building Your Own Housing

- Vision, Mission, Core Values/Guiding Principles
  - Who you want to support
  - What is the purpose and desired long-term outcomes
  - What type of housing, common spaces
  - How do you want it to operate
  - Medicaid-eligible or private pay
- Capacity and realistic expectations
- Learn from others - nothing like experiencing settings in-person
- Leverage professionals and people who've done it before
- Broad-based community support

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Funding to Build Your Own Housing

Non-Governmental:

- Founding board members, friends and family
- Broad-based community donations (70-80%)
- Foundations, family offices, and corporations (20-30%)
- Equity financing
- Debt
- Resident family-funded / co-ops
- Home sales:
  - Families for their children (Family Opportunity Mortgage)
  - Benevolent investors

Governmental:

- Tax credits
  - LIHTC Low-Income Housing Tax Credits (4% and 9%)
  - NMTC - New Markets Tax Credits
- HOME Investment Partnership Program
- Housing and Mortgage Finance Agency (NJ)
- Affordable Housing Trust Funds
- Land Banks
- Other state-specific funds
- Legislative appropriations

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Case Study: Riverflow Community

13

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Case Study: Riverflow Community

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Case Study: Riverflow Community

Riverflow Community

www.riverflowcommunity.org

Background

- 90%+ currently Shared Living Providers
- Least expensive - IRC 131
- i.e., Adult Foster Care - typically no long term stability, particularly for high support needs individuals
- Parents organize & advocate for change
- Legislature listens
- Vermont Act 186 (June 2022) - Planning Grants for Alternative Models

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Case Study: Riverflow Community

www.riverflowcommunity.org

Enter Riverflow! - Summer & Fall 2023

- Families and Intentional Living Professional form Riverflow
- Awarded Vermont one of the Act 186 Grants
- A marathon… but also a sprint
- Building the plane while flying…
  - Building the Team
  - Fundraising
  - Gov't approvals - IRS, Local Zoning, State Licensing (under CMS HCBS framework)
  - Renovations

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Case Study: Riverflow Community

www.riverflowcommunity.org

Two Biggies

- Funds for Bricks & Mortar
  - Founders
  - Friends & Families
  - Foundations
  - Grants
- Sustainable Operational Budget
  - IRC 119

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Case Study: Riverflow Community

January 2024 - start here... 😶 😳

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Case Study: Riverflow Community

October 2024 - End here!

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How To Find Housing Options

Autism Housing Network - www.autismhousingnetwork.org

Together for Choice - www.togetherforchoice.org/housing-directory

Special Needs Alliance - www.specialneedsalliance.org

State Medicaid Agencies - generally lists of group homes and institutions (if any) in each state, provider or government-controlled

Google - local, state, and national options

Word of Mouth / Advocacy Groups / Social media - local options

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Survey of Interest in Continuing Education Webinar Series

50-minute session covers only a fraction of the subject matter for housing for adults with IDD.

The QR code opens a 4-question survey to gauge the interest in an informational or continuing education webinar series that informs about housing in greater detail.

Link: https://s.surveyplanet.com/uz789er8

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Q&A

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U.S. Healthcare Isn't Ready for Seniors with Disabilities

STEPHEN DALE AND DAVID GOLDFARB

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The Global Age Wave

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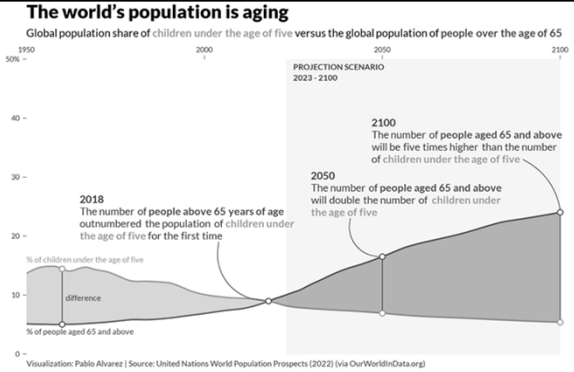

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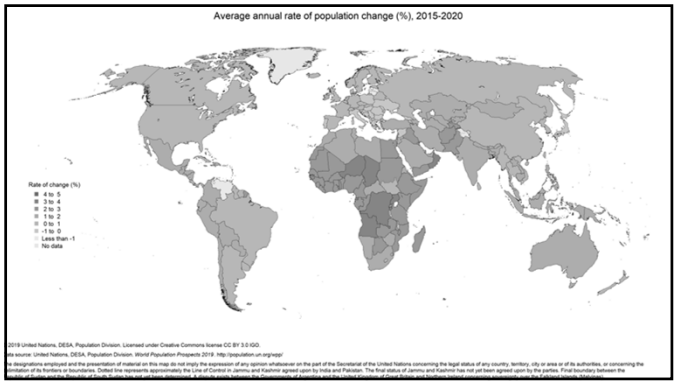

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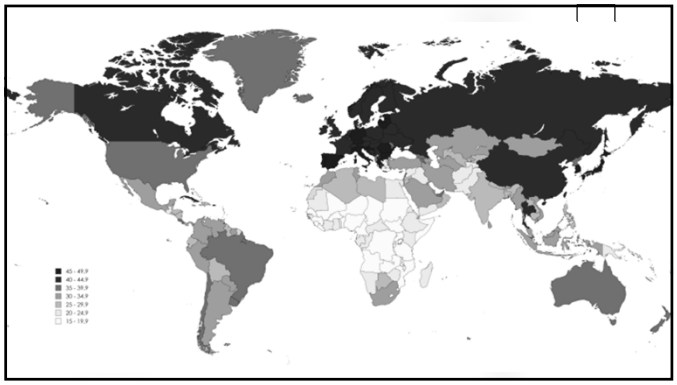

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The United States Age Wave

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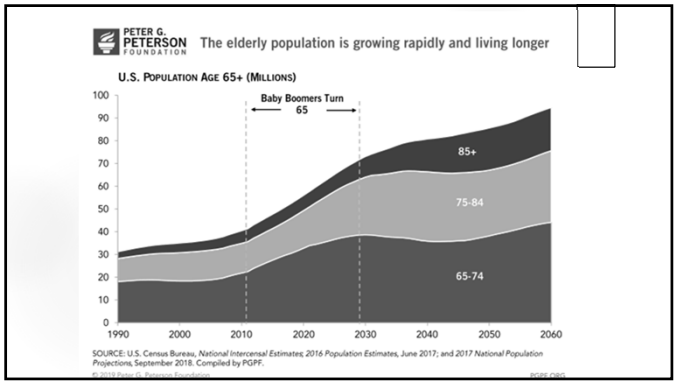
PETER G. PETERSON FOUNDATION
The elderly population is growing rapidly and living longer
U.S. Population Age 65+ (Millions)
Baby Boomers Turn 65
85+
75-84
65-74
100
90
80
70
60
50
40
30
20
10
0
1990
2000
2010
2020
2030
2040
2050
2060
SOURCE: U.S. Census Bureau, National Intercensal Estimates; 2016 Population Estimates, June 2017; and 2017 National Population Projections; September 2018. Compiled by PGPF.

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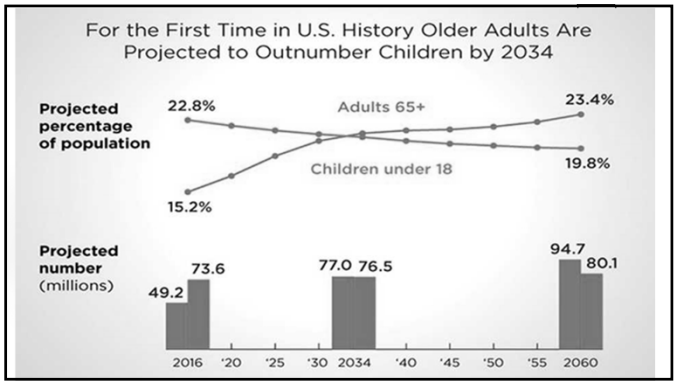
For the First Time in U.S. History Older Adults Are Projected to Outnumber Children by 2034
Projected percentage of population
22.8%
Adults 65+
23.4%
Children under 18
19.8%
15.2%
Projected number (millions)
49.2
73.6
77.0
76.5
94.7
80.1
2016
'20
'25
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2034
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2060

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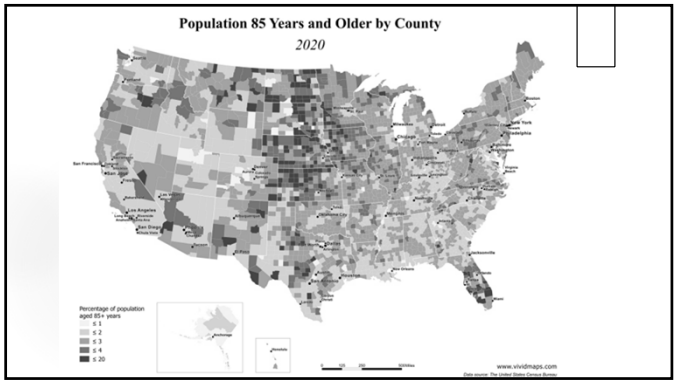
Population 85 Years and Older by County
2020
Percentage of population aged 85+ years
≤ 1
≤ 2
≤ 3
≤ 4
≤ 20
www.vividmaps.com

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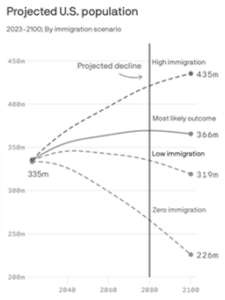
Future Growth: Immigration A Big Factor



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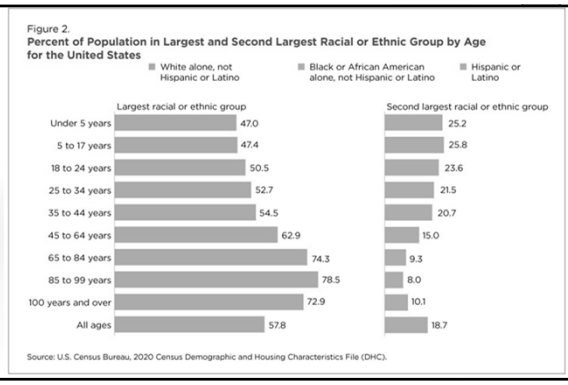
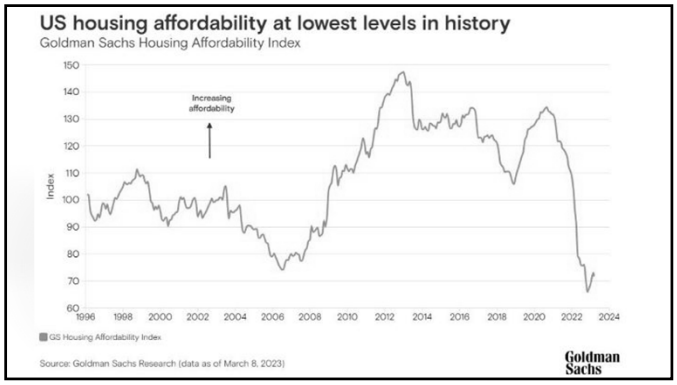


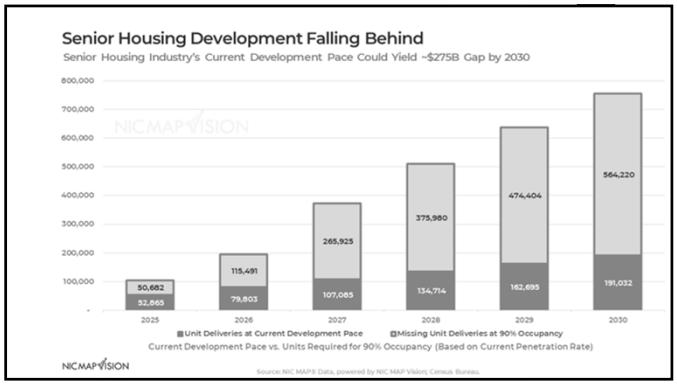
11

Accessible, Affordable Housing

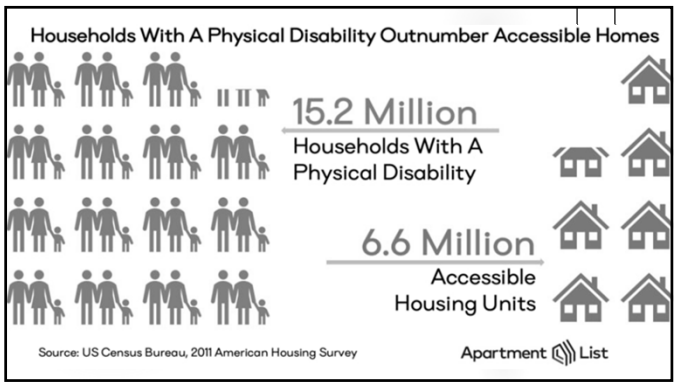
12


US housing affordability at lowest levels in history
Goldman Sachs Housing Affordability Index
Increasing affordability
Index
150
140
130
120
110
100
90
80
70
60
1996 1998 2000 2002 2004 2006 2008 2010 2012 2014 2016 2018 2020 2022 2024
GS Housing Affordability Index
Source: Goldman Sachs Research (data as of March 8, 2023)
Goldman Sachs

13


Senior Housing Development Falling Behind
Senior Housing Industry's Current Development Pace Could Yield ~$275B Gap by 2030
800,000
700,000
600,000
500,000
400,000
300,000
200,000
100,000
-
NICMAP VISION
50,682
52,865
115,491
79,803
265,925
107,085
375,980
134,714
474,404
162,695
564,220
191,032
2025
2026
2027
2028
2029
2030
Unit Deliveries at Current Development Pace
Missing Unit Deliveries at 90% Occupancy
Current Development Pace vs. Units Required for 90% Occupancy (Based on Current Penetration Rate)
NICMAP VISION

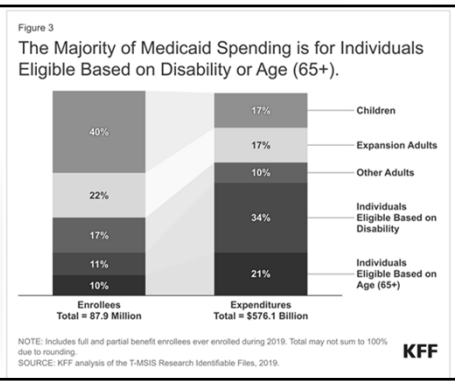
14


Households With A Physical Disability Outnumber Accessible Homes
15.2 Million
Households With A Physical Disability
6.6 Million
Accessible Housing Units
Source: US Census Bureau, 2011 American Housing Survey
Apartment List

15

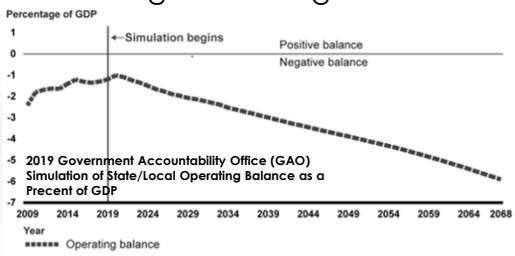
Federal & State Budgets

16



17

Worsening State Budgets Over Time

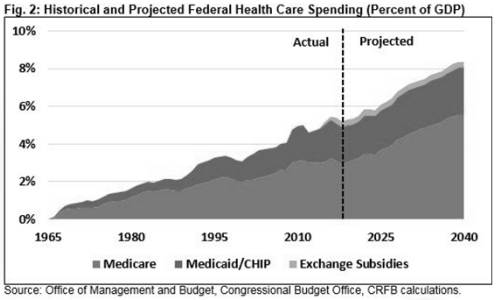


2019 Government Accountability Office (GAO) Simulation of State/Local Operating Balance as a Precent of GDP

18

Rising Federal Health Care Costs

Fig. 2: Historical and Projected Federal Health Care Spending (Percent of GDP)



Source: Office of Management and Budget, Congressional Budget Office, CRFB calculations.

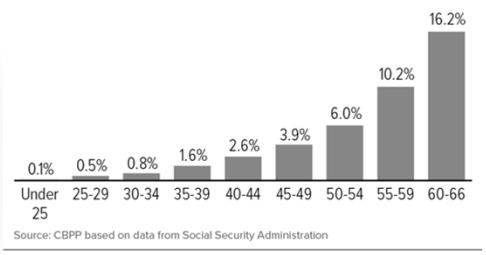
19

Disabilities & Old Age

20

Disability Rates Rise With Age

Disability Insurance beneficiaries as a percent of insured workers, December 2022

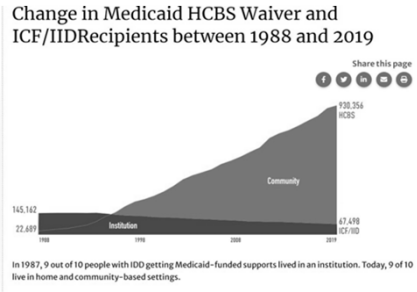


Source: CBPP based on data from Social Security Administration

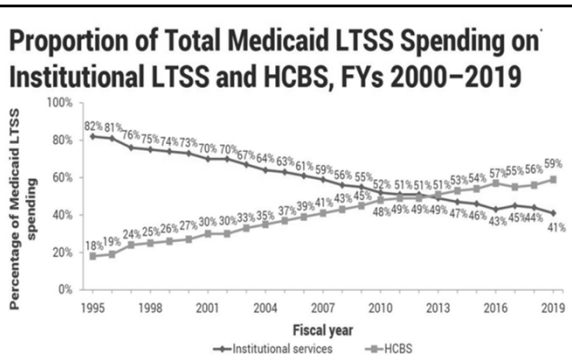
CENTER ON BUDGET AND POLICY PRIORITIES | CBPP.ORG

21

De-institutionalization



22



23

Staffing Crisis

24

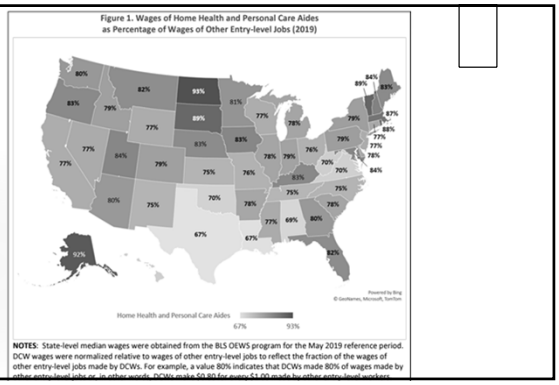
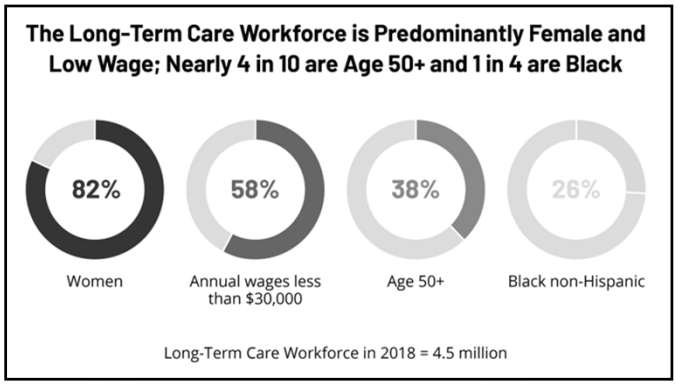
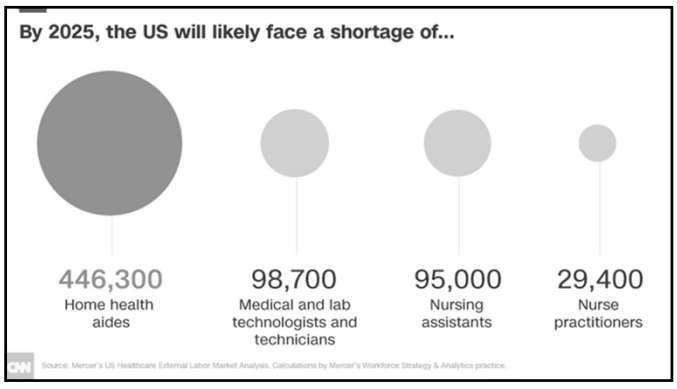


Figure 1. Wages of Home Health and Personal Care Aides
as Percentage of Wages of Other Entry-level Jobs (2019)
Home Health and Personal Care Aides
67%
93%
NOTES: State-level median wages were obtained from the BLS OEWS program for the May 2019 reference period.
DCW wages were normalized relative to wages of other entry-level jobs to reflect the fraction of the wages of
other entry-level jobs made by DCWs. For example, a value 80% indicates that DCWs made 80% of wages made by

25


The Long-Term Care Workforce is Predominantly Female and Low Wage; Nearly 4 in 10 are Age 50+ and 1 in 4 are Black
82%
Women
58%
Annual wages less than $30,000
38%
Age 50+
26%
Black non-Hispanic
Long-Term Care Workforce in 2018 = 4.5 million

26


By 2025, the US will likely face a shortage of...
446,300
Home health aides
98,700
Medical and lab technologists and technicians
95,000
Nursing assistants
29,400
Nurse practitioners
Source: Mercer's US Healthcare External Labor Market Analysis. Calculations by Mercer's Workforce Strategy & Analytics practice.

27

Service Provision and Integration

28

Intellectual Disabilities and Aging
Focus on Employment—What's Next?

29

Integrating Older Adult Settings

30

Recap

- Global & United States Age wave.
- Will impact government budgets.
- Need for housing.
- Need for staffing.
- Need for different services.
- Need to integrate aging services.

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National Conference on Special Needs Planning and Special Needs Trusts

November 21, 2024

The View from the Beneficiary's Side

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National Conference on Special Needs Planning and Special Needs Trusts

November 21, 2024

Ethical Issues in SNT Administration: What Attorneys and Trustees Need to Know

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THIRD-PARTY AND SELF-CREATED TRUSTS

A Modern Look

Rebecca C. Morgan, Robert B. Fleming, and Bryn Poland

ABA
AMERICANBARASSOCIATION
Real Property, Trust and Estate Law Section

mor52691_SelfCreatedTrusts.indb 1 3/22/23 1:27 PM

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CHAPTER 2

Ethical Issues and Fiduciary Representation[1]

I. Introduction

There are at least five typical scenarios to consider in drafting special needs trusts (SNTs) as part of planning for the clients who are elders or who have a disability. Is the attorney:

1. Only the drafter of the documents?
2. Representing the trustee or other fiduciary?
3. Hired by, and representing, the beneficiary?
4. Expected to draft the documents and represent one of the parties?
5. Drafting the documents and serving as a fiduciary once the drafting is finalized?

Whichever scenario applies, there will typically be ethical issues that an attorney may face in these discrete roles. Sometimes those issues will result from multiple roles—or at least multiple expectations—affecting the representation.

II. Who Is the Client?

The first step in any representation is to always, always determine who the attorney represents and make it clear to all concerned. In the creation of an SNT, the answer to the question may not be quite clear initially.

For example, with a first-party SNT, when only hired to draft the documents, the attorney may be hired by the personal injury attorney,

1. This chapter assumes the reader has a working knowledge of the applicable state Rules of Professional Conduct, and of the attorney's ethical duties.

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court-appointed guardian ad litem, or another to draft the SNT. In such instances, does the drafting attorney have any duty to the SNT beneficiary or another, such as the parents when the beneficiary is a minor? Is the SNT court-created and the drafting attorney's fees will be approved by the court? Who is signing the drafting attorney's engagement agreement?[2] In other cases, the client might be the beneficiary whose money will be used to establish the trust. In other instances, the client may be the parents, guardian, or grandparents[3] who act for the beneficiary. Although a court can "establish" the first-party SNT,[4] the attorney will not represent the court. Instead, the attorney may represent those who petitioned the court for approval of the SNT, who hired the attorney for the creation of the SNT, or who was appointed by the court to create the SNT. Keep in mind that with the first-party SNT, the settlor may not be the client, but instead the individual who has provided the money to fund the SNT.[5] Even if everyone understands that the client is the person who will sign the trust, or the person or entity that will fund it, the attorney's obligation to the beneficiary will often be both clearer and more complicated.[6] Although the attorney's duty to the nonclient beneficiary is going to be state specific, guidance may be taken from the Life Passages PSNT Best Practices Guidelines[7] for pooled trust administrators regarding when and how to best communicate with beneficiaries.[8]

When the attorney is hired to draft a third-party trust, it may be easier to identify the client. There is no scenario as in the first-party SNT where the beneficiary's money is used to fund the trust. The beneficiary is not the client.

The creation of the client-attorney relationship is critical for the imposition of duties on the attorney. The Restatement (Third) of the Law Governing

2. Who signs the engagement agreement is one factor to be considered when identifying who is the client. *See generally* Model Rules of Pro. Conduct scope [17] (Am. Bar Ass'n 1983).

3. 42 U.S.C. § 1396p(d)(4)(a).

4. *Id.*

5. *In re* Hertsberg Inter Vivos Tr., 578 N.W.2d 289, 291–92, 292 (Mich. 1998) (mother created trust and funded trust pursuant to court order for benefit of daughter; court held the money was that of the daughter) ("settlor is the one who provides consideration for a trust").

6. See, for example, Model Rules of Professional Conduct Rule 1.14 comment 2, which states: "The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication." See also comment 4, which states:

> If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

7. Stetson L., Life Passages PSNT Best Practices Guidelines (2020), https://www.stetson.edu/law/academics/elder/home/media/Best_Practices_Guidelines_Final_42022.pdf.

8. *Id.* at 13.

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Lawyers section 14, Formation of a Client-Lawyer Relationship, explains how a client-attorney relationship is typically created:

> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>
> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (2) a tribunal with power to do so appoints the lawyer to provide the services.[9]

A. First-Party Trusts: Is the Question, "Who Is the Client?" More Complicated?

It is possible that the attorney is hired by another just to draft the trust. The attorney first must determine who the attorney represents. Typically, the attorney represents the individual who will sign the documents, such as a will, revocable or irrevocable inter vivos trust, testamentary trust, and so on.[10] In situations of third-party SNTs, the client is not the beneficiary.

The money is that of the beneficiary, but who does the attorney represent? Remember as noted earlier, 42 U.S.C. § 1396p(d)(4)(a) provides that the trust

9. Restatement (Third) of the Law Governing Lawyers § 14 (Am. L. Inst. 2000).

10. *See*, *e.g.*, S.D. State Bar Ethics Op. 2007-3 (A niece, agent under power of attorney, demanded client's estate planning documents, claiming status as "co-client" who stands in client's shoes. Committee determined "who is the client" is question answered by substantive law and circumstances may be relevant, and decision may be question of fact, communications, and circumstances.). *See also* Pa. Bar Ass'n Comm. on Legal Ethics Op. 2004-7 (2004), 2004 WL 5333296 (attorney represented a guardian in capacity as guardian; discusses duties to nonclient beneficiaries, quoting with approval American College of Trust and Estate Counsel (ACTEC) Commentaries to Model Rules 1.2 and 1.6); Ky. Bar Ass'n Ethics Op. KBA E-401 (amended 2019), which states:

> This Committee adopts the ACTEC Commentaries because the Commentaries properly set forth a lawyer's ethical obligations. Further, this Committee agrees with ABA Formal Opinion 94-380, and adopts the majority view; that is, that a lawyer who represents a fiduciary does not also represent the beneficiaries. We reject the view that a lawyer who represents a fiduciary also owes fiduciary obligations to the beneficiaries that in some circumstances will override obligations otherwise owed by the lawyer to the fiduciary, such as the obligation of confidentiality. We also reject the view that when a lawyer represents a fiduciary in a trust or estate matter, the client is not the fiduciary, but is the trust estate. We adopt the following comments made in the ABA's Formal Opinion. . . .
>
> Further, "[t]he fact that a fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary under the Rules of Professional Conduct, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties."

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may be established by the beneficiary, the beneficiary's parents, grandparents, guardian, or the court. So, it is possible the attorney is hired by another—not the beneficiary—to draft the trust that will benefit the beneficiary, and the beneficiary is not the client, even though it is the beneficiary's money that is used to fund the trust. The party hiring the attorney to draft the trust for the beneficiary has, in some way, a relationship to the beneficiary and is acting in that capacity to the beneficiary.[11] The client may be an official or unofficial representative of the beneficiary; an unofficial representative by virtue of the relationship to the beneficiary, such as the parent or grandparent, or official, such as the agent under a durable power of attorney[12] or a court-appointed guardian.

There will be occasion where the beneficiary hires the attorney and thus is the client. Although as a result of the Special Needs Trust Fairness Act[13] the individual can establish the trust for his or her own benefit, it may be more common that someone else is establishing the first-party trust for the individual. However, when the beneficiary is the client, consider whether the client is an adult[14] and has capacity both to hire the attorney and to create the trust. In those situations, the attorney's ethical duties are much clearer. The beneficiary is the client and although the client will have been determined to be disabled by the Social Security Administration (SSA),[15] that determination does not mean the client lacks capacity to hire the attorney.[16] The client may have a physical disability and have the needed capacity to hire the attorney as well as the capacity to create the SNT.[17] This analysis would hold true if the agent under

See also Ala. Ethics Op. 2010-03, Representation of an Estate and Client Identity (2010), https://www.alabar.org/assets/2019/02/2010-03-1.pdf (when attorney hired by personal representative for the estate, attorney's only client is the personal representative); Legal Ethics Comm. Ind. State Bar Ass'n Op. 2 (2001).

11. For example, the individual contacting the attorney may be the parent or grandparent. *See* 42 U.S.C. § 1396p(d)(4)(a).

12. *See*, *e.g.*, Draper v. Colvin, 779 F.3d 556 (8th Cir. 2015) (discussing whether the parents, also agents under a power of attorney, could establish the SNT for the beneficiary). The *Draper* case was decided prior to the amendment to 42 U.S.C. § 1396p(d)(4)(a), which added the provision to allow the beneficiary to establish his or her own SNT.

13. 42 U.S.C. § 1396p(d)(4)(a) provides:

> A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

14. An SNT can be established for a minor, so if the beneficiary is a minor, an authorized representative of the beneficiary would have to hire the attorney and direct the attorney to draft the SNT.

15. 42 U.S.C. § 1382c(a)(3)(c).

16. *See also* Model Rules of Pro. Conduct r. 1.14 cmt. 6 (Am. Bar Ass'n 1983).

17. *See*, *e.g.*, *id.* r. 1.14.

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a durable power of attorney hires the attorney to create the SNT on behalf of the beneficiary.

In some instances, the beneficiary is an unemancipated minor. In this case, the client would either be a parent, since the parent is typically the natural guardian of the minor,[18] the grandparent (likely through some grant of authority), or the court-appointed guardian because the beneficiary has a legal incapacity of age. Consider whether the attorney will have any duty to the beneficiary.[19]

In this area of practice, it is possible that the beneficiary is an adult with a disability that results in the beneficiary lacking legal capacity. In this case, the beneficiary would not be the client, and the client would either be a parent, grandparent, or the court-appointed guardian or guardian ad litem, and the money will still be that of the beneficiary. Even though the parents have the authority under 42 U.S.C. § 1396p(d)(4)(A), the parents may not have legal authority beyond creating the SNT. The more traditional view of client representation would be that the client is the parent or the court-appointed guardian. When the court orders the creation of the SNT, the court is not assuming the role of client, but instead is either appointing a representative such as a guardian or guardian ad litem to hire the attorney to create the trust or directing the petitioner's attorney to submit an order to the court for the court's signature directing the creation of the SNT. In the first scenario, the fiduciary will be the client and, in the latter, the attorney for the petitioner (if the court order directs the petitioner's attorney to hire the drafting attorney), or the petitioner, depending on the exact language of the order.

B. Third-Party SNTs: Is the Question, "Who Is the Client?" Easier to Answer?

Here, the situation is much clearer. The client hires the attorney to create the trust and the client provides the assets to fund the trust. The SNT can either be inter vivos or testamentary. The client is not the beneficiary, but a third party, the settlor of the trust for the benefit of another. The client is not creating and funding the trust in a representative capacity to the beneficiary. The client signs the documents. Although the client may be related to the beneficiary,

18. *See*, *e.g.*, Unif. Tr. Code § 303(6) (Unif. L. Comm'n 2022).

19. Think of this in terms of whether an attorney who drafts any trust has any duties to beneficiaries of the trust. *See* Model Rules of Pro. Conduct r. 1.14 cmt. 4 (Am. Bar Ass'n 1983) ("In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.").

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for example the grandparent, sibling, or parent of the individual with special needs, there is nothing in trust law[20] that requires such a family relationship.

III. When an Attorney Represents the Trustee: The Ethical Issues

In many instances the attorney may be hired by the trustee to be the drafter only, or to be the drafter and represent the trustee—or is it the trust? With the question of fiduciary representation, there is a split amongst the jurisdictions as to whom the attorney represents.[21] In fiduciary representation, the question of who is the client is not easily answered. There are three prevailing views of the answer to the question.[22] The first, the majority view, is that the client is the fiduciary, with the position that the trust or estate is a thing, not a client.[23] The second view is that the attorney represents the entity.[24] The third

20. *See*, *e.g.*, Unif. Tr. Code § 103(15) (Unif. L. Comm'n 2022) (defining "settlor" as "a person, including a testator, who creates, or contributes property to, a trust").

21. *See*, *e.g.*, Kennedy Lee, *Representing the Fiduciary: To Whom Does the Attorney Owe Duties?*, 37 ACTEC L.J. 469 (2011) (discussing the three most common approaches: traditional, joint-client, and entity.)

22. *See*, *e.g.*, Ala. Ethics Op. 2010-03, *supra* note 10. J. Anthony McLain, *Representation of an Estate and Client Identity*, 72 Ala. Law. 149, 151 (2011) explains:

> There are three theories regarding the identity of the client when a lawyer handles an estate. The American Bar Association, in Formal Opinion 94-380, recognized that the majority view is that the lawyer represents only the personal representative or fiduciary of the estate and not the beneficiaries of the estate, either jointly or individually. In reaching a similar conclusion, a number of other state bars have relied, in part, on state law that indicated that an estate is not a separate legal entity. In Ethics Opinion No. 91-2, the Alaska State Bar noted that an estate is "for probate purposes a collection of assets rather than an organization, and is not an entity involved in the probate proceedings." In Formal Opinion 1989-4, the Delaware State Bar also concluded that under state law, the term "estate" only referred to the actual property of the decedent and did not have an independent legal existence. As such, the Delaware State Bar concluded that the estate could not be a "client" under their rules of professional conduct (citations omitted).

23. *See*, *e.g.*, *In re* Est. of Gory, 570 So. 2d 1381, 1383 (Fla. Dist. Ct. App. 1980). "In Florida, the personal representative is the client rather than the estate or the beneficiaries." *Id.* at 1383 (citing Rules Regulating the Florida Bar r. 4-1.7 (comment)). The comment specifically states that "[i]n estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved." *See also* Roberts v. Fearey, 986 P.2d 690 (Or. Ct. App. 1999) (attorney for trustee represents trustee, citing to Or. State Bar Ethics Op. 1991-119). *See also* Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996) (trustee who hires attorney is the client, citing to Tex. R. Civ. Evid. 503(a)(1)).

24. McLain, *supra* note 22, at 152 explains:

> The second approach to client identity in estate representation holds that the client is the estate itself. This view is identical to the entity theory of representation most commonly employed under Rule 1.13, *Ala. R. Prof. C.*, when representing businesses and corporations. Under this approach, the lawyer represents the "estate" as a freestanding legal entity. The lawyer does not have a lawyer-client relationship with either the fiduciary or beneficiaries of the estate. One argument in favor of this position is that estates and trusts are treated as separate legal entities for taxation purposes and,

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view, espoused by Geoffrey C. Hazard, Jr. and W. William Hodes, is the joint-representation model.[25]

The attorney may find himself or herself in this situation when either (1) hired by the settlor to create the SNT and then hired by the trustee to represent the trustee or (2) when the attorney, although not hired to draft the trust, was hired by the trustee after the trust was established.

Beyond determining who is the client, the attorney will be faced with issues surrounding conflicts of interest[26] and confidentiality.[27] Further consideration must be given to the question of whether the attorney owes any duties to the beneficiary of the SNT.[28]

The American Bar Association (ABA) issued a seminal ethics opinion in 1994 (under the older version of the Model Rules), ABA Formal Ethics Opinion 94-380, Counseling a Fiduciary:

> When the fiduciary is the lawyer's client, all of the Model Rules prescribing a lawyer's duties to a client apply. The scope of the lawyer's representation is defined by and limited by Model Rule 1.2. The lawyer must diligently

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therefore, an estate or trust is a recognizable legal entity. Under this approach, the fiduciary of the estate is merely an agent of the entity (citations omitted).

25. *Id.* at 152–53 explains:

The third view holds that the lawyer jointly represents the fiduciary and beneficiaries of the estate. This view of estate representation has been most prominently advocated by Geoffrey C. Hazard, Jr. and W. William Hodes in *The Law of Lawyering*, § 57.3, 4. 3rd Edition (2005), in which the authors argue the following:

> Where the lawyer's client is a fiduciary, however, there is a third party in the picture (namely the beneficiary) who does not stand at arm's length from the client; as a consequence, the lawyer also cannot stand at arm's length from the beneficiary. Clients with such responsibilities include trustees, partners, vis-à-vis other partners, spouses, corporate directors and officers vis-à-vis their corporations, and many others, including parents. In the situations posited, because the lawyer is hired to represent the fiduciary and because the fiduciary is legally required to serve the beneficiary, the lawyer must be deemed employed to further that service as well.
>
> It is only a small additional semantic step, and not a large analytic one, to say that in such situations the fiduciary is not the only client, but merely the "primary" client. [Footnote omitted] In this view, the beneficiary is the "derivative" client. The beneficiary, strictly speaking a non-client, may be entitled to the loyalty of the lawyer almost as if he were a client. [Footnote omitted]
>
> A number of consequences follow from adopting the derivative client approach to representation of a fiduciary. First, the lawyer's obligation to avoid participating in a client's fraud . . . is engaged by a more sensitive trigger. The fiduciary is subject to a high standard of fair dealing as regards the beneficiary, but may face temptation to engage in improper overreaching. The lawyer therefore faces a correspondingly greater risk of being implicated in the fiduciary's misconduct, and also has a greater duty to ensure that the purpose of the representation is not subverted.

26. Lee, *supra* note 21, at 470.

27. *See* Model Rules of Pro. Conduct r. 1.6 (Am. Bar Ass'n 1983).

28. Lee, *supra* note 21, at 470–71. *See also In re* Est. of Fogleman, 3 P.3d 1172, 1177 (Ariz. Ct. App. 2000) (in discussing whether the beneficiaries of an estate were the "clients" of the personal representative, the court noted that the "personal representative owes a beneficiary the lesser duty of fairness, rather than the duty of undivided loyalty, demonstrates that the beneficiary is not the . . . client").

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> represent the fiduciary, see Model Rule 1.3, preserve in confidence communications between the lawyer and the fiduciary, see Model Rule 1.6, and be truthful in statements to others, see Model Rule 4.1(a). The fact that the fiduciary client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer, or otherwise expand or supersede the lawyer's responsibilities under the Model Rules of Professional Conduct.
>
> A lawyer's duty of confidentiality to a client is not lessened by the fact that the client is a fiduciary. Although the Model Rules prohibit the lawyer from actively participating in criminal or fraudulent activity or active concealment of a client's wrongdoing, they do not authorize the lawyer to breach confidences to prevent such wrongdoing.
>
> ***
>
> The Model Rules provide important guidelines for defining a lawyer's duties to a client. These guidelines contain no exceptions when the client owes duties, fiduciary or otherwise, to third parties. So long as a fiduciary is the lawyer's only client in the matter, that client is entitled to the same protections under the Model Rules as any nonfiduciary client, including, most importantly, the duty of confidentiality set forth in Model Rule 1.6.[29]

The scope of representation under Rule 1.2 becomes critical to the analysis regarding whom the attorney represents, for example, as noted in the American College of Trust and Estate Counsel (ACTEC) Commentaries on the Model Rules of Professional Conduct:

> The scope of the representation of a fiduciary is an important factor in determining the nature and extent of the duties owed to the beneficiaries of the fiduciary estate. For example, a lawyer who is retained by a fiduciary individually may owe few, if any, duties to the beneficiaries of the fiduciary estate other than duties the lawyer owes to other third parties generally. Thus, a lawyer who is retained by a fiduciary to advise the fiduciary regarding the fiduciary's defense to an action brought against the fiduciary by a beneficiary may have no duties to the beneficiaries beyond those owed to other adverse parties or nonclients. . . . The relationship of the lawyer for a fiduciary to a beneficiary of the fiduciary estate and the content of the lawyer's communications regarding the fiduciary estate may be affected if the beneficiary is represented by another lawyer in connection with the fiduciary estate. In particular in such a case, unless the beneficiary and the beneficiary's lawyer consent to direct communications, the lawyer for the fiduciary should communicate with the lawyer for the beneficiary regarding matters concerning the fiduciary estate rather than communicating directly with the beneficiary.

29. ABA Comm. on Ethics & Pro. Resp., Formal Op. 94-380, Counseling a Fiduciary (1994) (citations omitted).

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> See MRPC [Model Rules of Professional Conduct] 4.2 (Communications with Persons Represented by Counsel). . . . [E]ven though a separately represented beneficiary and the fiduciary are adverse with respect to a particular matter, the fiduciary and a lawyer who represents the fiduciary generally continue to be bound by duties to the beneficiary.[30]

According to the ACTEC Commentaries on Rule 1.2:

> As a general rule, the lawyer for the fiduciary should consider informing the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while the fiduciary and the lawyer will, from time to time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests. As indicated in MRPC 2.3 (Evaluation for Use by Third Persons), the lawyer may, at the request of a client, evaluate a matter affecting a client for the use of others.[31]

Comment f to the Restatement (Third) of the Law Governing Lawyers section 14 offers this caution:

> In trusts and estates practice a lawyer may have to clarify with those involved whether a trust, a trustee, its beneficiaries or groupings of some or all of them are clients and similarly whether the client is an executor, an estate, or its beneficiaries. In the absence of clarification the inference to be drawn may depend on the circumstances and on the law of the jurisdiction. Similar issues may arise when a lawyer represents other fiduciaries with respect to their fiduciary responsibilities, for example a pension-fund trustee or another lawyer.[32]

The Delaware State Bar Association Committee on Professional Ethics in Opinion 1989-4[33] concluded that an attorney who represents "an estate" actually represents the personal representative:[34]

> [W]e are of the view an "estate" has no legal existence, but instead describes the property and debts of a decedent. Given that conclusion, we do not believe an estate can be a "client" as that term is used under Rule 1.7, and

30. ACTEC, Commentaries on the Model Rules of Professional Conduct 40 (5th ed. 2016), https://www.actec.org/assets/1/6/ACTEC_Commentaries_5th_rev_06_29.pdf?hssc=1.

31. *Id.* at 37.

32. Restatement (Third) of the Law Governing Lawyers § 14 cmt. f (Am. L. Inst. 2000).

33. Del. State Bar Ass'n Comm. on Pro. Ethics Op'n 1989-4 (1989), https://media1.dsba.org/public/media/ethics/pdfs/1989-4.pdf (discussing attorney's representation of personal representative in that capacity and in the person's individual capacity).

34. *Id.*

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> the commonly used phrase "attorney for the estate" incorrectly describes the relationship existing between a lawyer and the executor. An attorney does not serve as an attorney for the estate; rather he or she serves as an attorney for the executor or other personal representative in that person's dealings concerning the estate of the decedent.[35]

The Alabama Bar General Counsel issued an ethics opinion on fiduciary representation in 2011.[36] Two questions were discussed, the first considering who the attorney represents in an estate administration:[37]

> Generally, the lawyer represents the individual who hired him to assist in the administration or probate of the estate. If that person has only one role and is not a fiduciary, the lawyer represents only that person, unless the client and lawyer agree otherwise. If the person is the personal representative, the lawyer represents the personal representative individually, unless the personal representative and lawyer agree otherwise. The lawyer must be careful not to give the impression, either by affirmative action or omission, that he also represents the beneficiaries of the estate. As a result, if the client is the personal representative only, the lawyer must advise the heirs and devisees ("beneficiaries") and other interested parties in the estate known to the lawyer that the lawyer's only client is the personal representative in order to avoid violating Rule 4.3. A lawyer must comply with certain duties upon undertaking representation of a fiduciary or risk violating certain rules of professional conduct. If the lawyer failed to give such notice, it could be found that he has undertaken to represent both the fiduciary and the beneficiaries of the estate.[38]

Prior to the issuance of the formal opinion, the opinion references earlier informal opinions on the topic:

> The Disciplinary Commission is also aware that the Office of General Counsel has given recent informal opinions concerning this issue. In their informal opinions, the Office of General Counsel has opined that the client is the estate. The lawyer represents the estate by acting for and through the fiduciary of the estate for the ultimate benefit of the beneficiaries of the estate. Because the lawyer is retained by the personal representative to represent the estate and because the personal representative is legally required to serve the beneficiaries, the lawyer also has an obligation to the beneficiaries. This relationship has been characterized as one where the fiduciary is not the only

35. *Id.*
36. McLain, *supra* note 22.
37. *Id.*
38. *Id.* (citations omitted).

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client, but merely the "primary client," while the beneficiary is the "derivative client." In some situations where there is a sole beneficiary of the estate, that beneficiary (ostensibly a non-client) may be entitled to the loyalty of the lawyer to much the same extent as the fiduciary.[39]

IV. When the Attorney Is the Trustee (or Other Fiduciary)

Occasionally an attorney or law firm may act as trustee, or in some other fiduciary capacity. The practice is permissible, but fraught with potential dangers. The fiduciary/attorney should pay particular attention to the following:

1. The possibility of conflicts of interest, particularly in moving from attorney/counselor/advocate to fiduciary. In any case in which an attorney prepares documents for a client naming the attorney, his or her firm or others in a business relationship as fiduciary, the attorney should pay particular attention to the requirements of full disclosure to the client.[40] With some variation in the language of Model Rule 1.4 as adopted by various states, and as a good practice in any event, the drafting attorney should usually spell out the terms under which the attorney (or his or her firm or associated business) would act, what costs would be associated with that fiduciary action, and what effect the fiduciary role would have on the continued attorney-client relationship.
2. The costs for preparation of documents naming the attorney as fiduciary. While there is no requirement that the attorney charge less for preparation of such documents, there may be an expectation that "reasonableness" of the attorney's fee might be affected by the prospect of future compensation for fiduciary services.[41]
3. The potential for future conflicts of interest arising from the change in roles.[42] What, for example, would the attorney's role be if the client sought to remove him or her as fiduciary at a time when the attorney believed the client was incapacitated, or subject to undue influence—perhaps even the exact problem that led to the client initially naming the attorney as fiduciary?[43] And what are the ethical concerns inherent

39. *Id.* at 151.
40. Model Rules of Pro. Conduct r. 1.4(b) (Am. Bar Ass'n 1983).
41. *Id.* r. 1.5(a); *see also* Colo. Formal Op. 02-426 (2002).
42. Model Rules of Pro. Conduct r. 1.7 (Am. Bar Ass'n 1983).
43. For an illustration of how easy it is for the lawyer's competing roles to raise problems, consider *In re Disciplinary Proceeding against Eugster*, 209 P.3d 435 (Wash. 2009).

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in an attorney/trustee having to initiate proceedings (which might not be judicial proceedings) to determine capacity of the lawyer's former client or otherwise handle the fiduciary responsibility?[44]

4. The need for the attorney to have appropriate staff, training, and mechanisms to effectively act as fiduciary.[45]

Of course, there are other fiduciary roles that an attorney might fulfill, including trust protector or trust advisory committee member. While the possibilities for conflict might be lowered in such roles (as compared to the role as trustee), the same considerations should be kept in mind.

V. Does the Attorney for the Trustee Have Any Duty or Liability to the Trust Beneficiary?

The answer is some instances is yes. But that answer is qualified by "it depends." The Restatement (Third) of Law Governing Lawyers section 51, Duty of Care to Certain Non-Clients, provides:

> For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:
>
> (1) . . .
>
> (2) to a nonclient when and to the extent that:
>
> (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and
>
> (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;
>
> (3) to a nonclient when and to the extent that:
>
> (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;

44. *See* Model Rules of Pro. Conduct r. 1.14 (Am. Bar Ass'n 1983) (and especially comment 5 to that rule). And consider for a moment whether the same logic might apply to, say, an administrative proceeding initiated by an attorney to remove the attorney's former client's ability to drive a vehicle—as just one illustrative example.

45. *Id.* r. 1.1.

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(b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and

(c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and

(4) to a nonclient when and to the extent that:

(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;

(c) the nonclient is not reasonably able to protect its rights; and

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.[46]

The attorney may have "special obligations" to a beneficiary when the client is the fiduciary.[47] With the erosion of privity,[48] even though the beneficiary is not the client, the attorney for the trustee may have a duty to the beneficiary.[49] For example, in *Spinner v. Nutt*,[50] the court was concerned with whether the attorneys for the trustees owed the "duty of care" to the beneficiaries who were not clients.[51] The court considered several theories of liability

46. Restatement (Third) of the Law Governing Lawyers § 51 (Am. L. Inst. 2000). The comments to this Restatement explain the differences between (3) and (4) as follows:

Subsections (3) and (4), although related in their justifications, differ in application. In situations falling under Subsection (3), the client need not owe any preexisting duty to the intended beneficiary. The scope of the intended benefit depends on the client's intent and the lawyer's undertaking. On the other hand, the duty under Subsection (4) typically arises when a lawyer helps a client-fiduciary to carry out a duty of the fiduciary to a beneficiary recognized and defined by trust or other law.

47. Model Rules of Pro. Conduct r. 1.2 cmt. 11 (Am. Bar Ass'n 1983).

48. Restatement (Third) of the Law Governing Lawyers § 51 cmt. h (Am. L. Inst. 2000) ("A lawyer representing a client in the client's capacity as a fiduciary (as opposed to the client's personal capacity) may in some circumstances be liable to a beneficiary for a failure to use care to protect the beneficiary. The duty should be recognized only when the requirements of Subsection (4) are met and when action by the lawyer would not violate applicable professional rules (see § 54(1)). The duty arises from the fact that a fiduciary has obligations to the beneficiary that go beyond fair dealing at arm's length. . . . The duty recognized by Subsection (4) is limited to lawyers representing only a limited category of the persons described as fiduciaries—trustees, executors, guardians, and other fiduciaries acting primarily to fulfill similar functions.").

49. *See*, *e.g.*, Est. of Treadwell v. Wright, 61 P.3d 1214 (Wash. Ct. App. 2003) (in guardianship case, discussing test to determine whether attorney has duty to nonclient).

50. 631 N.E.2d 542 (Mass. 1994).

51. *Id.* at 544.

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and concluded that the attorneys had no duty to the beneficiaries; the duty was only to the client trustee.[52]

In the California case of *Goldberg v. Frye*,[53] the court held that the attorney for the personal representative of the estate represents the personal representative, not the estate.[54] Although the actions of the attorney and the attorney's services may benefit the beneficiaries of the estate, the attorney does not represent the beneficiaries.[55] The court identified six factors that must be found to impose a duty.[56] "The very purpose of the fiduciary is to serve the interests of the estate, not to promote the objectives of one group of legatees over the interests of conflicting claimants."[57] In explaining the rationale for determining the client is the fiduciary, the court observed:

> It would be very dangerous to conclude that the attorney, through performance of his service to the administrator and by way of communication to estate beneficiaries, subjects himself to claims of negligence from the beneficiaries. The beneficiaries are entitled to even-handed and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney.[58]

The engagement agreement plays an important role in structuring the client-attorney relationship. Under Rule 1.2, Scope of Representation, the attorney delineates the parameters of the representation. An ambiguous or insufficient description of the scope of representation in the engagement agreement can lead subsequently to issues regarding whom the attorney represents and the services the attorney is to perform. For example, in *Svaldi v.*

52. *Id.* at 547. The court considered when a duty to a beneficiary of a trust might be imposed and noted the potential of creating conflicting loyalties if the attorney owed a duty to the trustee and to the beneficiaries, which would impinge on the attorney's ability to effectively represent the trustee. *Id.* at 544–45. As well, it would be counter to the Massachusetts ethics rule, referencing Supreme Judicial Court Rule 3.07, Cannon 4, DR 4-101. *Id.* at 545. The court also considered and rejected the application of the third-party beneficiary theory of recovery. *Id.* at 546. *See also* Roberts v. Fearey, 986 P.2d 690, 691 (Or. Ct. App. 1999) (attorney did not have a duty to beneficiaries).

53. 217 Cal. App. 3d 1258 (Cal. Ct. App. 1990).

54. *Id.* at 1267.

55. *Id.* (opinion discusses duty and liability in cases where there is no privity).

56. *Id.* at 1268. The six factors are:

> [The] extent to which transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession.

(citations omitted).

57. *Id.* at 1269 (citations omitted).

58. *Id.* (citations omitted).

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Holmes,[59] the attorney drafting the power of attorney included two safeguard clauses that required an initial inventory and annual accountings.[60] In a malpractice suit against the attorney, the court considered whether the inclusion of these paragraphs created a duty that the attorney owed to the client to provide oversight of the actions of the agents.[61] The court concluded that the inclusion of the safeguard clauses "expanded the scope of [the attorney's] representation of [the client] beyond the mere drafting of the legal documents" and the attorney had undertaken "a responsibility to make [the inventory and accounting] work."[62] Although the attorney had an expanded representation of the client, the attorney did not have the duty to supervise the agents.[63]

The ACTEC Commentaries address this issue as follows:

> *Representation of Client in Fiduciary, Not Individual, Capacity*. If a lawyer is retained to represent a fiduciary generally with respect to an estate, the lawyer's services are in furtherance of the fulfillment of the client's fiduciary responsibilities and not the client's individual goals. The ultimate objective of the engagement is to assist the client in properly administering the fiduciary estate for the benefit of the beneficiaries. Confirmation of the fiduciary capacity in which the client is engaging the lawyer is appropriate because of the priority of the client's duties to the beneficiaries. The nature of the relationship is also suggested by the fact that the fiduciary and the lawyer for the fiduciary are both compensated from the fiduciary estate. Under some circumstances it is acceptable for the lawyer also to represent one or more of the beneficiaries of the fiduciary estate, subject to the fiduciary client's overriding fiduciary obligations. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients) and Example 1.7-2.
>
> *General and Individual Representation Distinguished*. A lawyer represents the fiduciary generally (i.e., in a representative capacity) when the lawyer is retained to advise the fiduciary regarding the administration of the fiduciary estate or matters affecting the estate. On the other hand, a lawyer represents a fiduciary individually when the lawyer is retained for the limited purpose of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or the persons beneficially interested in the estate. For example, a lawyer represents a fiduciary individually when the lawyer, who may or may not have previously represented the fiduciary generally with

59. 986 N.E.2d 442, 447 (Ohio Ct. App. 2012) (discussing the duty of the lawyer to the client comes from the scope of the representation) (citations omitted).

60. *Id.* at 445.

61. *Id.* at 447–48.

62. *Id.* at 448 (attorney had duty to contact agents regarding requirement of inventory and accounting).

63. *Id.* at 449.

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> respect to the fiduciary estate, is retained to negotiate with the beneficiaries regarding the compensation of the fiduciary or to defend the fiduciary against charges or threatened charges of maladministration of the fiduciary estate. A lawyer who represents a fiduciary generally may normally also undertake to represent the fiduciary individually. If the lawyer has previously represented the fiduciary generally and is now representing the fiduciary individually, the lawyer should advise the beneficiaries of this fact.[64]

As far as the attorney's duties to beneficiaries, if any, according to the ACTEC Commentaries, the scope and nature of the attorney's duties to beneficiaries are not static and in fact

> may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them.[65]

The Commentaries describe these duties owed as limiting the actions of the attorney; thus, the attorney may not "[take] advantage of [the attorney's] position to the disadvantage of the fiduciary estate or the beneficiaries."[66] Additionally there may be some situations where the attorney has to affirmatively act to safeguard the beneficiaries' interests.[67]

VI. Ability to Share Information with Nonclient Beneficiary

The ACTEC Commentaries caution that "the [attorney's] communications with the beneficiaries should not be made in a manner that might lead the beneficiaries to believe that the lawyer represents the beneficiaries in the matter except to the extent the lawyer actually does represent one or more of them."[68]

Consider the use of the engagement agreement to make clear who is represented and who is not.[69] Provide a copy to both the trustee and the

64. ACTEC, *supra* note 30, at 39.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 40.
69. *See*, *e.g.*, Lee, *supra* note 21, at 488–89. *See also* Restatement (Third) of the Law Governing Lawyers § 14 cmt. f (Am. L. Inst. 2000) (regarding inadvertent representation: "[u]nder Subsection (1)(b), a lawyer's failure to clarify whom the lawyer represents in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer. Hence, the lawyer must clarify whom the lawyer intends to represent when the lawyer knows or reasonably should know

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beneficiary,[70] or if the trustee prefers that the attorney not provide the engagement agreement to the beneficiary, then the attorney could write a letter to the beneficiary noting that the attorney has been hired by the trustee and represents the trustee, not the beneficiary, and including a copy of the trust agreement for the beneficiary's file, if the beneficiary does not already have one.

Train staff on how to respond if a beneficiary contacts the office either requesting action or complaining about a trustee. A desire to be helpful might create an obligation, or even liability. Although it is hard to say no, make sure staff know how to handle these scenarios.

What obligation does the attorney have to notify beneficiaries of the bad acts of the trustee? ACTEC Commentaries suggest the need in some jurisdictions to notify the beneficiaries of the trustee's bad acts.[71] The Commentaries direct the attorney to consult Rules 1.6 and 1.8(b) in determining whether to make the disclosures.[72] But what about jurisdictions where disclosure is not allowed? The Commentaries suggest adding a provision to the engagement agreement that allows the attorney to make the disclosures.[73] Even in jurisdictions that permit disclosure, this provision in the engagement agreement has advantages. It cautions the trustee to realize that there are ramifications to the trustee's bad acts. Further, it adds weight to achieving the "intentions of the creator of the fiduciary estate to benefit the beneficiaries."[74]

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that, contrary to the lawyer's own intention, a person, individually, or agents of an entity, on behalf of the entity, reasonably rely on the lawyer to provide legal services to that person or entity." (citations omitted)).

70. Lee, *supra* note 21, at 488–89. *See also* Ala. Ethics Op. 2010-03, *supra* note 10 (discussing the three theories); McLain, *supra* note 22, at 154–55 explains: "Upon commencement of representation, the lawyer should clarify with the personal representative the role of the lawyer, the scope of representation and the personal representative's responsibilities toward the lawyer, the court, the beneficiaries and other interested third parties." McLain also states:

> First and foremost, upon being hired by a personal representative to assist in the administration of an estate or trust, the lawyer should explain to the beneficiaries or other interested parties that the lawyer's sole client in the matter is the Personal Representative, individually. A lawyer who fails to do so could be in violation of Rule 4.3, *Ala. R. Prof. C.* . . .

Id. at 155.

71. ACTEC, *supra* note 30, at 38. The commentary offers: "In some jurisdictions a lawyer who represents a fiduciary generally with respect to the fiduciary estate may disclose to a court or to the beneficiaries acts or omissions by the fiduciary that might constitute a breach of fiduciary duty."

72. *Id.*

73. *Id.* ("lawyer engaged by a fiduciary may condition the representation upon the fiduciary's agreement that the creation of a lawyer-client relationship between them will not preclude the lawyer from disclosing to the beneficiaries of the fiduciary estate or to an appropriate court any actions of the fiduciary that might constitute a breach of fiduciary duty").

74. *Id.*

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A. What about Privileged Information? Is That Protected from Disclosure?

Some, but not all, jurisdictions have recognized a fiduciary exception to attorney-client privilege.[75] This exception prevents "a fiduciary, such as a trustee of a trust, . . . from asserting the attorney-client privilege against beneficiaries on matters of trust administration."[76] The exception is recognized on two grounds, that the trustee is not the sole client, but instead is serving as a "proxy for the beneficiary," and that the trustee has a "duty to disclose all information related to trust management to the beneficiary."[77] The second ground has been viewed as "an instance of the attorney-client privilege giving way in the face of a competing legal principle, . . . the duty to disclose."[78] In *Murphy v. Gorman*,[79] a case of first impression in New Mexico, the question[80] of the fiduciary exception and attorney-client privilege was discussed in the context of a revocable trust.[81] The federal court noted that the trustee retained the attorney to represent himself, not himself *and* the beneficiary, concerning the dispute between the beneficiary and the trustee over the trust terms and trust administration.[82]

Canarelli v. Eighth Judicial District Court of Nevada[83] also considered whether Nevada would recognize the fiduciary exception to attorney-client privilege.[84] The Nevada Supreme Court noted that the Nevada legislature had previously adopted five exceptions to the attorney-client privilege but did not adopt the fiduciary exception.[85] The Nevada Supreme Court as a result specifically decided to not approve the fiduciary exception.[86] In discussing various arguments raised, the court recognized that a beneficiary typically can review the records and "books" of the trust, but if a beneficiary could see the

75. *See*, *e.g.*, Murphy v. Gorman, 271 F.R.D. 296, 305–09, 314–15 (D.N.M. 2010) (discussing, among other things the fiduciary exception). *See also* Huie v. DeShazo, 922 S.W.2d 920, 925 (Tex. 1996) (rejecting the "fiduciary exception" because it is not in the evidence code) ("trustee must fully disclose material facts regarding the administration of the trust, the attorney-client privilege protects confidential communications between the trustee and . . . attorney under Rule 503").

76. *Murphy*, 271 F.R.D. at 305–06 (citations omitted).

77. *Id.* at 306 (citations omitted).

78. *Id.* (citations omitted)

79. 271 F.R.D. 296.

80. *Id.*

81. *Id.* at 300–02, 308.

82. *Id.* at 317, 318.

83. 464 P.3d 114 (Nev. 2020).

84. *Id.* at 117. Two sets of documents were under consideration. The first were the prior trustee's notes from a conversation with the attorney and the second, the same trustee's notes from a meeting with the attorney, other trustees, opponents, and an appraiser.

85. *Id.*

86. *Id.*

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attorney and trustee communications for situations where the trustee is in an adverse position with the beneficiary, it would cause the trustee to be reluctant to obtain legal advice[87] and attorneys may be hesitant to give "transparent advice."[88]

The Restatement (Third) of the Law Governing Lawyers section 84 provides an exception:

> In a proceeding in which a trustee of an express trust or similar fiduciary is charged with breach of fiduciary duties by a beneficiary, a communication otherwise within § 68 is nonetheless not privileged if the communication:
>
> (a) is relevant to the claimed breach; and
>
> (b) was between the trustee and a lawyer (or other privileged person within the meaning of § 70) who was retained to advise the trustee concerning the administration of the trust.[89]

In *Barnett Banks Trust Co. v. Compson*,[90] the trustee sued the brokerage firm and the widow of the settlor. The attorney for the trustee inquired whether privilege protects the documents. Although beneficiaries have to be kept reasonably informed by a trustee under Florida law, the court held that the "statute does not require disclosure of privileged materials concerning a pending lawsuit in which an individual, who happens to be a beneficiary, seeks to deplete, rather than return, trust assts."[91] The court determined that the widow, who counterclaimed, and, as such, "does not stand to benefit from the trustee's actions" in the litigation, as a result "is not the real client of the trustee's attorneys. The real client of the law firms is the trustee . . . [and the court found] that the attorney-client privilege, belonging to the trustee as client,

87. *Id.* at 122. The court was discussing the application of the common interest exception.

88. *Id.*

89. Restatement (Third) of the Law Governing Lawyers section 84 comment b explains:

Rationale. In litigation between a trustee of an express trust and beneficiaries of the trust charging breach of the trustee's fiduciary duties, the trustee cannot invoke the attorney-client privilege to prevent the beneficiaries from introducing evidence of the trustee's communications with a lawyer retained to advise the trustee in carrying out the trustee's fiduciary duties. The exception applies in suits brought directly by a beneficiary or by a representative of the beneficiary. It does not apply to communications between the trustee and a lawyer specifically retained by the trustee to represent, not the trust or the trustee with respect to executing trust duties, but the trustee in the trustee's personal capacity, such as to assist the trustee in a dispute with a beneficiary or to assert a right against the beneficiary.

The exception does not require the beneficiary to show good cause (compare § 85 [fiduciary within organization]). Nonetheless, the tribunal might enter a protective order to safeguard the interests of other beneficiaries or the trust against unnecessary disclosure.

90. 629 So. 2d 849 (Fla. Dist. Ct. App. 1993).

91. *Id.* at 851 (citations omitted).

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prohibits disclosure of communications . . . absent any waiver."[92] Even though the law firm and the trustee had shared information with "aligned beneficiaries," that was not waiver of privilege since their "interests coincide with the trustees. The 'common interest' or 'joint defense' exception applies among the entities sharing common interests and their attorneys."[93]

VII. Always an Attorney Must Be Competent

Regardless of which of the five scenarios face the attorney, the attorney must always be competent. Model Rule 1.1 requires that the attorney be competent to handle the legal matter; "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [1] to Rule 1.1 is particularly applicable in the context of SNT practice. The comment provides:

> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. *Expertise in a particular field of law may be required in some circumstances*.[94]

We point this out because of the complexity of the practice of special needs planning. In drafting the trust, the attorney must be cognizant of the trust law in the jurisdiction (both in drafting, funding, and even choice of law), as well as public benefits laws and regulations (federal and state), the Social Security Program Operations Manual System (POMS),[95] any applicable SSA regional pronouncements, and more. In our view, SNT practice is not for the faint of heart or the novice practitioner.

92. *Id.*

93. *Id.* For an excellent discussion on fiduciary representation, see Renée C. Lovelace, *Representing Fiduciaries: Guidance from NAELA's Aspirational Standards*, NAELA J. (Special Edition) 119 (2018).

94. Model Rules of Pro. Conduct r. 1.1 cmt. 1 (Am. Bar Ass'n 1983) (emphasis added).

95. The POMS is available at https://secure.ssa.gov/apps10/poms.nsf/Home?readform (last visited Nov. 25, 2022). As SSA describes them, the purpose of the POMS is to be the "primary source of information used by Social Security employees to process claims for Social Security benefits. The public version of POMS is identical to the version used by Social Security employees except that it does not include internal data entry and sensitive content instructions." *Id.*

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Illustrative of this is *Redies v. Attorneys Liability Protection Society (ALPS)*,[96] a first-party SNT case. The beneficiary, injured in a bicycle accident, had a permanent conservator and a guardian.[97] The conservator sought advice from an attorney about the beneficiary's property in light of the beneficiary's mounting bills.[98] The attorney hired by the conservator had suggested selling off the beneficiary's assets, rather than recommending an SNT.[99] As the attorney for the beneficiary noted in a demand letter:

> Lawyers in particular, are obligated to know about the laws which are relevant to their client's case. . . . To diligently represent Ms. Redies, . . . [the attorney] had a duty to do sufficient research to learn about the Montana Self Sufficiency Trust statutes . . . [and the] failure to do so [resulted in] Redies' estate [being] quickly depleted [with her] now [living] in poverty.[100]

VIII. Conclusion

Fiduciary representation, just like a special needs planning practice, is not for the faint of heart. The takeaways from this chapter might be summarized as follows:

1. Review your state's rules of professional conduct and ethics opinions.
2. Download and read carefully the ACTEC Commentaries and the National Academy of Elder Law Attorneys (NAELA) Aspirational Standards.
3. Determine the scope of your practice—what are you willing to do?
4. Consider whether you are competent to handle the matter.
5. Determine whom you represent.
6. Make it clear to everyone whom you represent.
7. Be sure to use an engagement agreement that identifies whom you represent and the scope of representation. Take care to not alter the scope of representation accidentally.
8. In cases where you represent the trustee, include a proviso in the engagement agreement that if the trustee breaches the duty to beneficiaries, you will advise the beneficiaries, the court, and withdraw if the trustee does not remedy the breach within (x days).

96. 150 P.3d 930 (Mont. 2007).
97. *Id.* at 932.
98. *Id.* at 933.
99. *Id.*
100. *Id.* at 934. The suit was eventually settled. *Id.* at 935. The rest of the opinion is devoted to the beneficiary's claim against the ALPS. *Id.* at 935 *et seq*.

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9. In cases where you represent the trustee, communicate with beneficiaries that you represent the trustee, not them, and what that means.
10. Document, document, document.
11. Train your staff so they do not inadvertently cause problems when trying to be helpful.

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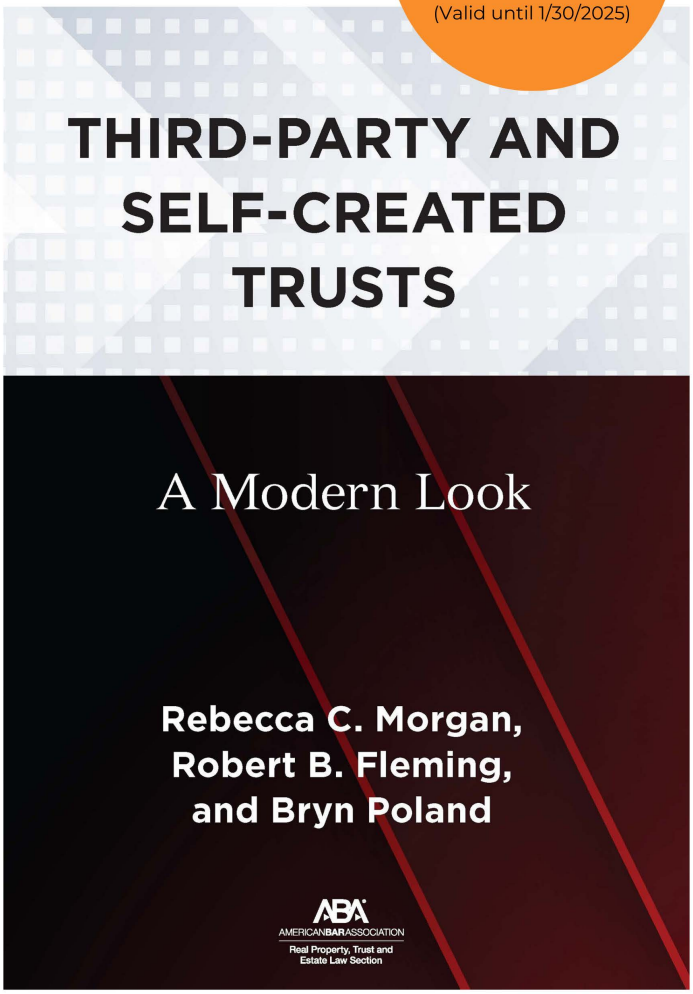
By Rebecca C Morgan, Robert B Fleming Jr, and Bryn Poland



Building on the groundbreaking *Third-Party and Self-Created Trusts* authored by the inimitable Clifton B. Kruse, Jr., this extensive rewrite reflects modern approaches to planning for people with disabilities and explains the effect that governmental legislation has had on trust law and guides you through the maze of federal laws that affect planning for the elderly and disabled. Focusing on the effect of the Omnibus Budget Reconciliation Act of 1993 on trusts for older and disabled Americans, this guide includes the full text of this act and outlines how it affects the drafting of trusts, illustrated by a comprehensive chart showing OBRA 1993's effect on nine commonly used trusts.

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- Draft trusts for individuals who have disabled children or elderly or disabled parents so that the trust beneficiary is not disqualified from receiving government entitlement programs
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The Ethics of SNT Administration

Rebecca Morgan &

Bryn Poland

With guest appearances by Robert Fleming and Mary Alice Jackson

1

In this session we will:

Discuss	Discuss the attorney's role,
Using	Using hypotheticals, list various ethical issues for the attorney when reviewing the decisions a trustee makes in administering a trust,
Offer	Offer suggestions regarding the trustee's decision-making process, and
Discuss	Discuss a framework for the attorney to make sure the trustee's decisions and actions are ethical.

2

What is the attorney's role?

- Drafter of the documents?
- Representing the trustee or other fiduciary?
- Hired by, and representing, the beneficiary?
- Expected to draft the documents and represent one of the parties?
- Drafting the documents and serving as a fiduciary once the drafting is finalized?

3

- How identify client?
- Why important?
- Ethics rules; substantive law, see Scope (12)
- To whom does the attorney owe a duty?
- Restatement (3rd) Law Governing Lawyers § 14 (how create client-attorney relationship

4

- First Party Trust
  - More options, more questions
- Third Party Trust
  - Clear client identification

5

- Fiduciary representation
- Potential for conflicts?
- Duties to others?
- When beneficiary is not the client.

6

Question

- Trustee asks if ok to make distributions to parents for care of a beneficiary in light of their existing legal responsibilities as a parent?

7

Question

- Trustee fails to keep trust property in good condition and as a result, beneficiary is injured. Can a trustee be liable?

8

Question

- But what if the trustee has kept the property in good condition, and the beneficiary is injured. Can a trustee be liable?

9

Question

- What if beneficiary asks you to seek action vs. trustee for beneficiary's injuries caused by the trust property?

10

- Communication?
- Conflicts?
- Confidentiality?

11

Question

- Trustee asks you if ok to allow non-beneficiary person to remain in trust-owned property now that the beneficiary no longer lives there?

12

Question

- Trustee asks you if it is ok to make distributions to a non-beneficiary?

13

- Communication
- Conflicts
- Confidentiality
- Fees
- Liability to beneficiary?

14

- Beneficiary
- Others
- Is the information privileged?
- Who can consent to sharing info?
- Should they?

15

Question

- Beneficiary, now 18, no cognitive limits, asks for bank statements, etc. Do you say ok?

16

Difficult Situations: What Does the Attorney Advise?

- Trustee tells you that parents of a beneficiary are preventing the beneficiary from achieving financial independence in order to continue to receive trust benefits (parents are threatening that beneficiary will not go to college because they are worried once he's done with school, parents will be kicked out of house). What do you advise?

17

Difficult Situations: What Does the Attorney Advise?

- Trustee tells attorney that beneficiary has allowed "friends" to move in and they are cooking meth in the garage. What do you advise?

18

- Trustee: read the trust, talk to the attorney, remember the purpose of the trust and the role of the trustee.
- Attorney:
  - Read the trust, read the law, repeat.
  - Remember who is the client.
  - Educate trustee on asking permission vs. asking forgiveness.
  - Pay attention!

19

20


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The Nuts and Bolts of Third Party Special Needs Trusts

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Third Party Special Needs Trusts

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Special needs planning.

Special needs planning is a niche practice area within the estate planning field that requires a comprehensive understanding of various legal disciplines, including tax, government benefits, and trusts and estates. An experienced special needs planning practitioner will not only possess knowledge of the law but also be able to offer practical advice to their clients that enhances the quality of life of individuals with disabilities and their families. Familiarity with local practices and laws is essential, as these can vary significantly from state to state.

A cornerstone of special needs planning is the use of special needs trusts ("SNTs"). This outline focuses on third party special needs trusts, also known as third party supplemental needs trusts.

One of the primary goals of special needs planning is to ensure the individual with disabilities can qualify for government benefits while maintaining access to additional assets that can cover items not provided by government programs. Special needs planning is relevant for individuals currently receiving government benefits as well as those who may need them in the future.

I. Third Party Special Needs Trusts - General.

A third party SNT is a trust that is created by and funded with assets belonging to someone other than the individual with a disability. A typical example involves parents creating a third party SNT for the benefit of their child with a disability. The parents' estate plan would typically provide that, upon their deaths, the assets allocated for the benefit of the child with a disability be placed in the third party SNT created for the child's benefit. The purpose of a third party SNT is to permit a parent, grandparent or other person to set aside assets in the trust in order to provide for the needs of the beneficiary beyond what is covered by government benefits. If the assets were left outright to the individual with disabilities, they would be disqualified for Medicaid and Supplemental Security Income ("SSI"). Even wealthier families may benefit from special needs planning depending on a number of factors, including the anticipated cost of care, the age of the person with special needs, the type of disability, day programs, the community in which they reside, and how that community is pad for (e.g. through government benefits). Moreover, there can be no assurance that a family's wealth will continue to the next generation(s), potentially increasing the need to rely on government benefits to pay for at least a portion of the care of the individual with disabilities.

Third party SNTs are not governed by federal law, although some states have statutes that address them. Third parties can generally include anyone other than the person with disabilities,

although there may be other issues to address if the beneficiary is a minor child or spouse or someone else whom the creator of the trust has an obligation to support. Prior to drafting a third party SNT, it is important to determine which means-tested government benefits the beneficiary is receiving or may receive in the future. Whether the assets in a third party SNT are considered a resource for government benefits eligibility purposes will often depend upon the terms of the trust, including the existence of a support standard, the extent of discretion given to the trustee and whether the beneficiary can compel a distribution. The settlor's intent to create an SNT should also be clearly stated in the trust instrument. Use of the words "supplement, rather than supplant government benefits" are typically good indicators of the settlor's intent. In determining whether the assets of a third party SNT have any effect on the beneficiary's eligibility for SSI, it is important to review the Social Security Administration's Program Operations Manual System ("POMS") to ensure that all requisite criteria are met so that trust assets do not disqualify the beneficiary from benefits.[1]

A third party SNT can be created by a revocable inter-vivos trust, an irrevocable inter-vivos trust, or a testamentary trust under a last will and testament. One of the many benefits of creating a third party SNT during lifetime is that other relatives can leave assets to this trust if they desire. Thus, it can serve as a vehicle to receive potential bequests from others thereby ensuring that the beneficiary's government benefits are protected. If the SNT is irrevocable, the settlor can engage in their own estate tax planning through the use of lifetime gifts to the trust. The special needs planning practitioner should be careful not to give Crummey rights of withdrawal to the beneficiary with disabilities as this may result in trust assets being considered an available resource for the beneficiary for SSI and Medicaid purposes. Moreover, the failure to exercise the right of withdrawal may be considered an uncompensated transfer resulting in a penalty period with respect to the beneficiary's eligibility for those benefits. If the SNT is revocable, it is imperative that there be a provision to convert it to an irrevocable trust upon the receipt of assets from persons other than the settlor. Without such a provision, it is unlikely that others would contribute assets to the SNT for fear that the trust could be revoked, and the assets are not used to enhance the quality of life of the beneficiary with disabilities. It should be clear that the beneficiary has no right to revoke the trust.

Another benefit of an inter-vivos trust, is it is typically easier to make changes to the trust, including replacing trustees, without the need of going through the expense and time of a court proceeding which is often required with testamentary trusts.

When drafting an SNT for a surviving spouse who is receiving, or expected to receive Medicaid benefits in the future, the SNT must be a testamentary trust created under a will. Assets contained in an inter-vivos trust created by a spouse will be considered an available resource of the surviving spouse for government benefits purposes.

A third party SNT does not have to be for the sole benefit of the individual with disabilities, whereas a first party SNT must be. Thus, it is permissible to have beneficiaries of a third party SNT who are not disabled. For families with more than one child, the assets can either be left to one "pot" trust with sprinkling provisions or to separate trusts set up for each child. There are

[1] *See:* POMS § SI 01120.200.

conflicting views as to which is the best approach. The benefit of a pot trust is that the trustee can use the money where it is determined to be most appropriate among all the children. However, this can lead to an unfair (in someone's eyes) allocation of resources depending on the circumstances. By leaving the assets in separate trusts and having one of them be a third party SNT, it is clear from the beginning how much each beneficiary was intended to receive. Caution must be noted when using a pot trust if it is being funded with tax-deferred retirement assets, as unintended tax consequences can occur.

Unlike a first party SNT, any assets remaining in the third party SNT at the time of the beneficiary's death are not subject to Medicaid payback. This makes sense since the creator of the trust has no legal obligation to use these assets to pay for the expenses of the beneficiary. Thus, they should not be subject to a Medicaid payback. A third party SNT often resembles a traditional discretionary spendthrift trust drafted to protect the trust assets for the benefit of a person who is vulnerable to exploitation or who does not manage money well. In order for a discretionary trust to meet the criteria of a special needs trust, and thus be exempt from consideration when determining financial eligibility for means-tested government benefits, the trust must limit the powers of the beneficiary, the authority of the trustee, and the trust must include a spendthrift clause.

An alternative to a third party SNT is to disinherit the person with disabilities. While this will accomplish the goal of not disqualifying the individual for government benefits, it will not further the goal of enhancing their quality of life. Alternatively, some families consider leaving the assets to a third party (perhaps a sibling) who makes a verbal commitment to assist the person with a disability. Unfortunately, this type of arrangement puts the person with disabilities at risk. The person who is entrusted with the assets could pass away prior to the death of the individual with disabilities, get divorced, get married, become disabled themself, get sued, etc. For these reasons, this option is often unsuitable for most families since it does not ensure that there will be available assets to enhance the quality of life of the individual with disabilities.

II. Taxation of Third Party Special Needs Trusts.

If a third party SNT is revocable, then all income is reported on the settlor's personal income tax return. If the trust is funded, it will not constitute a completed gift for gift tax purposes and the trust corpus will be includable in the settlor's gross estate upon their death. Upon the settlor's death, the trust becomes irrevocable. Caution should be exercised if this type of trust is to be funded from sources other than the settlor as there may be unintended estate tax consequences.

If the third party SNT is irrevocable, then the trust should qualify as either a grantor trust or qualified disability trust.

A grantor trust enables the trust's income to be reported on the settlor's personal income tax return, with the settlor typically responsible for any tax due. A third-party trust can retain its grantor trust status so long as the settlor is alive. Giving an irrevocable inter-vivos third party trust grantor trust status can be an important estate planning tool for families who want to

preserve trust assets and decrease their net worth by having the settlor pay the income taxes. For a third party SNT to qualify as a grantor trust, the practitioner must include appropriate provisions under IRC sections 671 through 677 in the trust agreement. A testamentary supplemental needs trusts cannot be considered a grantor trust as the settlor is no longer alive.

Upon the death of the grantor – and sometimes upon establishment of the trust – the third party SNT will become a separate taxable entity. Due to the compressed income tax rates for trusts, if the taxable income of the trust exceeds $15,200 in 2024 the trust income will be taxed at the highest federal marginal income tax rate of 37 percent (plus the Medicare and net investment income surtax). Whereas a single individual is not taxed at the 37 percent marginal rate until income exceeds $609,350. This can be a significant issue for SNTs since not all income is typically distributed. To address this concern, the trustee can invest trust assets in investments which do not generate taxable income subject to the highest rates and can also determine if the trust meets the criteria of a qualified disability trust ("QDisT").

A QDisT can claim an exemption in the amount of $5,000 in 2024.[2] In order for a third party SNT to qualify as a QDisT, the trust must be irrevocable for the sole benefit of the beneficiary who was under the age of 65 at the time the trust was established and that the beneficiary must have a disability as defined for purposes of SSI and SSDI programs.[3] Further, the third party SNT cannot be a grantor trust. Thus, a first party SNT would not typically qualify as a QDisT because it is usually a grantor trust. On the other hand, many third party SNTs will qualify as qualified disability trusts.

Irrevocable inter-vivos third party SNTs will not be included in the settlor's estate so long as the settlor retains no dominion or control over the trust. Thus, any contributions to the third party SNT during the settlor's life will not be included in the settlor's gross estate. As mentioned above, the special needs planning practitioner should be careful not to give Crummey rights of withdrawal to the beneficiary with disabilities as this may result in trust assets being considered an available resource for the beneficiary for SSI and Medicaid purposes. Moreover, the failure to exercise the right of withdrawal may be considered an uncompensated transfer resulting in a penalty period with respect to the beneficiary's eligibility for those benefits.

III. Drafting Considerations.

A. Trustee Selection.

The selection of the trustee is one of the most, if not the most, important decisions in determining whether the special needs plan created will ultimately work for the client and their family. The perfect trustee should be knowledgeable in many areas, including trust law, tax law, government benefits law (sometimes referred to as public benefits), investments, medical issues, education issues and advocacy issues. Obviously finding the perfect trustee is not always possible. This is an area where the input of an experienced special needs trust practitioner can be extremely useful to the client.

[2] IRC § 642(b)(2)(C).
[3] 42 U.S.C. § 1396p(c)(2)(B)(iv).

The trustee may be a family member, professional colleague or a corporate fiduciary. The beneficiary themselves should not be the trustee. The government would likely argue that this would give the beneficiary too much control over the trust assets, and it could cause the trust assets to be considered an "available" resource for Medicaid and SSI purposes. It may make sense for the client to consider appointing co-trustees: a family member and a professional trustee. The family member trustee can deal with the advocacy and care issues, while the professional trustee can take care of the investment and compliance issues.

1. Professional Trustee.

In many situations, the client will be well-served by having a professional appointed as trustee of an SNT. This may be a corporate bank, trust company or lawyer who works in this field. Of course, this will likely mean increased expense compared to a family member; however, in most cases this will be well worthwhile. Most family members have never served as trustee of any kind of trust, much less an SNT. There could be a tendency to treat the trust money as their own or comingle the assets with their own. This is especially troublesome when the beneficiary with special needs is not capable of monitoring the trustee's actions. It is important to have a trustee who will take the time to get to know the beneficiary and who will investigate and understand their needs. The trustee must have the backbone to refuse to make inappropriate distributions that are not for the benefit of the beneficiary and also be flexible enough to make distributions that will enhance the quality of life of the beneficiary. However, not all professional trustees will take the time to do the job properly. Increasingly, courts are becoming less tolerant of SNT trustees who simply invest the money, take their fees and do nothing much else to benefit the beneficiary. Courts are holding trustees of an SNT to a higher standard, often requiring them to apply for government benefits on behalf of the trustee or make distributions that improve the quality of life of the beneficiary. For this reason, among others, many banks and trust companies will not serve as a trustee of an SNT. It is important to work with a trust company that seeks out this type of business and will do a good job.

When utilizing a corporate trustee, the practitioner make should incorporate their fee schedule into the trust document. Most banks and trust companies have a minimum annual fee or may have a minimum corpus requirement. In many cases, this will be an impediment to appointing a corporate trustee. It is important to establish relationships with professional trustees who seek out this type of business and who are flexible when it comes to minimum corpus requirements.

B. Trust Protector.

It is often appropriate to appoint someone or an entity as trust protector to have the authority or duty to oversee the trustee in an SNT since the beneficiary often cannot serve this role. For example, a beneficiary with cognitive impairment would not be able to review the accounts of the trustee. A trust protector can be given the power to

remove and replace a corporate trustee. A trust protector can have a number of roles, depending on state law and the trust instrument itself. It is important to carefully think through which powers are given to a trust protector, as these can vary widely. They can be merely administrative in nature or can be substantive. The trust should make clear whether the trustee has to follow the direction of the trust protector or whether the trust protector is merely acting in an advisory capacity. Depending on the powers given to the trust protector, fiduciary responsibility may attach thereto.

C. Trustee Discretion.

SNT practitioners frequently debate whether an SNT should include very specific distribution standards or standards that are broad in nature. The theory behind specific standards is the hope that it will provide clear guidance to trustees (and beneficiaries and family members) as to what is intended with respect to permissible distributions. The thought is that this will reduce any potential litigation risk or the need to seek court approval for distributions. Conversely, it is thought that broad standards allow the trustee to exercise their unfettered discretion to make a distribution to improve the quality of life of the beneficiary in accordance with the trust instrument. In fact, many corporate trustees actually prefer this to a specific standard. After all, it is very hard to anticipate at the time of drafting all the future possible needs of the beneficiary. One of the drawbacks of a broad standard is that the trustee often feels the need to seek court approval for certain distributions since they are not specifically stated in the trust. With respect to this issue, there is no "one size fits all" approach that can be applied to all trusts. Each case must be thought through and discussed with the relevant parties prior to drafting the trust.

One drafting issue with respect to trustee discretion that deserves some thought is whether the trustee should be permitted to make a distribution even if it reduces or eliminates the beneficiary's entitlement to government benefits. If this type of distribution would improve the quality of life of the beneficiary, then perhaps it makes sense to make the distribution even if it has a negative impact on government benefits.

1. Purchase of a Home.

The purchase of a home for someone with disabilities is something that can improve their quality of life for a long time. However, a home purchase often presents a number of complex issues at the time of purchase and during the time period that the beneficiary resides in the house. For this reason, many practitioners suggest that a beneficiary rent instead of owning a home. If the decision is made to purchase a home, a threshold question is whether the purchaser of the home should be the trust, the beneficiary, or some other third party. With respect to third party SNTs, it often makes sense for the SNT to own the home since there is no Medicaid payback with these types of trusts and the beneficiary is not able to convert an exempt asset (i.e., their homestead) to a non-exempt asset (i.e., cash).

When purchasing a home, the question invariably arises as to whether the purchase should be financed. If the trust owns the home, it may be difficult for the trustee to qualify for a mortgage. Of course, this situation can be ameliorated if the trust company and the mortgage company are owned by the same entity. If the home purchase transaction is structured so that the beneficiary owns the home, it may also be difficult to obtain a mortgage since many beneficiaries do not work or have poor credit. For this reason, it is common for home purchases to be all cash transactions.

2. Purchase of a Vehicle.

A trust can purchase a vehicle for the benefit of a beneficiary. It is important to consider who should be the owner of the vehicle. In many cases, it makes sense to title the vehicle in the name of the beneficiary or family member. This way, if a car accident occurs in which the beneficiary or family member was responsible, it will minimize the exposure of trust assets in any subsequent litigation. Additionally, it may be difficult to obtain auto insurance if the vehicle is owned by the trust. It is suggested that the trust holds a lien on the title of the car so the beneficiary or family member cannot sell the vehicle.

D. Trustee Powers.

It is important for the trustee to have the power to invest trust assets in non-income producing assets, such as a car or a house. Also, in an SNT, preservation of principal may not be paramount since the intent is to improve the quality of life of the beneficiary with special needs and the interests of the remaindermen typically fall behind the lifetime beneficiary.

E. Trust Amendment.

Due to a rapidly changing regulatory and legal landscape, it is possible that an SNT will need to be amended after it is executed. For example, if the beneficiary moves to another state and the new state's Medicaid agency doesn't agree with certain trust provisions and requires that they be removed or amended before Medicaid will be granted in that state. Another example is that the POMS are constantly changing and may cause the exempt trust to no longer be exempt. This is a major reason the special needs planning practitioner needs to incorporate flexibility into the trust so that it may be amended when necessary. Even though decanting or reformation may be available, it is almost always more cost effective and practical to amend the trust if the power to do so is included in the trust document.

F. Other Provisions.

The trust should also give the trustee the power to hire other professionals, including lawyers, accountants, and care managers.

IV. Common Errors.

The following are some common errors practitioners make when representing clients in special needs planning. These are by no means exhaustive, but merely a sampling of some of the things that can go wrong if careful attention is not paid to detail and all scenarios are not properly thought out. Each client's situation must be evaluated on its own as one size does not fit all when it comes to special needs planning.

A. **Retirement benefits.** If the client has substantial retirement benefits, the practitioner must consider the implications of the recently enacted SECURE Act. Previously, it often made sense to leave non-retirement assets to a third party SNT, while leaving retirement benefits to other beneficiaries. However, under SECURE it may now be more beneficial for the client to leave retirement benefits to a third-party SNT. Individuals who are disabled or chronically ill are considered Eligible Designated Beneficiaries (EDBs). While the general rule under the SECURE Act is that designated beneficiaries are required to withdraw the entire retirement account within 10 years, the previous "stretch" rules still apply for EDBs. A properly drafted third party SNT can qualify as an EDB, and the practitioner should ensure that accumulation language is included (as opposed to a conduit or pass through trust).

B. **Not being flexible in drafting.** The practitioner must carefully consider the needs of the trust beneficiary and circumstances of the particular matter. The trust should not be "cookie cutter," but rather an instrument that will provide flexibility to meet the beneficiary's needs for years to come. The goal of most clients is to improve the quality of life of the individual with special needs. They are relying on the practitioner to draft a document and put in place a plan that will adapt to the changing needs of the trust beneficiary and the ever-changing status of the law.

C. **Not creating a third party SNT for someone 65 or older.** There is no law prohibiting the creation and funding of a third-party trust for individuals with disabilities who are age 65 or older. This limitation applies only to first party SNTs. Testamentary third party SNTs may also be an effective planning tool for married seniors when one of the spouses may be facing a long-term care situation.

D. **Requiring mandatory distributions of income or principal.** SNTs must be purely discretionary trusts. If the special needs planning practitioner includes a provision allowing the beneficiary to demand distributions from the trust, it could undermine the entire purpose of the trust. Ideally, the trust should be designed to supplement, not replace, government benefits. Mandating trustee distributions could compromise the beneficiary's right to certain government benefits.

E. **Spending third party trust assets prior to first party trust assets.** Often, individuals with special needs are beneficiaries of both a first party SNT and a third party SNT. For example, they might have received a lawsuit settlement which was placed into a first party SNT, and the parents might have funded a third party SNT. Since the third party SNT does not have a Medicaid payback provision, it is recommended that (to the extent

possible) assets of the first party SNT be spent first prior to expending any third party SNT assets.

F. **Gifts to first party trust made by third parties.** While this may seem obvious, unfortunately, it does happen. Since the first party SNT must have a payback provision, it is imperative that any planning done by third parties include a third party SNT and that contributions by third parties go into the third party SNT and not the first party SNT.

G. **Failure to coordinate with other relatives' planning.** The practitioner should discuss with their client whether other family members are intending to leave assets to a child with a disability. After a client completes their estate planning, the client should write a "Dear Family" letter to family members and inform them of the trust that has been put into place and how they can contribute to it if they wish to leave anything to the individual. This is one of the benefits of utilizing an inter-vivos third party SNT.

H. **Failure to review and coordinate all beneficiary designations.** In any estate plan, but especially in a special needs situation, it is important to review and coordinate beneficiary designations. The intent and purposes of a third party SNT will be frustrated if the beneficiary designations of life insurance, retirement accounts, etc. leave assets outright to a person with special needs.

I. **Not preparing a letter of intent.** While not a legally binding document, a letter of intent is a critical component of a special needs plan. It provides a roadmap for future caregivers so that they can do the best job possible.

J. **Failure to appropriately consider proper trustee.** Too often, not enough time is spent discussing this particularly important decision. In many cases, the proper trustee is the key to the successful implementation of the plan and administration of the trust. Clients often wish to appoint a family member. However, family members often have a conflict of interest and have no experience serving as trustee. Serving as trustee of an SNT is even more complicated than serving as a trustee of a more traditional trust since the trustee must also be familiar with government benefit rules. In fact, some banks and trust companies refuse to serve as trustee of an SNT. Oftentimes, it makes sense to have co-trustees where the individual trustee can address the beneficiary's personal needs and the corporate trustee can handle the investment and compliance issues.

K. **Failure to consider a trust protector.** In an SNT, the beneficiary is often not able to monitor the actions of the trustee due to cognitive issues. Thus, a trust protector can serve a very useful oversight role in these cases. The trust protector can have a number of powers, including the power to make certain changes to the trust, the power to approve distributions, the power to change the trustee, among others. The practitioner should consider whether the trust protector will be a fiduciary. There are several states which have trust protector statutes, and these must be reviewed if the trust is governed by the laws of one of those states.

L. **Having remainder beneficiaries who are adverse to the beneficiary with disabilities.** Too often, families lose sight of the fact that the SNT was set up primarily for the benefit of the person with disabilities. Practitioners need to be mindful of potential conflicting and hostile family relationships which may impact the administration of the SNT. For example, if the sibling is a trustee and also a remainder beneficiary, the sibling may be hesitant to spend necessary money on the beneficiary for fear that their remainder interest will be diminished.

M. **Failure to include a contingent SNT in Will.** Many practitioners will not include an SNT in an estate plan because the family is not sure that the individual with special needs will ever need government benefits. In these situations, a contingent SNT works very well. The practitioner can draft the will leaving the assets either outright or in a non-SNT. If, at the time that the beneficiary becomes entitled to receive the assets, it is possible that government benefits may be in his future, then the SNT provisions can be triggered. This approach allows the decision on whether to utilize an SNT to be deferred, thereby giving all parties more time and information to make the proper decision.

N. **Prohibiting disqualifying distributions.** The goal of special needs planning is to improve the quality of life of the individual with special needs. In certain circumstances, the beneficiary may be better off if services or items are paid for by the trust even if this will have the effect of reducing or eliminating benefits. It is important that the trust allow the trustee to exercise its discretion in this regard.

O. **Include payback in third party trust.** Including a Medicaid payback provision in a third-party SNT is a serious error that can result in unhappy clients and even a malpractice claim. Many practitioners misunderstand the difference between first-party and third-party SNTs and assume that all SNTs require a Medicaid payback provision, which is not the case.

P. **Give SNT beneficiary with disabilities Crummey powers.** For tax planning purposes, it is often desirable for trust beneficiaries to have a Crummey right of withdrawal so that contributions to the trust qualify for the annual gift tax exclusion. If the trust beneficiary is receiving government benefits, however, it is possible that SSA or Medicaid could take the position that a disabled beneficiary's Crummey right of withdrawal could cause the assets of the trust to be available to that beneficiary. Additionally, the lapse of the power could be considered a gift. If estate and gift tax planning is important, consider granting Crummey powers to other beneficiaries, such as contingent remaindermen.

Q. **Not reviewing government benefits.** Clients are often unaware of the exact benefits they are receiving. Always review written documentation of benefit eligibility. For example, if a beneficiary receives only SSDI and Medicare and is not expected to receive means-tested benefits, an SNT may not be necessary.

R. **Knee-jerk SNT.** Practitioners often assume that an SNT is the best option, when in fact, it might not always be the case. In a third party SNT situation this can be addressed by using a contingent SNT. This allows for the creation of an SNT in the future if necessary.

Dear Family and Friends Letter Template

[Client Name]
[Client Address Line 1]
[Client Address Line 2]

Dear Family and Friends:

This is intended to let you know that I have recently completed updating my estate planning, which includes providing for [name of child]'s future. This has taken me many months to complete and entails some rather extensive estate and financial planning for [name of child]'s future needs if something happens to me.

My main purpose in notifying you about my personal plans is to make you aware of the existence of a special needs trust that is designed to hold various assets and funds for [name of child]'s benefit. In order for [name of child] to qualify or to maintain [his/her] current qualification for various government programs it is imperative that [he/she] not receive any monies or funds directly in [his/her] own name, including be named as beneficiary on any assets. Instead, anything that I or anyone else leaves [name of child] must go to the special needs trust established for [his/her] benefit. Otherwise, if [name of child]were to receive any funds outright, [his/her] eligibility for most government provided special needs programs would be jeopardized.

I am not asking you or anyone else to leave funds for [name of child]. My intention is to take care of [his/her] future needs myself. However, in the event you do want to leave something, I want to make you aware of the best way of doing so without jeopardizing [his/her] eligibility for these vital government programs that I anticipate [he/she] will need for the rest of [his/her] life. Quite simply, all you need to do is make sure that any funds are directed only to the trust, which is referred to as the: "[name of trust] dated [date of trust]."

Thank your understanding.

Sincerely,

[Client Name]

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LETTER OF INTENT GUIDELINES TO FAMILIES

No one else knows your child as well as you do, and no one ever could. You are a walking encyclopedia of your child's history, experiences, habits, and wishes. If your child has special needs, the family's history adds a helpful chapter to your child's book, one detailing their unique medical, behavioral, and educational requirements.

What would happen if you suddenly became unable to provide your child with the necessary supports they need? Without you, your child may become dependent on other caregivers who simply do not possess all of your personal knowledge and insight. However, there are steps you can take now to minimize the natural disruption and disorientation that will occur upon your death or incapacity.

One step is to prepare a letter of intent to help loved ones and your child manage a difficult transition when you no longer are the primary caregiver. A letter of intent is an important planning tool for parents of children with special needs (including adult children).

Although a letter of intent is one of the most important planning documents a parent can prepare, it is not a formal legal document that must be created by an attorney. The goal of a letter of intent is to memorialize your knowledge of your child's needs so that you can guide future caregivers, guardians, and/or trustees in providing the best possible care for your child. Simply put, a thoughtful letter of intent ensures that those who come after you need not waste precious time figuring out the best way to manage and care for your child.

The letter of intent may be addressed to anyone you wish – for example "To Whom it May Concern," "To my Guardian(s), Trustee(s) and Executor." At minimum, the letter should address the following points:

Family History: Where and when you were born, raised, and married, including anecdotes about your own siblings, grandparents, and other relatives or special friends. A description of your child's birth and their connections to specific family members or friends will complement your account of favorite memories and feelings about your child.

General Overview: A brief summary of your child's life to date and your general thoughts and hopes about the future for your child.

Daily Schedule: Because levels of functionality vary for each child and future caregivers may fail to recognize this fact, it is important to include a list of your child's daily routines, favorite activities, and events or tasks he loves or hates. Because a child's ability to contribute to even the most mundane aspects of family life builds self-esteem, it is important that the letter mention whether your child can help with tasks like doing the dishes or raking leaves. Alternatively, if your child loves "swiffing" the floor but folding clothes frustrates him, make sure future caregivers have this information.

Food: Describe your child's diet, including their favorite foods and any specific manner in which the food should be prepared or served. Be certain that the letter also includes a list of foods to which your child is allergic, simply does not like or otherwise may react adversely due to medication.

Medical Care: Describe in detail your child's disability, medical history, and allergies, as well as current doctors, therapists, and hospitals. Detail the frequency of your child's medical and therapy appointments and the purposes and goals of these sessions. List current medications, including how they are administered and for what purpose, and be careful to describe all medications that have not worked for your child in the past.

Education: Detail your child's educational experiences and describe your desire for your child's future education, including regular and special classes, specific schools, related services, mainstreaming, extracurricular activities, and recreation. Discuss your wishes regarding the types of educational emphasis, i.e., vocational, academic, or total communication, and name any specific programs, teachers, or related service providers that you prefer to be part of your child's overall life plan.

Benefits Received: List the types of governmental benefits your child receives, including Medicaid, Medicare, SSI/SSDI, Supplemental Nutrition Assistance Program (food stamps), and housing assistance. Detail the agencies' contact information, identification numbers for your child's case(s), the recertification process for each benefit, including important dates and other reporting requirements.

Employment: Describe the types of work and work environments your child may enjoy; i.e., open employment with supervision, a sheltered workshop, or an activity center. List any companies of which you are aware that provide employment in the community and may be of specific interest to your child.

Residential Environment: Describe your child's living arrangements with family, friends, or other organizations. If your child will be unable to continue living with these individuals after you stop being the primary contact for their care, describe what you consider to be the best alternative arrangements. For instance, explain whether you prefer that your child live in a group home or institution located in the same community, the preferred size of the institution, or that your child has a single room or roommate.

Social Environment: Mention the types of social activities your child enjoys, i.e., sports, dances, or movies. Indicate whether your child should be given spending money and, if so, how he has spent money in the past. The letter of intent also should note whether your child takes and/or enjoys taking vacations and, if so, whether he has a favorite travelling companion.

Religion: Specify your child's religion and any local place of worship your family attends. List all local clergy that may be familiar with your child and your family. Describe your child's religious education and indicate whether this is of interest to your child.

Behavior Management: Describe any current behavior management program that has a positive impact on your child and discuss any other behavior management programs that were unsuccessful in the past.

Final Arrangements: List your desires for your child's final arrangements, including whether you have planned for a funeral, cremation or burial, and any cemetery, monument, religious service, or specific clergy to officiate the proceeding.

Other Information: Include any other information that you believe will provide the best possible guidance to the person who assumes responsibility for caring for your child.

Once you prepare, sign and date the letter of intent, you should review the document annually and update it as necessary. It is important that you let your child's potential future caregiver know the letter of intent exists and where it can be accessed; even better, you can review the document with the caregiver on an annual basis. The letter of intent should be placed with all of your other relevant legal and personal documents concerning your child.

The letter of intent can be a difficult and extremely emotional document to write, as it is often the first time parents actually envision their child with special needs navigating this world without them. However, once it is completed, the first important step has been taken toward creating a detailed road map for future caregivers and trustees. As a parent of a child with special needs, you also may be relieved to know that you are ensuring the highest quality of life for your child by laying the foundation for as seamless a transition as possible after you are gone.

Administering a Special Needs Trust

A Handbook For Trustees (2024 Edition)

SNA
SPECIAL NEEDS ALLIANCE

Attorneys for special needs planning.

Administering a Special Needs Trust
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Administering a Special Needs Trust: A Handbook for Trustees

Introduction and Definition of Terms

"Special Needs" trusts are complicated and can be hard to understand and administer. They are like other trusts in many respects—the general rules of trust accounting, law and taxation apply—but unlike more familiar trusts in other respects. The very notion of "more familiar" types of trusts will, for many, be amusing—most people have no particular experience dealing with formal trust arrangements, and special needs trusts are often established for the benefit of individuals who would not otherwise expect to have experience with trust concepts.

The essential purpose of a special needs trust is usually to improve the quality of an individual's life without disqualifying him or her from eligibility for public benefits. Therefore, one of the central duties of the trustee of a special needs trust is to understand what public benefits programs might be available to the beneficiary and how receipt of income, or provision of food or shelter, might affect eligibility. Because there are numerous programs, competing (and sometimes even conflicting) eligibility rules, and at least two different types of special needs trusts to contend with, the entire area is fraught with opportunities to make mistakes. Because the stakes are often so high—the public benefits programs may well be providing all the necessities of life to the beneficiary—a good understanding of the rules and programs is critically important.

The essential purpose of a special needs trust is usually to improve the quality of an individual's life without disqualifying him or her from eligibility to receive public benefits.

Before delving into a detailed discussion of special needs trust principles, it might be useful to define a few terms:

GRANTOR (sometimes "Settlor" or "Trustor")—the person who establishes the trust and generally the person whose assets fund the trust. There might be more than one grantor for a given trust. The tax agency may define the term differently than the public benefits agency. Special needs trusts can make this term more confusing than other types of trusts, since the true grantor for some purposes may not be the same as the person signing the trust instrument. If, for example, a parent creates a trust for the benefit of a child with a disability, and the parent's own money funds the trust, the parent is the grantor. In another case, where a parent has established a special needs trust to handle settlement proceeds from a personal injury lawsuit or improperly directed inheritance, the minor child (through a guardian) or an adult child will be the grantor, even though he or she did not decide to establish the trust or sign any trust documents.

TRUSTEE—the person who manages trust assets and administers the trust provisions. Once again, there may be two (or more) trustees acting at the same time. The grantor(s) may also be the trustee(s) in some cases. The trustee may be a professional trustee (such as a bank trust department or a lawyer), or may be a family member or trusted adviser—though it may be difficult to qualify a non-professional to serve as trustee.

BENEFICIARY—the person for whose benefit the trust is established. The beneficiary of a special needs trust will usually (but not always) be disabled. While a beneficiary may also act as trustee in some types of trusts, a special needs trust beneficiary will almost never be able to act as trustee.

DISABILITY—for most purposes involving special needs trusts, "disability" refers to the standard used to determine eligibility for Social Security Disability Insurance or Supplemental Security Income benefits: the inability to perform any substantial gainful employment.

INCAPACITY (sometimes Incompetence)—although "incapacity" and "incompetence" are not interchangeable, for our purposes they may both refer to the inability of a trustee to manage the trust, usually because of mental limitations. Incapacity is usually important when applied to the trustee (rather than the beneficiary), since the trust will ordinarily provide a mechanism for transition of power to a successor trustee if the original trustee becomes unable to manage the trust. Incapacity of a beneficiary may sometimes be important as well. Not every disability will result in a finding of incapacity; it is possible for a special needs trust beneficiary to be disabled, but not mentally incapacitated. Minors are considered to be incapacitated as a matter of law. The age of majority differs slightly from state to state, though it is 18 in all but a handful of states.

REVOCABLE TRUST—refers to any trust which is, by its own terms, revocable and/or amendable, meaning able to be undone, or changed. Many trusts in common use today are revocable, but special needs trusts are usually irrevocable, meaning permanent or irreversible.

IRREVOCABLE TRUST—means any trust which was established as irrevocable (that is, no one reserved the power to revoke the trust) or which has become irrevocable (for example, because of the death of the original grantor).

SOCIAL SECURITY DISABILITY INSURANCE—sometimes referred to as SSDI or SSD, this benefit program is available to individuals with a disability who either have sufficient work history prior to becoming disabled or are entitled to receive benefits by virtue of being a dependent or survivor of a disabled, retired, or deceased insured worker. There is no "means" test for SSDI eligibility, and so special needs trusts may not be necessary for some beneficiaries—they can qualify for entitlements like SSD and Medicare even though they receive income or have available resources. SSDI beneficiaries may also, however, qualify for SSI (see below) and/or Medicaid benefits, requiring protection of their assets and income to maintain eligibility. Of course, just because a beneficiary's benefits are not means-tested, it does not follow that the beneficiary will not benefit from the protection of a trust for other reasons.

SUPPLEMENTAL SECURITY INCOME—better known by the initials "SSI," this benefit program is available to low-income individuals who are disabled, blind or elderly and have limited income and few assets. SSI eligibility rules form the basis for most other government program rules, and so they become the central focus for much special needs trust planning and administration.

MEDICARE—one of the two principal health care programs operated and funded by government—in this case, the federal government. Medicare benefits are available to all those age 65 and over (provided only that they would be entitled to receive Social Security benefits if they chose to retire, whether or not they actually are retired) and those under 65 who have been receiving SSDI for at least two years. Medicare eligibility may forestall the need for or usefulness of a special needs trust. Medicare recipients without substantial assets or income may find that they have a difficult time paying for medications (which historically have not been covered by Medicare but began to be partially covered in 2004) or long-term care (which remains largely outside Medicare's list of benefits).

MEDICAID—the second major government-run health care program. Medicaid differs from Medicare in three important ways: it is run by state governments (though partially funded by federal payments), it is available to those who meet financial eligibility requirements rather than being based on the age of the recipient, and it covers all necessary medical care (though it is easy to argue that Medicaid's definition of "necessary" care is too narrow). Because it is a "means-tested" health care program, its continued availability is often the central focus of special needs trust administration. Because Medicare covers such a small portion of long-term care costs, Medicaid eligibility becomes centrally important for many persons with disabilities.

The Most Important Distinction

Two entirely different types of trusts are usually lumped together as "special needs" trusts. The two trust types will be treated differently for tax purposes, for benefit determinations, and for court involvement. For most of the discussion that follows, it will be necessary to first distinguish between the two types of trusts. The distinction is further complicated by the fact that the grantor (the person establishing the trust, and the easiest way to distinguish between the two trust types) is not always the person who actually signs the trust document.

"Self-Settled" Special Needs Trusts

Some trusts are established by the beneficiary (or by someone acting on his or her behalf) with the beneficiary's funds for the purpose of retaining or obtaining eligibility for public benefits—such a trust is usually referred to as a "self-settled" special needs trust. The beneficiary might, for example, have received an outright inheritance, or won a lottery. By far the most common source of funds for "self-settled" special needs trusts, however, is proceeds from a lawsuit—often (but not always) a lawsuit over the injury that resulted in the disability. Another common scenario requiring a person with a disability to establish a self-settled trust is when they receive a direct inheritance from a well-intentioned, but ill-advised relative.

A given trust may be treated as having been "established" by the beneficiary even if the beneficiary is completely unable to execute documents, and even if a court, family member, or lawyer representing the beneficiary actually signed the trust documents. The key test in determining whether a trust is self-settled is to determine whether the beneficiary had the right to outright possession of the proceeds prior to the act establishing the trust. If so, public benefits eligibility rules will treat the beneficiary as having set up the trust even though the actual implementation may have been undertaken by someone else acting on their behalf. Virtually all special needs trusts established with funds recovered in litigation or through a direct inheritance will be "self-settled" trusts.

Self-settled special needs trusts are different from third-party trusts in two important ways. First, self-settled trusts must include a provision directing the trustee, if the trust contains any funds upon the death of the beneficiary, to pay back anything the state Medicaid program has paid for the beneficiary. Second, in many states, the rules governing permissible distributions for self-settled special needs trusts

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are significantly more restrictive than those controlling third-party special needs trusts.

Because Social Security law specifically describes self-settled special needs trusts, these instruments are sometimes referred to by the statutory section authorizing transfers to such trusts and directing that trust assets will not be treated as available and countable for SSI purposes. That statutory section is 42 U.S.C. §1396p(d)(4)(A), and so self-settled special needs trusts are sometimes called, simply, "d4A" trusts.

"Third-party" Special Needs Trusts

The second type of special needs trust is one established by someone other than the person with disabilities (usually, but not always, a parent) with assets that never belonged to the beneficiary. It is often used, when proper planning is done for a disabled person's family, to hold an inheritance or gift. Without planning, a well-meaning family member might simply leave an inheritance to an individual with a disability. Even though it may be possible to set up a trust after the fact, the funds will have been legally available to the beneficiary. That means that any trust will probably be a "self-settled" special needs trust, even though the funds came from a third party.

> Some trusts are established by the beneficiary for the purpose of retaining or obtaining eligibility for public benefits with the beneficiary's funds. By far the most common source of funds for "self-settled" special needs trusts is proceeds from a lawsuit—often (but not always) a lawsuit over the injury that resulted in the disability.

Parents, grandparents and others with the foresight to leave funds in a third party special needs trust will provide significantly better benefits to the beneficiary who has a disability. This type of trust will not need to include a "payback" provision for Medicaid benefits upon the beneficiary's death. During the beneficiary's life, the kinds of payments the trust can make will usually be more generous and flexible.

The "Sole Benefit" Trust

Although there are two primary types of special needs trusts, there is actually a third type that might be appropriate under certain unusual circumstances. Because Medicaid rules permit applicants to make unlimited gifts to or "for the sole benefit of" disabled children or spouses, some individuals with assets may choose to establish a special needs trust for a child or grandchild with disabilities in hopes of securing eligibility for Medicaid for both themselves as grantor and for the disabled beneficiary. A number of states are very restrictive in their interpretation of the "sole benefit" requirement, so that such trusts are rarely seen. In many ways they look like a hybrid of the two other trust types; they may be taxed and treated as third-party trusts, but require a payback provision like a self-settled trust (at least in some states).

The Second Most Important Distinction

Once the type of trust is determined, the next important issue is discerning the type of government program providing benefits. Some programs (like SSDI and Medicare) do not impose financial eligibility requirements; a beneficiary receiving income and all his or her medical care from those two programs might not need a special needs trust at all, or might benefit from more flexibility given to the trustee. A recipient of SSI and/or Medicaid, however, may need more restrictive language in the trust document and closer attention on the part of the trustee.

SSDI/Medicare Recipients

Neither Social Security Disability Insurance benefits nor Medicare are "means–tested." Consequently, it may be unnecessary to create a special needs trust for someone who receives benefits only from those two programs. After 24 months of SSDI eligibility, the beneficiary will qualify for Medicare benefits as well, so it may be appropriate to provide special needs provisions to get the SSDI recipient through that two-year period, during which he or she may rely on Medicaid for medical care. Restrictive special needs trust language may actually work against an SSDI beneficiary if it prevents distribution of cash to the beneficiary in all circumstances; an SSDI recipient will almost always benefit from broad language giving more discretion to the trustee.

Some SSDI/Medicare recipients may also receive SSI and/or Medicaid benefits. It may be critically important for those individuals to have strict special needs language controlling use of any assets or income that would otherwise be available. As the Medicare prescription drug benefit evolves over the next few years, this concern may be somewhat lessened—but for the moment, it remains true that availability of the drug coverage provided by Medicaid is critically important to many Medicare recipients.

Even an SSDI/Medicare beneficiary who does not receive any SSI or Medicaid benefits may be a good candidate for special needs trust planning. Future developments in public benefits programs, including housing, are uncertain, but constant budget pressure may well make benefits now taken for granted completely or partially indexed to income and/or assets in the future. Medical conditions also change, of course, and some persons with disabilities living in the community who presently receive adequate support from

Medicare may one day become dependent on Medicaid for services not available under Medicare–like long term care.

SSI/Medicaid Recipients

Most special needs trust beneficiaries are eligible for (or seeking eligibility for) Supplemental Security Income payments. In many states, receipt of SSI payments automatically qualifies one for Medicaid eligibility. Many other government programs explicitly rely on SSI eligibility rules as well, so that SSI eligibility rules become the central concern for those charged with administering special needs trusts.

Veterans' Benefits

"Veterans' benefits" is the term used to describe the benefits available to veterans, the surviving spouses, children or parents of a deceased veteran, dependents of disabled veterans, active duty military service members, and members of the Reserves or National Guard. These benefits are administered by the U.S. Department of Veterans Affairs ("VA").

> Parents, grandparents and others with the foresight to leave funds in a third-party special needs trust will provide significantly better benefits to a beneficiary with disabilities.

The benefits available to veterans include monetary compensation (based on individual unemployability or at least ten-percent disability from a service-connected condition), pension (if permanently and totally disabled or over the age of 65 and have limited income and net worth), health care, vocational rehabilitation and employment, education and training, home loans and life insurance. Although the pension is available to low-income veterans, it is important to note that some income, such as child's SSI or wages earned by dependent children, is excluded when determining the veteran's annual income. Also keep in mind that a service-connected disability payment will not offset SSDI, but any VA disability payment will offset SSI.

The benefits available to dependents and survivors of the veteran include Dependency and Indemnity Compensation ("DIC") and, in certain circumstances, home loans.

Transferring a VA recipient's assets into a special needs trust may not be fully effective. According to VA interpretation, the assets of such a trust will be counted as part of the claimant's net worth when calculating an improved pension. It is important to remember that the VA may place a "freeze" on new enrollees in order to manage the rapid influx of new veterans or older veterans who did not previously enroll for services. Therefore, it is important to evaluate current and future need for VA services in order to anticipate and plan for a situation where a person is otherwise eligible for VA benefits but, due to a freeze, cannot receive services. Under a new law, attorneys must become accredited with the VA to advise clients in this area.

Subsidized Housing

FEDERAL SUBSIDIZED HOUSING

The U.S. Department of Housing and Urban Development ("HUD") provides opportunities to low-income individuals and families to rent property at a cost that is lower than the open market. This is especially important to those people who are expected to pay for their shelter costs (rent or mortgage, plus utilities) with their insufficient SSI income. There are two issues to consider when evaluating the role of special needs trusts and subsidized housing: the initial eligibility for subsidized housing and the rent determination.

Eligibility for subsidized housing depends on the family's annual income. Annual income includes earned income, SSI, SSDI, pension, unemployment compensation, alimony, and child support, among other items. Annual income also includes unearned income, which is comprised, in part, of interest generated by assets. If the family has net family assets in excess of $5,000, the annual income includes the greater of the actual income derived from all net family assets or a percentage of the value of such assets based on the current passbook savings rate, as determined by HUD.

Assets that are not included as income upon receipt are lump sums, such as inheritances and insurance settlements for losses (although the income they generate will be countable), reimbursement for medical expenses, PASS set-asides, work training programs funded by HUD and the income of a live-in aide.

In general, to qualify for federal subsidized housing, an individual's countable income may not exceed eighty percent of the median income in the area to be considered "low income", and the individual's income may not exceed fifty percent of the median income to be considered "very low income". The result is a disparity in eligibility depending on where the person resides within the county, state, and region of the country.

There is no asset limit to be eligible for federal subsidized housing, although as described above, if countable assets are greater than $5,000, the interest income generated will be counted towards eligibility. If a person transfers an asset for less than its fair market value, then HUD will treat the asset as if it were still owned by the individual for two years after the transfer. HUD will assume that the asset generates income at the passbook rate and will include that income in calculating the individual's rent. Therefore, it is very likely that HUD will treat transfers to a special needs trust as a transfer for less than fair market value and, for the next two years, will include

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the interest generated by the special needs trust as income to the individual, either at the passbook rate or the actual earnings, whichever is greater.

Special Needs Trusts are excluded from family assets and the income generated by the trust assets is not included once the two-year penalty period has expired. It is important to note that, similar to other programs such as Medicaid and SSI, "regular" distributions from a special needs trust, even if made to a third-party provider, will be treated as countable income, even if used for non-food and shelter items.

> In many states, receipt of SSI payments automatically qualifies one for Medicaid eligibility. Many other government programs explicitly rely on SSI eligibility rules as well, so that SSI eligibility rules become the central concern for those charged with administering special needs trusts.

The second issue relating to subsidized housing and a special needs trust is determining the monthly rent. Generally, an individual/family's rent will be thirty percent of their adjusted gross income. Similar to treatment under the threshold eligibility rules, the special needs trust and the income generated by trust assets are excluded, but "regular" distributions made directly to the beneficiary (as opposed to a third-party provider of goods or services) will be considered as income.

SECTION 8

Section 8 is a voucher program that is administered by HUD but managed by local public housing authorities ("PHA") or metropolitan housing authorities ("MHA"). The tenant pays their rent, typically thirty percent of their net adjusted income, to the landlord. The PHA pays the remaining balance due, which is called the voucher, to the landlord. The rent is based on the market value for the area and established by the PHA according to payment standards issued by HUD.

While a family member generally cannot serve as a Section 8 landlord, it is possible for a special needs trust to do so, even if the trustee is a family member. Although there are special rules applicable to a Section 8 landlord, it can be a beneficial relationship. The trust beneficiary would pay rent to the trustee (using the thirty percent of income rule) and the PHA would pay the remainder to the trustee.

It is important to investigate how your local housing authority's rules differ from the general rules listed above.

Temporary Assistance for Needy Families ("TANF")

TANF provides assistance and work opportunities to needy families. TANF is administered locally by the states, but is overseen by The Office of Family Assistance ("OFA"), which is located in the United States Department of Health and Human Services, Administration for Children and Families. TANF is a result of combining two other programs: Aid to Families with Dependent Children ("AFDC") and Job Opportunities and Basic Skills Training ("JOBS"). Because TANF is administered on a local level, the program and eligibility rules vary greatly from state to state. However, it is safe to assume that distributions directly made to the beneficiary of a special needs trust, or to the beneficiary's family if a minor, may be considered income and will impact eligibility for TANF.

Other Means-Tested Benefits Programs

State supplements to SSI and other government benefit programs, like vocational rehabilitation services, also play important roles in the lives of many individuals with disabilities. Because the welter of eligibility programs is confusing and the reach of most other programs is not as broad as those described in detail here, those other programs are not described in any depth. In analyzing the proper approach to establishment or administration of a special needs trust, however, care should be taken to consider all the available program resources and restrictions on use of trust funds mandated by those programs.

Eligibility Rules for Means- Tested Programs

As previously noted, the primary program with financial eligibility restrictions is SSI, the Supplemental Security Income program. Because the concepts are central to an understanding of other eligibility rules, and because many other programs explicitly utilize SSI standards, the SSI rules become the most important ones to grasp. They are described here in a general way, with a few notations where other programs (particularly long-term care Medicaid) differ from the SSI rules.

Income

SSI eligibility requires limited income and assets. SSI rules have a simple way of distinguishing between income and assets: Money received in a given month is income in that month, and any portion of that income remaining on the first day of the next month becomes an asset. SSI rules also distinguish between what is "countable" or "excluded," "regular" or "irregular," and "unearned" or "earned" income. "Countable" income means that it is used to compute eligibility and benefit amount. "Excluded" means that it is not counted. "Regular" means that it is received on a periodic basis, at least two or more times per quarter or in

consecutive months, and "irregular" or "infrequent" means that it is not periodic or predictable. "Unearned" means that it is passively received, such as SSDI benefits or bank account interest. "Earned" means that work is performed in exchange for the income. An SSI recipient is permitted to receive a small amount of any kind of income ($20 per month) without reducing benefits. That amount is sometimes referred to as the SSI "disregard" amount.

Each classification or grouping has a somewhat different rule, and it is an understatement to call these income rules "confusing." Any unearned income reduces the SSI benefit by the amount of the income, so investment income or gifted money simply reduces the benefit dollar for dollar, less the disregard. Earned income is treated more favorably, only reducing benefits by about half of the earnings. This is designed to encourage SSI recipients to return to the workforce. Keeping in mind that disability is defined as "unable to perform any substantial gainful activity," it is easy to see that any significant amount of earned income will eventually imperil SSI eligibility and, since trust administration does not usually involve earned income in any event, we will not attempt to deal with those issues here.

SSI also has a concept of "in-kind support and maintenance" (ISM) that is central to much understanding of special needs trust administration. Any payment from a third party (including a trust) for necessities of life—food or shelter (note that the federal government deleted "clothing" from the list of necessities in March 2005) to a third party provider of goods or services—will be treated as countable income, albeit subject to special rules for calculating its effect.

The effect of receiving ISM on SSI benefits is different from the receipt of cash distributions. Where as cash payments reduce the SSI payment dollar for dollar, ISM reduces the benefit by the lesser of the presumed maximum value of the items provided or an amount calculated by dividing the maximum SSI benefit by three and adding the $20 disregard amount.

For 2024, the maximum federal SSI benefit for a single person is $943. One third of that amount is $314.33, and so the maximum reduction in benefits caused by ISM (no matter how high the value) is $334.33 per month. The meaning of that confusing collection of information is best illustrated using an example (CAUTION: some states provide SSI supplemental payments that affect this calculation).

Consider John, who is disabled as a result of his serious mental illness. He has no work history, and he does not qualify for SSDI. He is an adult, living on his own. He qualifies for the maximum federal SSI benefit of $943; he lives in a state which does not provide an SSI supplement.

If John's mother gives him $100 cash per month (for food and cigarettes), he is required to report that as countable unearned income each month. Although SSI may take two or three months to accomplish the adjustment, the program will eventually withhold $80 ($100 minus the $20 disregard) from his benefit for each month in which his mother makes a cash gift to him. The same result will obtain if John's mother is trustee of a special needs trust for John and the cash comes from that trust.

If, however, John's mother does not give him the $100 directly, but instead purchases $70 worth of food and $30 worth of video games each month, only the food will affect his SSI payment—reducing it by $50 ($70 minus the $20 disregard). If she purchases $20 worth of food and $80 worth of video games, there will be no effect at all—the food purchase is within the $20 monthly disregard amount. Similarly, if she purchases $20 worth of video games and $30 worth of movie tickets, there will be no effect—provided that the movie tickets cannot be turned in for cash (because if the movie tickets can be converted to cash, John could—even if he does not—convert the movie tickets into payment for food or shelter).

In other words, the effect of John's mother's payments to him or for his benefit changes with the nature of her payments. Any cash she provides to him (over the $20 monthly amount ignored by SSI) reduces his SSI payment directly. Direct purchase of items other than food or shelter does not affect his SSI, so long as the purchased items cannot be converted to food or shelter. Finally, any payment she makes for food or shelter reduces his SSI check as well, but not as harshly as cash payments directly to John.

Now suppose that John's mother decides to give up on trying to work around the strictures of SSI rules, and she simply pays his rent at an adult care facility that provides his meals. Assume that the facility costs her $1500 per month, which she pays from her own pocket. Because of the ISM rules, John's SSI benefit will be reduced by only $334.33 per month, and so his SSI check will be reduced to $608.67. Critically important, however, John will still qualify for Medicaid benefits in most states because he receives some amount of SSI. If the adult care home payment comes from a special needs trust for John's benefit, the same result will occur, assuming that the room and board portion of the payment exceeds $334.33. Incidentally, the same result will also obtain if John's mother simply takes him in and allows him to live and eat with her without charging him rent.

Now assume that John does have a work history before becoming disabled, and that he qualifies to receive $700 per month from SSDI. Because he has been receiving SSDI for more than two years, he also qualifies for Medicare. Because his countable income is less than $943, he continues to receive $263 in SSI benefits ($20 of the SSD is disregarded), and qualifies for Medicaid as well (we will ignore the effect

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of the QMB and SLMB programs for qualified, special low-income Medicare beneficiaries, and the Medicare Part B premium which would ordinarily be withheld from his SSDI check). Now if John's mother pays his rent at the adult care home, or takes him into her own home, he will lose his SSI altogether—since he is receiving less than $334.33 per month from SSI, the effect of the ISM rules will be to knock him off the program. Unless he separately qualifies for Medicaid, he will also lose his coverage under that program. The income strictures are the same or similar for other programs, with one important exception. In some states, but not all, eligibility for community or long-term care Medicaid is also dependent on countable income. The income tests vary. In some, you can "spend down" excess income over the limit to become eligible. In others, if countable income exceeds the benefit "cap" (like SSI), you cannot become eligible at all.

Some states also attempt to limit expenditures from self-settled (and even third-party) special needs trusts, and can require amendments to the language of those trusts in order to allow eligibility. While a good argument can be made that the Medicaid program does not have that ability, as a practical matter, the trustee of the special needs trust will have to either litigate that issue or acquiesce in the Medicaid agency's demands.

Assets

The limitation on assets for SSI eligibility may be somewhat easier to master, or at least to describe. A single person must have no more than $2,000 in available resources in order to qualify for SSI. Some types of assets are not counted as available (called "non-countable"), including the beneficiary's home, one automobile, household furnishings, prepaid burial amounts plus up to $1500 set aside for funeral expenses (or life insurance in that amount), tools of the beneficiary's trade, and a handful of other, less important items. Each of these categories of assets is subject to special rules and exceptions, so it is easy to become tangled in the asset eligibility structure.

Deeming

The SSI program considers portions of the income and assets of non-disabled, ineligible parents of minor disabled children and of an ineligible spouse living with the SSI recipient as available, and countable for eligibility purposes. This is called "deeming". A certain portion of the ineligible person's income and assets is considered as necessary for his or her own living expenses, and therefore is excluded.

As soon as a child reaches age 18, parental deeming no longer occurs, even if the child continues to live in the household. If spouses voluntarily separate and live in different households, then deeming from the separate spouse or parent also ends. However, in both instances, if the separate person continues to provide support or maintenance to the SSI eligible individual, it will still count as income as described above unless a Court orders it to be deposited directly into the trust. There is also a limited exception to all parental deeming for a severely disabled minor child returning home from an institution or whose condition would otherwise qualify them for institutionalization, which is called a waiver.

"I Want to Buy a..." or "I Want to Pay for..."

What do these complicated rules mean for expenditures from a special needs trust? In-kind purchases, meaning purchase of goods or services for the benefit of the beneficiary, only potentially affect the SSI benefit amount, and not Medicaid benefits, although the Medicaid agency may restrict expenditures for approved things. There are a number of specific purchases that frequently recur:

Home, Upkeep and Utilities

Keep in mind that SSI's in-kind support and maintenance (ISM) rules deal specifically with payments for "food and shelter." The Social Security Administration includes only these items as food and shelter:

1. Food
2. Mortgage (including property insurance required by the mortgage holder)
3. Real property taxes (less any tax rebate/credit)
4. Rent
5. Heating fuel
6. Gas
7. Electricity
8. Water
9. Sewer
10. Garbage removal

The rules make special note of the fact that condominium assessments may in some cases be at least partial payments for water, sewer, garbage removal and the like.

In other words, a payment for rent will implicate the ISM rules, as will monthly mortgage payments. The outright purchase of a home, whether in the name of the beneficiary or the trust, will not cause loss of SSI (although it may reduce the beneficiary's SSI benefit for the single month in which the home is purchased). This brings up another consideration. Purchase of a home in the trust's name will subject it to a Medicaid "payback" requirement on the death of the beneficiary, whereas purchase in the name of the beneficiary may allow other planning that will avoid the home becoming part of the payback. This complicated interplay of trust rules, ISM definition, estate-recovery rules, and home ownership

makes this area of special needs trust administration particularly fraught with difficulty.

However, the Medicaid state agency's treatment of distributions from special needs trusts may differ from the Social Security interpretation—especially when the beneficiary of a self-settled trust is eligible for Medicaid benefits. For example, contrary to putting the house in the individual's name, a state may require that any purchase of a home by such a trust would result in title being held in the trust's name, thereby ensuring that the state will at least receive the proceeds from the sale of the residence upon the death of the beneficiary.

Clothing

Until March 7, 2005, purchase of clothing by a trust was considered as ISM for SSI, similar to shelter and food. Since then, a clothing purchase for the beneficiary will not affect the benefit amount or eligibility, whether the clothing in question is special garments related to the disability or just ordinary street clothes and shoes. Not all state Medicaid regulations reflect this change.

Phone, Cable, and Internet Services

Other than those utilities listed above, there is no federal limitation on utility payments. In other words, the trust can pay for cable, telephone, high-speed internet connection, newspaper, and other "utilities" not on the list.

Vehicle, Insurance, Maintenance, Gas

Purchase of a vehicle and maintenance (including gas and insurance) is permitted under federal law. Note that there is a mechanical difficulty in providing gasoline without providing cash that could be converted to food or shelter. One technique which has worked well has been to arrange for the beneficiary to have a gas-company credit card. Because eligibility for such cards is easier to meet, and because the cards cannot be used to purchase groceries, administration of the credit account is easier to set up and monitor, and the card can then be billed directly to the trust.

Some state Medicaid agencies put limitations on the value, type, and title ownership of vehicles, such as only allowing a vehicle valued at up to $5,000, handicapped-equipped, or requiring a lien in favor of the payback trust on the title. The SSI program does not specifically require or monitor such limitations.

Pre-paid Burial/Funeral Arrangements

Nothing in federal law prohibits or restricts use of special needs trust funds for purchase of burial and funeral arrangements during the beneficiary's lifetime— except to the extent that the beneficiary has access to the funds used to pay for the arrangements, and thereby subject to the asset limitations affecting SSI recipients. State Medicaid agencies may limit the value of the burial contract. It is important to ask for an "irrevocable, pre-paid" funeral plan.

Tuition, Books, Tutoring

No limit under either federal or state law. This is an excellent use of special needs trust funds.

Travel and Entertainment

Once again, no limit except that there may be some concern about payment for hotels. When the beneficiary still maintains a residence at home, the hotel stay and restaurant may be considered "shelter" and "food" expenses. Some states may impose limitations on companion travel not found in federal law. These might include not allowing recipients to have the special needs trust pay for more than one traveling companion, the companion must be necessary to provide care, and the companion may not be a person obligated to support the beneficiary such as a minor beneficiary's parent. Note that foreign travel can have two other adverse effects: (1) airline tickets to foreign destinations, if refundable, will be treated as being convertible into food and shelter, and (2) if an SSI recipient is out of the country for more than a month, he or she may lose eligibility until return. For those reasons, foreign travel, unlike domestic travel, usually must be limited in time.

> As soon as a child reaches age 18, parental deeming no longer occurs even if the child continues to live in the household.

Household Furnishings and Furniture

The trust can be used to purchase appliances, furniture, fixtures and the like. Before March 2005, there was a theoretical concern in the SSI program that the value of household furnishings might exceed an arbitrary limit and affect the beneficiary's eligibility; that value limit has now been removed.

Television, Computers and Electronics

There is no specific limitation on purchase of household televisions or other electronic devices, although under SSI rules the individual is only allowed to own "ordinary household goods" that are not kept for collectible value and are used on a regular basis. The trust can also provide a computer for the beneficiary, plus software and upgrades.

Durable Medical Equipment

There is no federal limitation on any medical related equipment, but individual states may limit purchase of some equipment as not being "necessary." Problem areas could be if the equipment could also be considered as recreational, such as a heated swimming pool needed for arthritic or other joint conditions.

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Care Management

No federal limitation, but many states attempt to limit payments for care or management if made to a family member or other relative, especially if there is an obligation of support (e.g., parents of minor children).

Therapy, Medications, Alternative Treatments

Same principle as durable medical equipment, above, so long as the state does not regulate the treatment, there is no federal limitation.

Taxes

No federal limitation, but states may attempt to direct trust language on what taxes can be paid for, such as taxes incurred as a result of trust assets or at the death of the beneficiary. Since it is difficult to imagine an SSI or Medicaid beneficiary having significant non-trust income, it is hard to see how this limitation is so much troublesome as it is quarrelsome.

Legal, Guardianship and Trustee Fees

At least some states allow legal, guardianship, and trustee fees to be paid from the trust, although some federal law indicates that payment of guardian's fees or guardian's attorney fees may really benefit the guardian and not the beneficiary. Payments for trust administration expenses, including the trust's attorney's fees, are clearly permissible under both federal and state law, and are rarely limited beyond reasonableness standards.

> It is generally beneficial for a self-settled special needs trust to be a grantor trust. This is true because the tax rates for non-grantor trusts are tightly compressed, and the highest marginal tax rate on income is reached very quickly for trusts.

Loans, Credit, Debit and Gift Cards

Receipt of a "loan" will not count as income for the SSI or Medicaid programs, which means that a trust can make a loan of cash directly to a beneficiary. There are rules that must be followed for loans to be valid and non-countable. There must be an enforceable agreement at the time that the loan is made that the loan will be paid back at some point, which usually means that it should be in writing. The agreement to pay back cannot be based on a future contingency such as, "I only have to pay it back if I win the lottery..." Finally, the loan must be considered as "feasible," meaning that there is a reasonable expectation that the beneficiary will have the means at some point to pay back the loan.

If a loan is forgiven, then it would count as income at that time. Also, if the beneficiary still has the loaned amount in the following month, it will then count as a resource. However, school loans are not countable as income or as a resource so long as the funds are spent for tuition, room and board, and other education-related expenses within nine months of receipt.

Since goods or services purchased with a credit card are actually a "loan" that must be paid back to the credit card company, they are also not considered as income to the beneficiary at time of purchase. As long as the beneficiary doesn't sell the goods for cash, there is also the added advantage that the trust can pay back the credit card company without the payment counting as income, except for purchases that are considered as food or shelter. Food and shelter related purchases use the same ISM countable income rules (and particularly the countable income limits) described above.

Use of a debit card by a beneficiary when purchases are made for payment through a trust-funded bank account is income to the beneficiary for the amount accessed. The total amount in the account available to be accessed could possibly be a countable resource. Is a gift card purchased by a trust and provided to a beneficiary considered to be a distribution of income, a line of credit to a vendor (similar to a credit card), or just access for in-kind purchase of goods or services on behalf of a beneficiary by the trust? SSI rules are not yet clear on this point, and it is probable that different Social Security and Medicaid offices will treat the use of debit and gift cards differently until precise guidelines are provided by the agencies. The safe approach is to use them in a very limited way; if they are to be used at all, keep receipts for all special needs items, and be prepared for adverse treatment.

Trust Administration and Accounting

Actual administration of a special needs trust is in most respects similar to administration of any other trust. A trustee has a general obligation to account to beneficiaries and other interested parties. Tax returns may need to be filed (though not always), and tax filing requirements will be based on the tax rules, not special needs trust rules. Some special needs trusts, but by no means all, will be subject to court supervision and control.

Trustee's Duties

As with general trust law requirements, the trustee of a special needs trust has an obligation not to self-deal, not to delegate the trustee's duties impermissibly, not to favor either

income or remainder beneficiaries over one another, and to invest trust assets prudently. The obligations of a trustee are well-discussed in several centuries of legal precedent, and cannot be taken lightly. Legal counsel (and professional investment, tax and accounting assistance) will be required in administration of almost every special needs trust.

A few cardinal trust rules bear special mention:

NO SELF-DEALING

As with other trusts, the trustee of a special needs trust is prohibited from self-dealing. That means no investment of trust assets in the trustee's business or assets, no mingling of trust and personal assets, no borrowing from the trust, no purchase of goods or services (by the trust) from the trustee (other than, of course, trust administration services), and no sale of trust assets to the trustee. The same strictures also apply to the trustee's immediate family members, and the existence of an appraisal, or the favorable terms of a transaction, do not change these rules.

> A trustee has a general obligation to account to beneficiaries and other interested parties. Tax returns may need to be filed (though not always), and tax filing requirements will be based on the tax rules, not special needs trust rules.

IMPARTIALITY

Because the trust has both an "income" beneficiary (the person with disabilities) and a "remainder" beneficiary (the state, in the case of a Medicaid payback trust, or the individuals who will receive assets when the income beneficiary dies), the trustee has a necessarily divided loyalty. It is important to remain impartial as between the trust's beneficiaries. Thus, investment in assets exclusively designed to maximize income at the expense of growth, or vice versa, may violate the trustee's duty to the negatively affected class of beneficiaries. Note that a trust may, by its terms, make clear that the interests of one or the other class of beneficiaries should be paramount—though such language will probably earn the disapproval of the Medicaid agency in any self-settled trust which must be submitted to Medicaid for approval.

DELEGATION

Generally speaking, a trustee may delegate functions but may not avoid liability by doing so. In other words, while the trustee may hire investment advisers, tax preparers and the like, he or she will remain liable for any failures by such professionals.

Some states do limit the trustee's liability. For example, in states which have adopted the Uniform Prudent Investor Act, delegating investment authority pursuant to the Act will limit the trustee's liability so that he or she will only be required to carefully select and monitor the investment adviser.

INVESTMENT

Any trustee should be familiar with the principles of Modern Portfolio Theory, with its emphasis on risk tolerance and asset diversification. A trustee who holds himself, herself, or itself out as having special expertise in investments or asset management will be held to a higher standard, but any trustee will be required to understand and implement prudent investment practices. Some courts will institute an investment policy that requires a percentage of assets to be held in fixed income investments and the remainder in securities (e.g., a 60/40 split is common).

Bond

A trustee, especially one who administers a special needs trust supervised by a probate court, may need to be bonded. Bond is a type of insurance arrangement whereby the trustee pays a premium in order to guarantee that the trustee manages the trust and carries out his or her fiduciary duties correctly. The bond premium is an acceptable expense of the trust, and need not come out of the trustee's own pocket. If the trustee fails to exercise his or her fiduciary duty and the trust loses money as a result, the insurance company that issued the bond will compensate the trust and take action to collect from the trustee.

The bond premium depends on multiple factors, including the credit history of the trustee and the value of the trust. Most corporate trustees are exempt from posting bond. Individual trustees must "post bond"; that is, provide written documentation to the probate court that the individual is bonded. The bond is typically issued for a set period of time, for example one year, and at the expiration of the time period, the trustee must pay an additional premium or show the bond issuer that bond is no longer required by the probate court.

It is possible in most states, at least when the trust is supervised by a court, to ask the court for permission to deposit the assets in a restricted or "blocked" account with a financial institution rather than posting bond. While this circumvents the issue of being bonded, the financial institution should require a certified copy of the court's order authorizing the expenditure of funds prior to making a distribution from the special needs trust. This can result in frequent in-person trips to the bank by the trustee, although it avoids the sometimes costly bond premium.

Titling Assets

The trust assets should not be titled in the beneficiary's name except in limited circumstances, such as when it is advantageous to title the home in the individual's name. Typically, the trust assets should be titled in the name of the

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trustee. For example, if James Jones is the trustee of the Lisa Martin Special Needs Trust, and that trust was signed on March 15, 2007, then the trust assets should be titled as follows: "James Jones, Trustee of the Lisa Martin Special Needs Trust u/a/d March 15, 2007" ("u/a/d" means "under agreement dated").

It is important that most assets not be held in James Jones's or Lisa Martin's name individually. If the assets are not titled properly, then the assets may be counted as a resource, or the interest earned counted as income, by the agencies that administer means-tested government benefits, which will frustrate the purpose of the special needs trust, as well as contribute to confusion during tax preparation. Additionally, as discussed in further detail below, it may also be important to request a separate Tax ID number for the trust as well as properly title the assets.

Accounting Requirements

A trustee is required to provide adequate accounting information to beneficiaries of the trust. That requirement generally means annual accountings. While there is no specific form required for accountings if the trust is not under court supervision, it is important to provide enough information that a reader could determine the nature and amount of any payment or investment. For some trusts, a simple "check register" accounting may be sufficient, showing interest income and the names of payees, with dates and amounts. Any trust with significant assets or diverse investments, however, should provide a thorough accounting.

> The trustee of a special needs trust is prohibited from self-dealing. That means no investment of trust assets in the trustee's business or assets, no mingling of trust and personal assets, no borrowing from the trust, no purchase of goods or services (by the trust) from the trustee (other than, of course, trust administration services), and no sale of trust assets to the trustee.

Regular, complete accountings are critical. A beneficiary is generally foreclosed from later raising objections to investments or expenditures if he or she received adequate disclosure in the annual accounting at the time. In other words, thorough accounting can limit the trustee's later exposure to claims by beneficiaries, and therefore benefits the trustee.

In addition to the accounting requirements to the beneficiary, the trustee may be required to provide an annual or biennial accounting to the probate court. The trustee should use the county-specific forms available upon request from the court, and may also be required to provide the court with copies of bank statements and cancelled checks or receipts as evidence of trust distributions and deposits. This requires the trustee to be organized or be prepared to pay potentially substantial bank fees for duplicate account statements or cancelled checks.

Reporting to Social Security

The simple term "income" has different meanings in trust accounting, tax preparation, and public benefits eligibility determinations. Trustees sometimes raise concerns that thorough trust accountings (to SSI, especially) may result in suspension of benefits, or that tax return information may be used to terminate SSI or other benefits. While such things undoubtedly do occur, Social Security workers are increasingly likely to be relatively sophisticated about such distinctions, and willing to work through any problems. In a general way, then, it is better to disclose more fully to Social Security rather than withhold any information. Annual accountings of any self-settled trust naming an SSI recipient as beneficiary should be provided to Social Security. Any third-party trust which makes significant distributions for the benefit of an SSI recipient should probably be provided to Social Security, just to prevent later problems that could have been headed off. If distributions disrupt eligibility, the problem is with the distribution, not with the accounting.

If the beneficiary receives only SSDI and not any concurrent SSI, there is no point in providing accounting information to Social Security, because SSDI benefits are not means-tested. If the trust is a third-party trust, the trustee may not have any obligation to provide accounting information, though the beneficiary may (if the beneficiary receives SSI and trust distributions invoke the ISM rules) be required to do so.

Although it no longer occurs as regularly, some Social Security eligibility workers may misunderstand the effect of special needs trust expenditures or terms and reduce or eliminate benefits improperly. When this does occur, it should be possible to remedy the error, but the beneficiary may suffer for months (or years) while the system works out the problem. Far better to head off problems in advance, rather than have to spend substantial resources and time resolving them after the fact. Be aware that fees for a trustee's time spent directly dealing with Social Security on the beneficiary's behalf may be subject to approval by SSA.

Reporting to Medicaid

If the beneficiary resides in a state where the receipt of SSI results in the beneficiary also being automatically enrolled in Medicaid, then no separate accounting requirement need be made to the Medicaid agency. However, if the individual is in a state where SSI and Medicaid are not interrelated, then it

may be necessary to account to both agencies. The Medicaid consumer (or their guardian) is required to notify Medicaid of a change in resources or income within a set period of time, usually as short as ten days. This includes situations where the Medicaid consumer receives an inheritance or settlement and immediately transfers the funds to a special needs trust.

The trustee of a third-party special needs trust may not have the same duty to account, but may choose to provide accounting information to Medicaid rather than risk later disqualification of the beneficiary, even though Medicaid's power to consider trust expenditures may be subject to challenge.

Reporting to the Court

Many self-settled special needs trusts will be treated in essentially the same fashion as a conservatorship or guardianship of the estate. This is so because, typically, the court was initially asked to authorize establishment of the trust. Most courts expect any trust established by the court to remain under court supervision, including bonding, seeking authority to expend funds, and filing periodic accountings.

Even if the trust does not require court accounting, some consideration should be given to seeking court involvement. One great advantage of court supervision of the trust is that each year's accounting is then final as to all items described in that accounting (provided, of course, that the appropriate notice has been given to beneficiaries who might otherwise complain about the trust's administration and other court procedural requirements are followed).

The Court may also have a set fee schedule that governs the amount the trustee can be compensated for providing trust administration services.

Modification of Trust

As explained above, a special needs trust must be irrevocable in order for the trust to be considered an exempt resource. However, that does not preclude the trust itself from permitting the trustee to amend or modify the trust in limited ways, particularly as it relates to program eligibility for the beneficiary. This is particularly important since we cannot predict future changes to the laws governing means-tested benefits. The courts may also be willing to modify or terminate a trust whose purpose has been frustrated by law changes or other factors, such as the trust assets being valued at a nominal amount.

Wrapping up the Trust

If the special needs trust is a self-settled trust with a provision requiring repayment of Medicaid expenses, it will obviously be necessary to determine the "payback" amount upon the death of the beneficiary or termination of the trust. Because Medicaid's historical experience with these trusts is still slight, state agencies may have difficulty providing a reliable and final figure. The prudent trustee will request a written statement of the amount due, including evidence showing how it was calculated and a statement of authority to make the final determination. Once any payback issues have been addressed (and remember that most third-party special needs trusts will have no requirement of repayment to the state), then termination of the trust will follow the usual requirements of tax preparation and filing, final accounting and distribution according to the trust instrument. Remember, because Social Security requires that Medicaid reimbursement and certain tax liabilities must be squared away before the trustee may even pay for the beneficiary's funeral, purchase during the beneficiary's lifetime of an irrevocable pre-paid funeral is critical.

Income Taxation of Special Needs Trusts

Special needs trusts, like other types of trusts, can complicate income tax preparation. The first question to be addressed is whether—for income tax purposes–the trust is a "grantor" trust or not. Tax rules defining "grantor" trusts are neither simple nor intuitive, but fortunately there are some easy rules of thumb to apply, and they will work for most special needs trusts.

"Grantor" Trusts

A "grantor" trust is treated for tax purposes as a transparent entity. In other words, the grantor of a "grantor" trust is treated as having received the income directly, even though the accounts are titled to the trust and all income shows up in the name of the trust.

Generally speaking, a self-settled special needs trust will be a grantor trust if a family member is the trustee. If the trust names an independent trustee it may still be a grantor trust if one of several specific provisions exists in the trust. A qualified accountant or lawyer should be able to tell whether a given trust is a grantor trust at a glance. If it is, it remains a grantor trust for its entire life—or at least until the death of the grantor (when the trust may either terminate or convert into a non-grantor trust as to its new beneficiaries). Until the trust has been reviewed by an expert, assume that it is probably a grantor trust.

It is generally beneficial for a self-settled special needs trust to be a grantor trust. This is true because the tax rates for non-grantor trusts are tightly compressed, and the highest marginal tax rate on income is reached very quickly for trusts. The practical difference will be small if the trust actually makes distributions for the benefit of the beneficiary in excess of its annual taxable income, but the proper tax reporting approach should still be followed.

TAX ID NUMBERS

A grantor trust may, but need not, obtain an Employer Identification Number (an EIN). Some attorneys and accountants choose to secure an EIN in each case, while

continued on page 16

continued from page 15

others resist doing so—either approach is defensible. Although banks, brokerage houses and other financial institutions may insist that the trust requires its own EIN, they are simply wrong. There is widespread confusion about the necessity for an EIN for irrevocable trusts, but a confident and well-informed trustee, attorney or accountant should be able to convince the financial institution that no separate EIN is required. Instead, the trustee can simply provide the financial institution with the grantor's Social Security number.

FILING TAX RETURNS

A grantor trust ordinarily will not file a separate tax return. If a grantor trust has been assigned an EIN, it may file an "informational" return. The return can include a paragraph indicating that the trust is a grantor trust, that all income is being reported on the beneficiary's individual return, and that no substantive information will be included in the fiduciary income tax return. Actually, completing the fiduciary income tax return is not an option for a grantor trust, although again there is much confusion on this point, even among some professionals.

Non-Grantor Trusts

Virtually all third-party, and some self-settled, special needs trusts will be non-grantor trusts. Because income will not be treated as having been earned by the beneficiary, a fiduciary income tax return (IRS form 1041) will be required.

TAX ID NUMBERS

A non-grantor trust will need to obtain its own EIN by filing a federal form SS-4. Nearly all third-party special needs trusts will be "complex" trusts—this designation simply means that the trust is not required to distribute all its income to the income beneficiary each year. Although the trust will be listed as "complex" on the SS-4, it may in fact alternate between "complex" and "simple" on each year's 1041.

FILING TAX RETURNS

The non-grantor trust must file a 1041 each year. All distributions for the benefit of the beneficiary are conclusively presumed to be of income first, so any trust expenditures in excess of deductions will result in a Form K-1 showing income imputed to the beneficiary. This should not cause particular concern, since Social Security (and even Medicaid) eligibility workers are increasingly likely to understand that "income" for tax purposes is different from "income" for public benefits eligibility purposes. Any tax liability incurred by the individual beneficiary as a result of this imputation can be paid by the trust, though the trustee may not have the authority to prepare and sign the individual's tax return.

Administrative and other deductible expenses on an individual tax return must reach 2% of the taxpayer's income before being deducted at all. The same is not true of a trust tax return, leading to a modest benefit to treatment as a non-grantor trust in some cases. This benefit may not offset the compressed income tax rates levied against non-grantor trusts, but each case will be different. The difficulty in determining the proper—and the best—income tax treatment is made worse when one adds the confusing option of treatment as a "Qualified Disability Trust."

Qualified Disability Trust

Beginning in 2002, Congress allowed some non-grantor special needs trusts to receive a modest income tax benefit. Trusts qualifying under Internal Revenue Code Section 642(b)(2)(C) receive a special benefit—they are granted a larger and special deduction on their federal income taxes. In tax year 2023 (that is, the taxes that will be paid in April, 2024) for example, a Qualified Disability Trust can deduct $4,700 before any tax payment is due. That figure is slated to increase each year. Once the trust deducts that amount from its income, any remaining income might then be passed through to the beneficiary's tax return; the beneficiary may well pay no tax, or a very low rate of tax.

Coupled with the greater flexibility available to non-grantor trusts in deducting administrative expenses, Qualified Disability Trust treatment may be advantageous in some cases. Typically, the Qualified Disability Trust election will be attractive when there is a fair amount of income on trust assets, and relatively few medical or other expenses incurred on behalf of the beneficiary. Careful review with a qualified income tax professional is usually necessary to determine whether to pursue Qualified Disability Trust treatment.

Seeking Professional Tax Advice

It should be apparent from this brief discussion of taxation of special needs trusts that professional tax preparation and advice are essential. Although most accountants are qualified to prepare fiduciary (trust) income tax returns, most do not have much experience in the field. A first question to ask a prospective accountant might be "How many 1041s do you typically prepare in a year?" Follow that with "Could you please explain the concept of Qualified Disability Trusts to me?" and you will quickly locate any truly proficient practitioner. You probably will not want to automatically reject an accountant who cannot tell you about Qualified Disability Trusts immediately, unless you are prepared to deal with an accountant in another city—there are simply not very many accountants or tax preparers who have ever had occasion to claim that status on any fiduciary income tax return. As always, you can get some assistance in complicated special needs trust issues from the attorney who prepared the document, or the attorney who advises you as trustee. Members of the Special Needs Alliance® are usually among the very few who are familiar with these concepts, and your attorney may have worked with an accountant in your area who is familiar with the special tax treatment of these trusts.

For Further Reading

There are a handful of books and articles, and a growing number of websites, available to aid trustees of special needs trusts. Among our favorites:

Special Needs Trust Administration Manual: A Guide for Trustees, by Jackins, Blank, Macy and Shulman—this guide is among the best available. It was written by four Massachusetts lawyers, and is frankly focused on Massachusetts law and practice. Much of what the authors have to say, however, is applicable to special needs trusts in every state.

Special People, Special Planning: Creating a Safe Legal Haven for Families with Special Needs, by Hoyt and Pollock—provides some general advice and direction, but is more conversational than detailed. This volume also tends to focus on the "why" more than the "how", which is an important message but not as useful to someone who is already administering a special needs trust.

Special Needs Trusts: Protect Your Child's Financial Future, by Elias—this recent addition to the literature comes from Nolo Press, an organization that many lawyers find annoying at best. We disagree. This is a plain-language, straightforward explanation of special needs trusts from a lawyer who doesn't even practice in the area (his previous books for Nolo Press include explanations of bankruptcy, trademark and other areas of law).

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Nuts and Bolts of Third Party Special Needs Trusts (Basics)

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1

Americans with Disabilities

More than 56 million Americans living with a disability which make up 19 % of U.S. population
1 in 6 (or about 17%) of children ages 3 to 17 have one or more developmental disabilities
1 in 44 children have autism (1 in 27 boys, 1 in 116 girls)

2

The Snyder Family

Tom and Barbara Snyder meet with you to discuss their estate planning. They have three children: Maggie, Jennie and Katie. Maggie and Jennie are neurotypical adults. Katie, is 27 years old and diagnosed with schizoaffective disorder. Katie has never been able to work and receives SSI and Medicaid benefits. She is in the process of moving to supportive housing.

Tom and Barbara's assets consist of a house valued at $1,000,000, retirement accounts totaling $2,000,000 and investments totaling $1,000,000

Their testamentary goals are to equalize the distributions for their daughters but understand Katie has extraordinary care needs.

3

Estate Planning Options for Snyder Family re: Katie

- Disinherit Katie
- Leave assets outright to Katie
- Distribute Katie's share to Maggie and Jennie
- Distribute to an ABLE Account for Katie
- Create a third party SNT for Katie

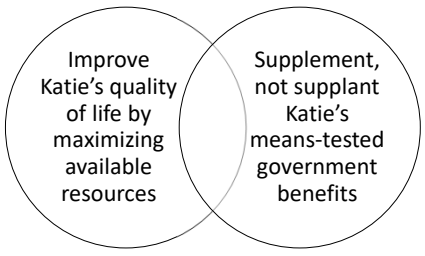
4

What is a Third Party SNT

- Trust established by a third party with assets of a third party for the benefit of a person with a disability (Katie)
- No federal statute; some state statutes
- Discretionary trust, no ascertainable standard (health, maintenance and support)
- Trust assets are exempt and not countable as Katie's assets
- No age requirement
- No Medicaid payback (Tom and Barbara choose remaindermen)

5

Purpose of Third Party SNT



6

Goals of Third Party SNT

- Provide money management, prudent investments
- Control distributions and avoid financial exploitation
- Allows Katie to not be "disinherited" and maintain eligibility for public benefits
- Provides for Katie even if public benefits are curtailed or eliminated

7

Settlor's Intention – Excerpt

The Settlor believes it to be in the best interest of Katie to establish this Trust with discretionary provisions to enhance the Katie's quality of life both now and in the future by providing for her needs. The Settlor intends that this Trust will provide benefits to supplement those which may otherwise be available to Katie from various sources, including insurance benefits and governmental entitlement programs. It is the Settlor's intention that Katie receive all government entitlements to which she would otherwise be entitled but for the existence of this Trust and distributions hereunder. The purpose of the Trust is to permit the use of the Trust Estate to supplement and not supplant or diminish any benefits or assistance of any federal, state or other governmental entity for which Katie may be eligible or which she may be receiving unless the Trustee in the Trustee's sole and absolute discretion determines the benefit of a distribution of the Trust Estate outweighs a potential impact on government entitlements.

8

Third-Party SNTs

Testamentary

- Irrevocable

Inter vivos

- Revocable; or
- Irrevocable

9

Testamentary Third Party SNT

- Created under Last Will and Testament
- Not established and cannot be funded until testator's death and then need to wait for probate
  - Typically, last to die between Tom and Barbara
- Can be more difficult to name as beneficiary on retirement accts and life insurance
- Irrevocable
- Court oversight - depending on state
- Court proceedings generally required to modify trust or change trustee
- Despite disadvantages, only option for planning for spouse

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Intervivos Third Party SNT - Revocable

- Revocable to settlor, not beneficiary
  - Trust becomes irrevocable upon settlor's death
- Allows flexibility for settlor to remain trustee
- Allows flexibility to make amendments as beneficiary's needs change
- Not recommended for estate and gift tax planning or if other people want to make contributions
- Any funding while trust is revocable is includable in settlor's estate and settlor pays income tax on trust income; basis step up at death

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Intervivos Third Party SNT - Irrevocable

- Often used when engaging in estate and gift tax planning
  - Do not give beneficiary Crummey withdrawal powers or general power of appointment
- Recommended when other individuals (not including settlor or settlor's spouse) want to make gifts to beneficiary
  - Grandparents, other family relations, friends
- Settlor should not be trustee

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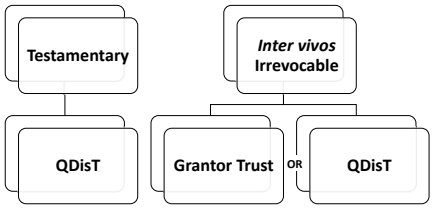
Third-Party SNTs – Irrevocable Income Taxation



13

Third-Party SNTs – Qualified Disability Trust

- If a third party SNT can meet the statutory requirements of Qualified Disability Trust (QDisT), it is allowed a personal exemption ($5,000 in 2024)
- But wait – I thought the Tax Cuts and Jobs Act of 2017 eliminated personal exemptions through 2025? It does – except for a QDisT
- IRC § 642(b)(2)(C)
- A grantor trust cannot be a QDisT
- If trust is not a grantor trust and does not qualify as QDisT then treated as complex trust with $100 exemption

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Third-Party SNTs – Qualified Disability Trust

Statutory Requirements - see 42 U.S.C. § 1396p(c)(2)(B)(iv); third party SNT must be:

- Irrevocable
- For the sole benefit of the beneficiary with a disability
- Beneficiary must be under age 65 at time trust is established
- Beneficiary must have a disability as defined for purposes of SSI and/or SSDI programs

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What can a Third Party SNT

Short answer… pretty much anything provided it is consistent with trust terms and for beneficiary's benefit

No cash distributions to beneficiary

Caution as certain distributions, such as shelter costs, can cause a reduction in certain benefits

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A Primer on Income

What is Income?

- Benefits income is not the same as taxable income
- This concept is often confused by Social Security and Medicaid workers and special needs attorneys often need to educate them about their own rules

Taxable Income

- For purposes of trusts and taxable income, distribution of income is either distribution directly to or for the benefit of the beneficiary

Benefits Income

- For purposes of "needs based" benefits, income is cash, or anything that can be used for shelter unless it is exempt.

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Third-Party SNTs – Income Example

Benefits Income ≠ Taxable Income

If the trustee of Katie's third party SNT pays her telephone bill directly from the trust, Katie has received a benefit and therefore has received taxable income to the extent it is made up of DNI.

In this example, Katie did not receive any income for benefits purposes because the she did not receive cash or shelter.

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Third-Party SNTs – Income Example

Benefits Income ≠ Taxable Income

If the trustee of Katie's third party SNT pays her rent directly from the trust and she receives SSI, Katie has received a benefit and therefore has received taxable income to the extent it is made up of DNI.

In this example, Katie will lose 1/3 of her SSI benefit as the payment of shelter is considered income to the beneficiary.

NOTE – ABLE ACCOUNTS CAN BE USEFUL HERE TO ELIMINATE 1/3 REDUCTION

19

Fair is Not Always Equal

What are the client's family circumstances?
Consider beneficiary's lifelong needs and abilities or inabilities
Permanent life insurance
Retirement account allocation
Have flexibility to change plan as family ages

20

Be Flexible in Drafting

Third party SNTs often last beneficiary's entire lifetime and their needs will likely change as they age

- Authorize trust amendments
- Allow change of situs
- Trust Protectors can be key
- Decanting

21

Choosing the Right Trustee

Carefully consider trustee – will they, can they do their job?	• Beneficiary's disability • Potential conflict of interest?
Proper education of role and responsibilities	• Complexity of government benefit regulations • Have a team!
Replacement and appointment flexibility	• Trust Protector?

22

A Few Cautions…

DO NOT:

- Make third party gifts to first party SNT
- Not create third party SNT for someone 65 or older
- Include 42 U.S.C. § 1396p(d)(4)(A) language or citation references in third party SNT
- Require mandatory distributions of income or principal or include a standard so beneficiary can demand distributions (think HEMS)
- Give SNT beneficiary a Crummey withdrawal powers or general power of appointment
- Spend third party SNT assets prior to first party SNT assets (if possible)
- Give SNT beneficiary cash distributions (or deposits into their personal bank account)
- Include Medicaid payback in third party SNT

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Contingency Planning

- Contingent SNTs in all Wills and Trusts
- Coordinate other relatives' planning
- Dear Family and Friends Letter

24

Avoid Knee Jerk SNT

- Means-tested benefits are not always necessary
- Allow distribution of income
- Can include trigger to third party SNT if benefits are required

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Thank You!

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November 21, 2024

Ensuring Effective Communication

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Center for Elder Justice

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The Arc Colorado
CPR Center for Public Representation

Breaking Barriers:
Ensuring Effective Communication for Individuals with Disabilities in Court

TIP SHEET

- ☐ Use person-first language unless the person asks you not to.
- ☐ Focus on the person, not on their disability or their supporters.
- ☐ Do not lean on or touch a person's assistive technology or wheelchair.
- ☐ Do not assume a person needs help. **Always ask before assisting**.
- ☐ Know the location of accessible parking spaces, rest rooms, drinking fountains, telephones.
- ☐ Recognize factors that can impact a person's ability to make decisions:
  - Not having accommodations
  - Stress, grief, depression
  - Institutionalization
  - Medical factors
  - Time of day
  - Education, cultural, and social barriers
- ☐ A diagnosis does not tell you everything (in fact it often tells you very little) about a person.
- ☐ Public benefits like Medicaid Waivers & Supplemental Security Income (SSI) are deficit-based. Receipt of these benefits does **not** mean guardianship, conservatorship or other protective arrangement is needed.
- ☐ A person almost always has way of communicating. If you struggle to communicate with someone, recognize that the difficulty rests on communication barriers ***between*** you, not with them.
- ☐ If a person has a speech disability:
  - Do not try to guess what they are saying.
  - Repeat back what you are hearing to confirm that you understood.
  - Do not speak for the person or try to finish their sentences.
  - Do not raise your voice. People with speech disabilities do not necessarily have hearing disabilities.
- ☐ If a person has a cognitive disability:
  - Use clear, concise and simple language.
  - A slow or lack of response does not mean the person isn't aware of what you said, give them time to respond in their own way
  - Ask the person what helps them understand information and how they communicate
  - Do not assume all people read
  - Consider breaks and timing
  - A person may have difficulty picking up on social cues, be clear about what you are asking.
- ☐ If you are working with a person who has a visual disability:
  - Identify yourself when entering a conversation and announce when you leave.
  - Face the person and speak in a natural tone.
  - Avoid pointing when giving directions and describe the setting, environment, and obstacles to them (i.e. how many steps).
  - Ask if they would like you to take their arm to guide them, **never** touch without asking.
- ☐ If you are working with a person who has a hearing disability:
  - Look directly at the person and speak clearly and slowly in normal tones
  - If a person uses a sign language interpreter, speak directly to the person, not the interpreter
  - Pause to make sure you are understood
  - Inquire about communication devices/tools.

For more information, check out: The Words We Use | CommunicationFIRST, Disability Etiquette - A Starting Guide - Disability:IN (disabilityin.org), Etiquette: Interacting with People with Disabilities - RespectAbility; Respectful Interactions: Disability Language and Etiquette | ADANW (nwadacenter.org); Disability Etiquette (askjan.org)

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The Arc
For people with intellectual and developmental disabilities

STETSON LAW

Ensuring Effective Communication:
Breaking Barriers for Individuals with Disabilities in Court
(*and beyond*)

Thursday, October 17, 2024
1:25-2:15pm

Stetson's 2024
National Conference on
Special Needs Planning &
Special Needs Trusts
~
St. Petersburg Beach, FL
October 2024

1

Our Pledge…

The Arc Colorado

"…with liberty and
justice for *all*."

2

Disabilities that may impact communication…

- Mobility
- Sensory
- Cognitive due to injury
- Cognitive due to age
- Intellectual & Developmental
- Mental Health

The Arc Colorado

3

An individual may…


take longer to absorb information


have difficulty understanding questions, abstract concepts or instructions


have difficulty with reading and writing and money skills


have a short attention span and might be easily distracted


find it difficult to maintain eye contact


find it difficult to adapt to new situations or to plan ahead or solve problems


find communication over the phone difficult


have difficulty expressing their needs

The Arc Colorado

4

Disabilities impacting communication can vary due to:

- Stress, grief, depression, and traumatic events
- Temporary medical conditions and medications
- Time of day
- Recent institutionalization
- Not having access to needed accommodations or assistive technology

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5

MISCONCEPTIONS	REALITY
• Making courts physically accessible accommodates the needs of most people with disabilities	• A wide range of accommodations are needed to make courts accessible.
• People with cognitive disabilities always need a guardian.	• Most people with cognitive disabilities do not need a guardian.
• People with disabilities need to live with their family or in facilities like nursing facilities or group homes.	• People with disabilities can live and work independently and may be eligible for community supports and services to do so.
• People with disabilities, especially people with mental health disabilities, are violent.	• People with disabilities, especially people with mental health conditions, are over-criminalized.

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MISCONCEPTIONS RESULT IN…

- Segregation
- Institutionalization
- Isolation
- Higher risk of being subject to overbroad and unnecessary guardianship
- Lack of access to medical care and support
- Ongoing bias, stereotypes, and low expectations

7

Americans with Disabilities Act (ADA) *July 26, 1990*

Prohibits discrimination and **guarantees** that people with disabilities have the **same opportunities as everyone else.**

Modeled after the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973 -- the ADA is an **"equal opportunity" law for people with disabilities**.

8

LEGAL OBLIGATIONS

- **Title II and Title III of the ADA:** Courts and attorneys must ensure that people with disabilities have an equal opportunity to access the benefits of their programs, services, and activities.
  - 42 U.S. Code § 12132; 42 U.S.C. § 12182(b)(1)(A)(ii)
- **Right to Effective Communication**: Whatever is written or spoken must be as clear and understandable to people with disabilities as it is for people who do not have disabilities.
  - 28 CFR § 35.160
  - DOJ Effective Communication Toolkit & Guidance

9

People who are **denied effective communication** face segregation, abuse and neglect, dehumanization, low expectations, and often guardianship

Commonly presumed that people who have communication access needs, require guardianship, when often **they may simply need appropriate supports and accommodations.**

https://youtu.be/_qkndlGznCw?si=GZ1gn2bfH8svdUvT

Why is providing effective communication important?

10

ONGOING REALITIES

- Some courtrooms remain physically inaccessible.
- Some court technology platforms are inaccessible.
- Court proceedings can be inaccessible to people with cognitive disabilities.
- People with disabilities are often denied their right to effective communication.
- Courts can lack clear policies about how to request and receive an accommodation or to file a complaint if they are denied an accommodation.
- Litigants with disabilities face bias and stereotypes about their credibility and capacity.

11

Information & Communication Barriers

- People with disabilities often experience challenges accessing critical information they need to reach the legal system.
- People with disabilities are less likely to have access to computers and internet than people without disabilities.
- People with disabilities more often lack access to representation and disproportionately must represent themselves *pro se*.
- Courts often fail to provide information about how to request accommodations. People with disabilities are often denied effective communication.
- People who have communication access needs are commonly presumed to need guardianship, when often they may simply need appropriate supports and accommodations.

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Accommodations

- Qualified interpreters (including ASL and certified Deaf interpreters)
- Notetakers
- Screen readers
- Computer-aided real-time transcription (CART)
- Augmentative and alternative communication devices
- Communication boards
- Closed caption decoders
- Video interpreting services
- Video/text displays
- Visual descriptions
- Physical changes to the courtroom space
- Proceedings at certain times of day
- Extra time or breaks or delays
- Description of visually presented materials
- Qualified readers
- Assistance filling out forms
- Audio recordings
- Plain language or easy read materials
- Braille materials
- Large print materials
- Materials in electronic format
- Supported decision-making

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Practice Tips & Strategies 1 of 2

- **Focus on the person, not on the disability.**
- Extend the person the same **dignity, consideration & respect** you would expect for yourself.
- Always assume (because it is nearly always true) **that every person has a way of communicating.**
- A diagnosis, IQ, manner of communication, assistive technology or aid, or level of support **does not** determine whether a person has diminished capacity.
- Public benefits systems like Medicaid Waivers, Supplemental Security Income (SSI), are **deficit based.** Access to them does not necessarily mean a person needs a guardian.

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Practice Tips & Strategies 2 of 2

- **Ask what accommodations a person may need at the onset**—this can create a more welcoming environment.
  - To the extent feasible, provide those accommodations
- **Recognize that the presence of accommodations may disrupt** how you typically run your courtroom.
  - For example, they may require slowing down the pace of the proceeding
- To the extent possible, try to draft your orders and opinions in **plain language**
- Work with your court's ADA coordinator

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Strategies for Supporting Communication Access Needs

- Ask individual about themselves and match their language.
- Use plain language, concrete terms and ideas.
- Avoid compound questions
- Avoid frustrating questions about time, complex sequences, or reasons for behavior.
- Highlight important information to improve memory retention.
- Repeat information to improve retention.
- Be careful not to provide nonverbal cues that may aid and/or improperly influence a person's response (resist the need to fill in the blanks)
- Take short breaks, as individuals learn best with multiple, short sessions rather than a few, long sessions.

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A few more practice tips…

Words to avoid:

- Non-verbal
- Severe or profound
- Disorders, impairments, and deficits
- Complex communication needs
- Non-communicative

Words to use:

- Use person-first language unless a person with a disability specifically asks you not to.
- Describe the supports and accommodations a person needs
- Refer to conditions and disabilities

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How to Report a Disability Rights Violation: Effective Communication

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RESOURCES

- **ADA Best Practices Tool Kit for State and Local Governments, Chapter 3, General Effective Communication Requirements Under Title II of the ADA,** retrieved 7/22/2022 at https://archive.ada.gov/pcatoolkit/chap3toolkit.htm
- **Something to Talk About: Supported Decision Making and Access to Justice for All,** https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-42/bifocal-vol-42-issue-6-july-august-2021/something-to-talk-about--supported-decision-making-and-access-to/ .
- **Communication FIRST:** https://communicationfirst.org/wp-content/uploads/2023/07/C1st-The-Words-We-Use-Style-Guide-v1-July-2023.pdf
- **4th National Guardianship Summit | Recommendations** http://law.syr.edu//academics/conferences-symposia/the-fourth-national-guardianship-summit-autonomy-and-accountability. See also (video): https://youtu.be/SBqwFqS51BM.
- **Center for Public Representation:** https://supporteddecisions.org/

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Justice Intermediary Starter Kit

Justice Intermediaries have been introduced in a few countries around the world. It is a recognised approach to ensuring effective participation for people with disabilities. The Justice Intermediary Starter Kit (JISK) has been designed to promote a similar approach in places that want to know more about starting a scheme.

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https://justiceintermediary.org/

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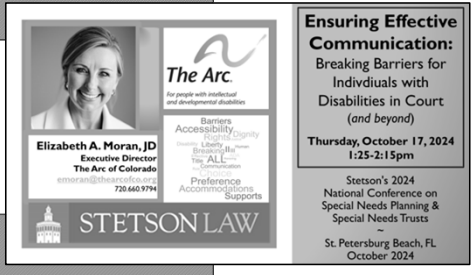

Ensuring Effective Communication: Breaking Barriers for Indivduals with Disabilities in Court (*and beyond*)

Thursday, October 17, 2024 1:25-2:15pm

Stetson's 2024 National Conference on Special Needs Planning & Special Needs Trusts

~

St. Petersburg Beach, FL October 2024

THANK YOU!

QUESTIONS?

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National Conference on Special Needs Planning and Special Needs Trusts

November 21, 2024

Trust Protectors: The Good, the Bad, & the Ugly

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COZEN O'CONNOR

TRUST PROTECTORS:
THE GOOD, THE BAD AND THE UGLY

Stetson 2024 National Conference on Special Needs Planning and Special Needs Trusts – October 17, 2024

Listing of Statutes Nationally

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1 The author gratefully acknowledges the significant contribution made by Lily Chen, a summer associate at Cozen O'Connor, during the summer of 2024. Ms. Chen conducted the enormous research required to assemble and organize the information contained in this outline.

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These materials are intended to generally educate the participants on current legal issues. Accordingly, these materials should not be relied upon without seeking specific legal advice on matters discussed herein.

TABLE OF CONTENTS

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STATES WITH TRUST PROTECTOR STATUTES

This outline is based upon the ACTEC article titled "Overview of State Directed Trust Statutes" (2019) and updates the information contained therein. At least 38 states have statutes that use the term Trust Protector, Trust Director, Trust Advisor or similar terms in their statutes. These state statutes are categorized below based upon whether the statute reflects an adoption of the Uniform Directed Trust Act ("UDTA"), the Uniform Trust Code ("UTC"), or the state's own Trust Protector statute. It is conceivable that a state's own Trust Protector statute is loosely based upon the UDTA or UTC as many state statutes follow an open-architecture plan that allows the trust terms to set the Trust Protector's powers. However, those states did not include the term UDTA or UTC in their statutes' names, and the structure of the statute does not directly follow the uniform statutes. Brief notes regarding each state's statute also is included in this outline.

States Adopting the Uniform Directed Trust Act (UDTA)	**States Adopting Uniform Trust Code (UTC) Section 808**	**State's Own DT/TP Statute**	**No State DT/TP Statute**
Arkansas	Alabama	Alaska	Louisiana
California	Connecticut	Arizona	New York
Colorado	Massachusetts	Delaware	Rhode Island
Florida	Minnesota	Hawaii	
Georgia	Mississippi	Idaho	
Indiana	Missouri	Illinois	
Kansas	New Jersey	Kentucky	
Maine	North Carolina	Iowa	
Michigan	Ohio	Maryland	
Montana	Oregon	Nevada	
Nebraska	South Carolina	New Hampshire	
New Mexico	Tennessee	North Dakota	
Oklahoma		South Dakota	
Pennsylvania		Wisconsin	
Texas		Wyoming	
Utah			
Vermont			
Virginia			
Washington			
West Virginia			

INTRODUCTION

Although now 6 years beyond its initial date of publication, the ACTEC article titled "Overview of State Directed Trust Statutes" (2019) includes a chart that summarizes directed trust statutes and provides a basic framework for this discussion. Some states have since enacted new UDTA/TP statutes, and in so doing have moved from the UTC approach to the UDTA approach, and some states have enacted statutes for the very first time; thus, I have updated the ACTEC list as it appears above to make it more current.

Directed Trust Statutes ("DTS") are similar to Trust Protector ("TP") statutes. DTS allow someone other than the trustee to possess responsibilities and liabilities traditionally associated with the trustee function. Trust Protectors or Trust Advisors commonly have the same or similar powers as Trust Directors, although some states distinguish between Trust Protectors and Trust Advisors. Trust Protectors are typically given more administrative powers, while Trust Advisors are typically given more trustee-like powers, such as investment and distribution powers.

All states adopting the UDTA establish that a Trust Director does not have the duty to monitor, provide advice, communicate or warn the other parties of the trust.

The UDTA was introduced by the National Conference of Commissioners on Uniform State Laws in 2017. The UTC has been around since the early 2000s. The difference between the UDTA and the UTC is addressed in Wayne E. Reames' article *"Beyond UTC Section 808 and the Uniform Directed Trust Act,"* ACTEC Law Journal, Volume 45, Number 1, Article 12, September 1, 2019:

> "The recent updates to the UTC provide some much needed assistance on each of these fronts, with the commissioners' endorsement of the Uniform Directed Trust Act (UDTA) as a wholesale expansion and replacement of section 808. This act provides a significant structural underpinning to directed trusts, although arguably adding no great advancement to the existing treatments afforded by the bespoke statutes of South Dakota or Alaska. If only by providing a common starting point for further developments and an acknowledgment of section 808's significant inadequacies, the UDTA represents forward progress. By proposing the term "trust director" for fiduciaries with traditional trustee powers of investment or distribution, the UDTA opens the door for a trifurcation of status, with "directors" as inherent fiduciaries, "advisors" (in the South Dakota family advisor sense) in an inherently nonfiduciary role, and "protectors" occupying a more flexible middle ground based on the powers and authorities granted to them by the instrument." (page 63).

Below is a list of commonly incorporated rules (with the states adopting such rules being identified after each rule is summarized). The rules are categorized into the following categories: Appointment, Powers, Restrictions, Jurisdiction, and Liability. Regarding powers, none of the state statutes suggest that the powers listed represents a complete list, so the listed powers are only examples of possible powers a TP may have.

Appointment

Statutes generally allow for the appointment TPs in the trust instrument itself. When statutes do not explicitly say that the TP's power arises from the trust instrument, the appointment may be implied. Some states for example, Wisconsin and Wyoming, mention that a court order or a settlement agreement may grant TP their powers.

Idaho specifically states that TP means any disinterested third party whose appointment is provided for in the trust instrument, whereas Michigan and Mississippi state that any person may serve as a Trust Advisor or Trust Protector.

Powers

Statutes generally suggest that the TP's list of powers is not exhaustive. States list between 4 powers (Alaska) to 16 powers (Iowa), however the TP can have the non-listed powers if the trust specifically includes those powers. Moreover, statutes often include that TP can exercise, or not exercise, those powers as they see fit. The TP's directions or the use of those powers are binding on all parties of the trust.

1. **Remove and appoint trustees.**

   [Alaska, Arizona, Connecticut (trust directors include TP; TP can also remove and appoint advisors, trust committee members, and other TPs), Michigan]

   [Minnesota (TP can also remove and appoint advisors, trust committee members, and other TP), Mississippi (TP can also remove and appoint advisors, trust committee members, and other TP), Missouri, New Hampshire, North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming.]

2. **Modify or amend the trust to achieve favorable tax status or respond to changes in tax laws.**

   [Alaska, Arizona, Connecticut, Idaho, Minnesota, Mississippi, Missouri, New Hampshire, North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming.]

3. **Increase or decrease the interests of any beneficiary.**

   [Alaska, Arizona, Connecticut, Idaho, Minnesota, Missouri, North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming.]

4. **Modify the terms of a power of appointment granted by the trust.**

   [Alaska, Minnesota, Missouri, North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming.]

5. **Changing the governing law of the trust and modifying the trust for any valid purpose.**

   [Arizona, North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming.]

6. **Trust protectors can file petitions to enforce the trust and may request the Attorney General's involvement if fraud or misuse of trust property is suspected. Courts may award costs and attorney's fees to the trust protector from trust property if the petition is necessary to fulfill their duty.**

   [Connecticut (TP for trust to provide for care of animal)]

7. **TP's power and discretions shall be provided by the trust instrument, which may be exercised or not exercised in the "sole and absolute" discretion of the TP and is binding on other persons.**

   [Idaho, Tennessee, Illinois]

8. **Modify the terms of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument.**

   [Idaho, Minnesota, New Hampshire]

9. **Terminate the trust.**

   [Idaho, Minnesota, Mississippi, New Hampshire, North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming.]

10. **Veto or direct trust distributions.**

    [Idaho, Michigan, Mississippi, New Hampshire, North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming.]

11. **Change situs or governing law of the trust, or both.**

    [Idaho, Minnesota, Mississippi (change the principal place of administration of the trust), New Hampshire, North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming.]

12. **Appoint a successor trust protector.**

    [Idaho, Minnesota, Mississippi, New Hampshire, North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming.]

13. **Interpret terms of the trust instrument at the request of the trustee.**

    [Idaho, Minnesota (review and prove a Trustee's trust reports or accountings) North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming.]

14. **Advise the trustee on matters concerning a beneficiary.**

    [Idaho, Minnesota, Mississippi, North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming.]

15. **Amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust.**

    [Idaho, Mississippi, North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming.]

16. **Provide direction regarding notification of qualified beneficiaries.**

    [Minnesota, Wisconsin]

Jurisdiction

States adopting the UDTA have a distinct section that requires a TP to submit to the state court's jurisdiction. Regardless, a state trust code will require that a TP/TA/TD or Trustee to be subjected to the state court's jurisdiction in other sections if not contained in the TP section of the trust code.

The Superior Court or a Probate Court shall have jurisdiction over any trust created pursuant to this section.

[Connecticut (TP for trust to provide for care of animal)

Any TP (or advisors) submits to jurisdiction of this State regarding any matter related to the trust.

[Connecticut, Idaho, Minnesota, North Dakota, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming.]

Restrictions

TP cannot grant a beneficial interest to individuals or classes not specified in the trust.

[Alaska, Arizona, Missouri] States without this restriction in the statute probably do not allow TP to modify the trust in a way that is not consistent with the intent of the trust.

TP cannot modify the beneficial interest of a governmental unit in certain trusts.

[Alaska, Arizona (SNT), Missouri] States without this restriction in the statute does not allow TP to modify the trust in a way that infringes on government interest.

Liability

Not liable as a trustee or fiduciary, subject to the terms of the trust instrument.

[Alaska, Arizona]

Advisers who direct, consent to, or disapprove fiduciary decisions are considered fiduciaries unless the governing instrument specifies they act in a non-fiduciary capacity.

[Delaware]

If the governing instrument provides that a fiduciary is to follow the direction of an advisor, and the fiduciary follows the direction, they are not liable unless there is willful misconduct.

[Delaware]

"Excluded fiduciary" means any fiduciary excluded from exercising certain powers under the instrument. An excluded fiduciary is not liable for any loss that results from compliance with a trust advisor's or TP's direction.

[Idaho, Minnesota (an excluded fiduciary has no duty to monitor, review, inquire, investigate, recommend, evaluate or warn), New Hampshire (an excluded fiduciary has no duty to monitor, review, inquire, investigate, recommend, evaluate or warn), Vermont (an excluded fiduciary has no duty to monitor, review, inquire, investigate, recommend, evaluate or warn)].

A trust instrument can provide TP with some, none, or all of the rights, powers, privileges, benefits immunities or authorities available to the Trustee, and TPs have no greater liability than a Trustee would if the liability is not established in the governing instrument.

[Iowa, Minnesota (lowest level of care cannot be below good faith standard)]

Presumed level is that TP is a fiduciary, but the trust can provide otherwise.

[Missouri, New Hampshire, Vermont]

Few states laws mandate that a TP is a fiduciary: North Carolina, Vermont, Virginia, and Wyoming. North Carolina's statute requires TP to have fiduciary duty when using certain powers, and does not require fiduciary duty when using other powers.

STATES WITH UTC § 808 "POWER TO DIRECT"

As of 2024, 36 states including DC had adopted the UTC. (https://www.uniformlaws.org/). However, based on Westlaw search, only 11 states have identified that they have adopted the UTC's section 808 Power to Direct. Section 808 Powers to Direct do not specifically use the term "Trust Protectors," but subsections (b)-(d) ratify the use of a TP and or TA according to UTC's official comment. This section suggests that TPs or others who have the power to direct are presumed to be fiduciaries.

SUMMARY OF STATE STATUTES

1. **Alabama:** Substantially Similar to UTC § 808. Powers to Direct.

   Summary: TP's the "power to direct" is conferred by the trust's terms, and those powers include modifying or terminating a trust. TP with the power to direct is presumed to have a fiduciary duty and is liable for any loss that results from breach of a fiduciary duty.

   Ala. Code 1975 § 19-3B-808. **§ 19-3B-808. Powers to direct.**

2. **Alaska:** Trust Protectors.

   Summary: TP's power is conferred by the trust's terms, and those powers include and are not limited to (1) appointing and removing Trustees, (2) modifying the trust to achieve favorable tax status, (3) modifying Beneficiary's interest, (4) change the trust's governing law. TP's modification may not (1) grant beneficiary interest to people who are not the original trust's beneficiaries, (2) modify the beneficial interest of the government in a SNT. (For states without those restrictions on TP's power, TP probably does not have the power to modify the beneficial interest of the government). TP does not have a fiduciary duty and is not liable for a breach of fiduciary duty.

   Alaska Stat. Ann. § 13.36.370 (West).

3. **Arizona:** Trust Protectors.

   Summary: TP's power is conferred by the trust's terms, and those powers include and are not limited to (1) appointing and removing Trustees, (2) modifying the trust to achieve favorable tax status, (3) modifying Beneficiary's interest, (4) change the trusts governing law. TP's modification may not (1) grant beneficiary interest to people who are not the original trust's Beneficiaries, (2) modify the beneficial interest of the government in a SNT. (For states without those restrictions on TP's power, TP probably does not have the power to modify the beneficial interest of the government). TP does not have a fiduciary duty and is not liable for a breach of fiduciary duty.

   Ariz. Rev. Stat. § 14-10818 (West). (Effective: September 13, 2013).

4. **Arkansas:** Adopts the Uniform Directed Trust Act (UDTA).

   Summary: UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers are granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts. It is probably implied that other states have the jurisdiction requirement for TD or TP as well.

   Ark. Code Ann. § 28-76-106 (West) (effective: January 1, 2020).

5. **California:** California Uniform Directed Trust Act, Adopts UDTA.

   Summary: UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers are granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts.

   California Probate Code Section 16600 et seq. (effective January 1, 2024).

6. **Colorado:** Colorado Uniform Directed Trust Act, Adopts UDTA.

   Summary: UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers are granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts. It is probably implied that other states have the jurisdiction requirement for TD or TP as well.

7. **Connecticut:** Adopts UTC with Added Rule about Transferor

   Summary: The TP's "power to direct" is conferred by the trust's terms, and those powers include modifying or terminating a trust. TP with the power to direct is presumed to have a fiduciary duty and is liable for any loss that results from breach of a fiduciary duty. Transferor can appoint TP and serve as TP.

   Conn. Gen. Stat. Ann. § 45a-487l (West).

8. **Delaware:** Trust Advisors,

   Summary: Delaware's statute uses "Trust Advisors" (TA), which only has the power to direct investment, distribution, or other decisions. Trust instruments can override the rule that TA are presumed to be fiduciaries. TA is only liable for willful misconduct or gross negligence.

   Del. Code Ann. tit. 12, § 3313 (West) (effective: July 11, 2018).

9. **Florida:** Adopts the Uniform Directed Trust Act (UDTA).

   Summary: UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers are granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts. It is probably implied that other states have the jurisdiction requirement for TD or TP as well.

   Fla. Stat. Ann. § 736.1401-1416 (West) (effective July 1, 2021).

10. **Georgia:** Based on UDTA.

    Summary: This section is based upon §§ 6, 7 UDTA. UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers are granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts. It is probably implied that other states have the jurisdiction requirement for TD or TP as well.

    Ga. Code Ann. § 53-12-502 (West) (Effective: January 1, 2021).

11. **Hawaii:** Directed Trust Statute - Haw. Rev. Stat. § 554D-808 (effective 1/1/2022).

12. **Idaho:** Based on Uniform Probate Code (UPC).

    Summary: TP is an excluded fiduciary, meaning that they do not have a fiduciary duty like Trustees. TA is defined to have a different meaning than TP: TA means a distribution trust advisor or an investment advisor, and TA's discretion is binding on all trust parties. Trust instruments provide TP with powers that they can choose to exercise or not exercise. The statute includes a long, non-exhaustive list of powers TP may have, in addition to the other common TP powers: TP can appoint a successor TP, interpret trust terms requested by Trustee, and advise Trustee on matters concerning a beneficiary.

    Idaho Code Ann. § 15-7-501 (West).

13. **Illinois:** Similar to Idaho's Statute.

    Summary: TA is defined to have a different meaning than TP: TA means a distribution trust advisor or an investment advisor. Trust instrument gives TP (or the same position with other similar names) the powers. Those powers are not limited to the 10 listed powers. TP have the sole and absolute discretion to exercise the authorized powers and have a binding effect on other parties of the trust. TP is an excluded fiduciary and is not liable unless there is willful misconduct.

    760 Ill. Comp. Stat. Ann. 3/808 (effective: January 1, 2022).

14. **Indiana:** Indiana Adopts the UDTA.

    Summary: UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers is granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts. It is probably implied that other states have the jurisdiction requirement for TD or TP as well.

15. **Iowa:** Separate Trust Directors and Trust Protectors

    Summary: The statute allows the trust instrument to appoint 3 different roles: investment TD, distribution TD, and TP. Investment TD tells Trustee which assets to hold and decides when to buy and sell investments, and Distribution TD manages distributions. The statute also listed 16 powers for TP, and the list is non-exhaustive. Both TD and TP are subject to the state's jurisdiction. Trust instrument may provide TD and TP with powers and immunities of trustee. TD and TP have no duty to communicate with, warn, or apprise any beneficiary or third party. Party challenging TD and TP in an action need to prove by clear and convincing evidence.

    Iowa Code Ann. § 633A.4801 (West) (effective: July 1, 2020).

16. **Kansas:** Kansas Uniform Directed Trust Act, Adopts UDTA.

    Summary: UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state statutes, TD's powers are granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts.

    Kan. Stat. Ann. § 58-5006 (West) (effective: July 1, 2022.

17. **Kentucky:** Directed Trust Statute - Ky. Rev. Stat. § 386B.8-080 (effective 7/15/2014).

18. **Louisiana:** No DT/TP Statute.

19. **Maine:** Maine Uniform Directed Trust Act, Adopts UDTA.

    Summary: UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers are granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts.

    Title 18-B, Chapter 21: MAINE UNIFORM DIRECTED TRUST ACT (effective January 1, 2020).

20. **Maryland:** Directed Trust Statute – MD Est & Trusts Code §14.5-808 (effective January 1, 2015)

21. **Massachusetts:** Adopts UTC § 808. Powers to Direct.

    Summary: TP's the "power to direct" is conferred by the trust's terms, and those powers include modifying or terminating a trust. TP with the power to direct is presumed to have a fiduciary duty and is liable for any loss that results from breach of a fiduciary duty.

    Mass. Gen. Laws Ann. ch. 203E, § 808 (West) (effective: July 8, 2012).

22. **Michigan:** Adopts the UDTA

    Mich. Comp. Laws - Section 700.7703a (effective: March 29, 2019).

23. **Minnesota:** Adopts UTC Section 808.

    Summary: TP is anyone who exercises the power listed, whether or not the trust instrument labels this person as "TP." The statute listed 12 powers, including veto or direct trust distributions, and provide direction regarding notification of qualified Beneficiaries. Unless the instrument provides otherwise, TP has the same duties as Trustees. Excluded fiduciary cannot be exonerated of a duty to act, but they do not have duty to monitor, review, or warn. TD must submit to the jurisdiction of the state court.

    Minn. Stat. Ann. § 501C.0808 (West) (effective: January 1, 2016).

24. **Mississippi:** Adopts UTC Section 808.

    Summary: TP is anyone who exercises the power listed, whether or not the trust instrument labels this person as "TP." The statute lists 23 powers, powers 16 to 23 are not commonly listed in other statutes. TA or TP has fiduciary duty and must act in good faith.

    Miss. Code Ann. § 91-8-1201 (West) (Effective 7/1/2014).

25. **Missouri:** Based on UTC Section 808 Power to Direct.

    Summary: TP has the power given by the trust instrument, including but not limited to the commonly listed 6 powers. TP is liable for a breach of fiduciary duty if acting in bad faith or reckless indifference.

    Mo. Ann. Stat. § 456.8-808 (West) (effective 8/28/2018).

26. **Montana:** Adopts the Uniform Directed Trust Act (UDTA).

    Summary: UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers is granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts. It is probably implied that other states have the jurisdiction requirement for TD or TP as well.

    Montana Code Annotated 2023, TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS - CHAPTER 40. UNIFORM DIRECTED TRUST ACT (effective October 21, 2024).

27. **Nebraska:** Adopts the Uniform Directed Trust Act (UDTA).

    Summary: UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers are granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts.

    Nebraska Revised Statute 30-4301-4319 (effective January 1, 2021).

28. **Nevada:** Powers of TP.

    Summary: TP may exercise the powers provided to TP in the instrument subject to the terms and provisions in the instrument. The statute listed 12 powers, including the power to review and approve a trustee's reports or accounting. Unless otherwise provided in the trust instrument, the powers of the trust protector shall be considered fiduciary in nature, but the instrument could reduce or relieve TP of a fiduciary duty.

    Nev. Rev. Stat. Ann. § 163.5553 (West).

29. **New Hampshire:** Fiduciary, Duty, Liability

    Summary: Except as otherwise provided under the terms of the trust, a trust advisor of a noncharitable trust or trust protector of a noncharitable trust is a fiduciary with respect to each power granted to such trust advisor or trust protector. A trust advisor of a charitable trust or a trust protector of a charitable trust is a fiduciary with respect to each power granted to that trust advisor or trust protector. An excluded fiduciary has no duty to review actions of trustee, TA, or TP.

    N.H. Rev. Stat. Ann. § 564-B:12-1202.

30. **New Jersey:** New Jersey Adopts the UTC - The NJ UTC codifies the use of directed trusts in N.J.S.A. § 3B:31-61 and -62 (effective July 17, 2016).
31. **New Mexico:** Adopts the Uniform Directed Trust Act (UDTA).

    Summary: UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers are granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts.

    New Mexico Statutes Chapter 46, Article 14 (effective January 1, 2019).
32. **New York:** No Trust Protector Statute – Case Law Recognizes
33. **North Carolina:** North Carolina Uniform Trust Code, based on UTC.

    Summary: The terms of a trust may provide that a power holder (probably a TP, or TA) is a nonfiduciary with respect to the exercise or non-exercise of a power, including the power to achieve the settlor's tax objectives. Unless the terms of a trust provide otherwise, the power to remove and appoint a Trustee or power holder (TP or TA) shall be deemed to be held in a nonfiduciary capacity.

    N.C. Gen. Stat. Ann. § 36C-8A-3 (effective: July 8, 2021).
34. **North Dakota:** Designation and Powers of TP.

    Summary: TP may be designated in the trust instrument. TP's powers may be exercised or not exercised in the sole and absolute discretion of TP and are binding on all other persons. The statute listed 12 powers a TP may have, and the list is not exhaustive.

    N.D. Cent. Code Ann. § 59-16.2-05 (West) (effective: August 1, 2017).
35. **Ohio:** Same as UTC.

    Summary: TP's the "power to direct" is conferred by the trust's terms, and those powers include modifying or terminating a trust. TP with the power to direct is presumed to have a fiduciary duty and is liable for any loss that results from breach of a fiduciary duty.

    Ohio Rev. Code Ann. § 5808.08 (West).
36. **Oklahoma:** Oklahoma Adopts the UDTA.

    Okla. Stat. Ann. tit. 60, § 1202 (West)(effective November 1, 2024).
37. **Oregon:** Trust Adviser Statute.

    Summary: A trust instrument may appoint a person to act as an adviser for the purpose of directing or approving decisions made by the trustee, including decisions related to distribution of trust assets and to the purchase, sale or exchange of trust investments. The appointment must be made by a provision of the trust that specifically refers to this statute. The appointment may provide for succession of advisers and for a process for the removal of advisers. An adviser shall exercise all authority granted under the trust instrument as a fiduciary unless the trust instrument provides otherwise. A person who agrees to act as an adviser is subject to Oregon law and submits to the jurisdiction of the courts of this state.

    If a trust instrument provides that a trustee is to follow the direction of an adviser, and that trustee acts in accordance with the adviser's directions, the trustee is not liable for any loss resulting directly or indirectly from the trustee's decision unless the decision constitutes reckless indifference to the purposes of the trust or the interests of the beneficiaries.

    ORS §130.735 – Appointment of Adviser (effective January 1, 2006).

38. Pennsylvania: Pennsylvania Adopts UTDA.

Summary: TP's the "power to direct" is conferred by the trust's terms, and those powers include modifying or terminating a trust. TP with the power to direct is presumed to have a fiduciary duty and is liable for any loss that results from breach of a fiduciary duty.

In July 2024, Pennsylvania Governor Josh Shapiro signed the Pennsylvania Directed Trust Act, Senate Bill 1231 (now part of Act No. 64 of 2024, sponsored by Senator Lisa Baker), into law, making Pennsylvania the 20th state to adopt a directed trust act following the Uniform Directed Trust Act published by the Uniform Law Commission in 2017.

Section 7778. Powers to direct [- UTC 808].

1 Direction of settlor.--While a trust is revocable, the trustee may follow a written direction of the settlor that is contrary to the trust instrument.

2 Compliance with power.--If a trust instrument confers upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with a written exercise of the power unless the attempted exercise is manifestly contrary to the trust instrument or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

3 Modification or termination of trust.--A trust instrument may confer upon a trustee or other person a power to modify or terminate the trust.

4 Fiduciary relationship.--A person other than a beneficiary who holds a power to direct certain actions of a trustee is **presumptively a fiduciary** who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of the holder's fiduciary duty.

5 Directed trust.

5.1 "Directed trust." A trust for which the terms of the trust grant a power of direction. Section 7780.12 Definitions.

5.2 "Power of direction" is defined in Section 7780.12 as follows:

5.2.1 A power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee.

5.2.2 The term includes a power over the investment, management or distribution of trust property or other matters of trust administration and, in the case of a trust protector, may include powers to modify the terms of the trust.

5.2.3 A power of direction includes incidental powers that are appropriate and necessary to the exercise or nonexercised of the power of direction. The rules specified in this subchapter govern the exercise of such incidental powers.

5.3 "Trust director" is defined in Section 7780.12 as follows:

5.3.1 A person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee.

5.3.2 A beneficiary or settlor of a trust may serve as a trust director of the trust.

5.4 "Trust protector" is defined in Section 7780.12 as follows:

5.4.1 **A trust director authorized by the terms of a trust to modify one or more terms of the trust.**

5.4.2 The terms of a trust may expressly grant to a trust director powers, alone or together with powers to direct a trustee's actions, to modify the terms of a trust. **In that event, the trust director is a trust protector. Section 7780.17(a).**

5.5 "Willful misconduct" is defined in Section 7780.12 as follows:

5.5.1 Intentional conduct that is malicious, designed to defraud or unconscionable.

5.5.2 Mere negligence, gross negligence and recklessness do not constitute "willful misconduct."

Section 7780.14 Exclusions

Section 7780.16 Trust Director for Investments

Section 7780.17 Trust Protector

6 Illustrative powers. Among the powers the terms of a trust may grant explicitly to a trust protector are the following:

6.1 To increase, decrease or otherwise modify what is distributable to one or more beneficiaries of the trust.

6.2 To terminate the trust and direct how the trustee shall distribute the trust property to or in further trust for any one or more of the beneficiaries.

6.3 To expand, modify, limit or terminate a power of appointment, and to grant a power of appointment to a beneficiary of the trust on terms as the trust protector specifies.

6.4 The powers described in section 8104 (relating to trustee's power to adjust) to adjust between income and principal and to convert the trust to a unitrust in accordance with section 8105 (relating to power to convert to unitrust).

6.5 **To convert a trust in whole or in part to a special needs trust, or provide that a special needs trust shall arise or be established at a specific time or upon the occurrence of an event with respect to some or all of the trust's assets.**

6.6 **To appoint or remove trustees, investment advisors and investment managers, and prescribe a plan of succession for future holders of any of these offices.**

6.7 **To appoint or remove trust directors, specify their powers and modify the powers of a trust director.**

6.8 To appoint one or more successor trust protectors, and prescribe a plan of succession for future holders of that office.

6.9 To renounce, release, limit or modify any power given to a trustee by the terms of the trust or by law.

6.10 To resolve disagreements among trustees.

6.11 To change the trust's situs or governing law, or both.

6.12 To apply to a court of competent jurisdiction to interpret any terms of the trust or pass upon an action that the trust protector, another trust director or a trustee proposes to take or not take.

6.13 Any other or different power that the settlor expressly grants to the trust protector."

7 Conflicts. If the terms of a trust grant the same power to both a trust protector and a trust director that is not a trust protector and do not provide a different rule, the trust protector shall control the exercise of the power."

7.1 Section 7780.18 Limitations on Powers of Trust Director

7.2 Section 7780.19 Duty and Liability of Trust Director

7.3 Section 7780.20 Duty and Liability of Directed Trustee

7.4 Section 7780.21 Duty to provide information to Trust Director or Directed Trustee

7.5 Section 7780.22 No Duty to Monitor, Inform or Advise

8 Subchapter H.1 of the PA Uniform Trust Act. See, 20 Pa.C.S.A. §§ 7780.11-7780.27 (effective October 13, 2024).

39. **Rhode Island:** Recognizes TP in Definitions, No TP Statute.

    Summary: No TP statute, but recognizes TA and includes TP or any other person who, in addition to a qualified trustee, holds one or more trust powers.

    18 R.I. Gen. Laws Ann. § 18-9.2-2 (West)

40. **South Carolina:** Based on UTC Section 808.

    Summary: Note that this statute includes a default way to appoint a successor TP if the serving TP is unwell or unable to serve and the trust document provides for a TP, the Trustee may petition the court having jurisdiction over the trust estate to appoint an individual or a bank or trust company to serve as TP. TP can be a fiduciary or an excluded fiduciary.

    S.C. Code § 62-7-1005A (West).

41. **South Dakota:** TP's Power, Excluded Fiduciary, Jurisdiction.

    Summary: Any governing instrument providing for a TA or TP may provide them with some, none, or all of the rights, powers, privileges, benefits, immunities, or authorities available to a trustee under the state law or under the governing instrument. Unless the governing instrument provides otherwise, a TA or TP has no greater liability to any person than would a trustee. The Statute lists 18 powers for TP - the list is not exhaustive.

    S.D. Codified Laws § 55-1B-1.1

42. **Tennessee:** Based on UTC, and Jurisdiction.

    Summary: The Statute lists 21 powers for the TP - the list is not exhaustive, including the power to perform a specific duty or function that would normally be required of a Trustee. The exercise of a power by a TA or TP shall be exercised in the sole and absolute discretion of the TA or TP and shall be binding on all other persons. TA and TP subject to court jurisdiction.

    Tenn. Code Ann. § 35-15-1201 (West)

43. **Texas:** Texas adopts UDTA

    Summary: Under §114.0031, any person given the power or authority to direct, consent to, or disapprove a trustee's actual or proposed "investment decisions, distribution decisions, or other decisions" is considered to be an advisor to the trust. The statute also makes it expressly clear that the advisor acts in a fiduciary capacity when exercising that authority, unless the terms of the trust agreement provide that the advisor acts in a nonfiduciary capacity.

    The new statute also defines the term "advisor" to include someone identified as a trust "protector." Pursuant to §114.0031, a "protector" has all of the powers and authority given to the protector by the terms of the trust agreement, which may include (i) the power to remove and appoint trustees, advisors, committee members, and other protectors; (ii) the power to modify or amend the trust terms to achieve a more favorable tax status or to facilitate efficient trust administration; and (iii) the power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary of the trust.

    Texas Property Code, Section 114.0031 (effective September 1, 2015).

44. **Utah:** Adopts the Uniform Directed Trust Act (UDTA).

    Summary: UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers are granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts.

    Utah Code Ann. § 75-12-108 (West).

45. **Vermont:** Adopts the Uniform Directed Trust Act (UDTA).

    Summary: This state has adopted UDTA in June 2024, but it also has statutes in Chapter 11, which is similar to UDTA. In Chapter 13 UDTA, the act uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers are granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts. It is probably implied that other states have the jurisdiction requirement for TD or TP as well.

    14A V.S.A. § 1306.

46. **Virginia:** Adopts the Uniform Directed Trust Act (UDTA).

    Summary: UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers is granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the jurisdiction of Virginia state courts. (In other states, jurisdiction over the TD/TP/TA can be implied under the general jurisdiction of the state courts to review and interpret trust generally.

    Va. Code Ann. § 64.2-779.26 (West) (effective: July 1, 2020).

47. **Washington:** Washington Adopts the Uniform Directed Trust Act (UTDA).

    Revised Code of Washington, Probate and Trust Law - Chapter 11.98B – Uniform Directed Trust Act

48. **West Virginia:** Adopts the Uniform Directed Trust Act (UDTA).

    Summary: UDTA uses Trust Director (TD) for TP because TD has similar powers and functions as TP. The statute is extensive with multiple sections. Like other state's statutes, TD's powers are granted by the trust's terms. The trust's terms may vary TD's duty or liability to the same extent as Trustees. TD has the same fiduciary duty and liability in the exercise or non-exercise of the power. TD has the same defenses as Trustees when they are being sued for a breach of trust. Moreover, TD has no duty to monitor, inform or advise Trustees. The statute requires TD to submit to the state courts.

    W. Va. Code Ann. § 44D-8A-801 (West) (effective 2020).

49. **Wisconsin:** Trust Protectors.

    Summary: Settlor in a trust instrument, a court order, or non-judicial agreement, may appoint a TP. TP can be referred to using other titles or no titles. The appointing party may specify the legal capacity of TP, if TP is not a fiduciary, the level of duty must not be below good faith. If unspecified in the trust, the statute provides that in exercising powers related to the Trustee (for example interpreting terms, review Trustee's reports, managing distributions, 5 powers were listed), TP should be in fiduciary capacity; and when exercising other rights (such as administrative powers, and modifications of the trust, 10 powers were listed) TP should not be held to act in fiduciary capacity. Similar restrictions apply to TP: they cannot modify government benefits, reduce Beneficiaries' income in certain trusts, or modify any beneficial interest in a in a manner that would have caused the trust not to qualify for certain tax deductions. TP must submit to the state's jurisdiction.

    Wis. Stat. Ann. § 701.0818 (West) (effective March 23, 2024).

50. Wyoming: Directed Trusts.

Summary: TP's powers is established (or modified) in the trust instrument or court order. TP can choose to exercise or not exercise those powers consistent with the best interest of the trust. The statute lists 12 powers, among the other commonly listed powers, it includes subsection (xii) To elect for the trust to become a qualified spendthrift trust under W.S. 4-10-516, a Wyoming specific statute. Unless otherwise provided, excluded fiduciary is not liable for any loss resulting from any action or inaction of TA or TP. When TP or TA is given the fiduciary duties of a Trustee, TP or TA is a fiduciary while the Trustee becomes an excluded fiduciary.

Wyo. Stat. Ann. § 4-10-718 (West).

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TRUST PROTECTORS: THE GOOD, THE BAD AND THE UGLY

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1

What is a Trustee?

A person appointed in a trust to act in the best interests of beneficiaries, consistent with the terms and purposes of the trust (the intent of the settlor).

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2

What is a Trust Protector?

"A Trust Protector is an individual (or committee or entity) who is not a trustee but who is nevertheless granted powers under the trust that supersede corresponding powers of the trustee."

- *Peter Protector in Trust Neverland: The Real Story of the Trust Protector 1* (2003), Alexander A. Bove, Jr. & Melissa Langa, available at http://www.bovelanga.com/publications/news_briefs/trusts_and_estates_forum/Real %20Story%20Trust%20Protector.pdf.

"For practical purposes, a trust protector is generally a person selected by the settlor of the trust to represent the interests of the settlor in making decisions related to the trust that the settlor is unable to make, most often because the settlor is deceased."

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What is a Trust Protector? (Cont'd)

"The idea behind the trust protector is to have a 'living embodiment' of the settlor to represent the settlor's interests, even after the settlor is gone."

"The protector is, at its core, an agent."

- *The Trustee and the Trust Protector: A Question of Fiduciary Power, Should a Trust Protector be Held to a Fiduciary Standard?* Philip J. Ruce, Drake Law Review, Vol. 59, page 67, February 24, 2011, citing Trust Protectors, Agency Costs, and Fiduciary Duty, 27 Cardozo L. Rev. 2761, 2763 (2006).

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What is a Trust Protector? (Cont'd)

a. Although the TP's role can be very useful, **its role is not clearly defined**.

b. **Statutes** among the states are diverse, inconsistent and arguably incomplete

c. There is a dearth of **domestic case law** on the subject both

i) interpreting state statutes, and

ii) identifying whether, and in what circumstances, the TP is a fiduciary (or not) – this is a huge problem!

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What is a Trust Protector? (Cont'd)

iii) New York Example – NY does not have a TP statute.

1. *In re Estate of Rubin*, 143 Misc.2d 303, 540 NYS2d 944 (Sur. Ct. Nassau Co. 1989), aff'd, 172 AD 2d 841, 570 NYS2d 996 (2d Dep't 1991), **held that a directed trust was effective**,
   - **but a later case,**
2. *In re Rivas*, 30 Misc.3d 1207(A), 958 NYS2d 648 (Sur. Ct. Monroe Co. 2011), aff'd 93 AD3d 1233, 939 NYS2d 918 (4th Dep't 2012), **held that it was not**.

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6

What is a Trust Protector? (Cont'd)

What we **can** say -

d. There is no mandate that the TP actually "protect" the trust. The name itself is misleading and could mean anything – but it has no inherent meaning.
   - Many commentators critique this point of view and believe that the name trust protector absolutely should be interpreted as imposing an obligation to protect.

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7

What we can say - (Cont'd)

e. In addition to the traditional roles played by a trustee which can be assigned to a Trust Protector, such as
   - The **settlor** and **beneficiary** typically have the right to remove/replace a trustee, and
   - the power over **investment** and **distribution powers**

   The TP may be asked to handle more profound issues, such as **change of trust situs** or **change in beneficiaries**

   - **The above roles not typically assigned to a trustee**

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8

What we can say - (Cont'd)

Loose Definition - A Trust Protector is someone appointed by the grantor to:

- Oversee the administration of the trust
- Monitor the trustee (if required by the trust or by statute)
- Assure that the grantor's intent is carried out
- Relieve beneficiaries of the need to monitor the trustee's actions

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9

Where Were Trust Protectors First Used?

a. 3rd party oversight has been a part of US trust law for many years.

b. Before the emergence of the TP, **Trust Advisors** were and continue to be used to **bifurcate** some of a trustee's duties.

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Where Were Trust Protectors First Used? (Cont'd)

c. Trust Protectors

Began to be used in foreign jurisdictions for **offshore asset protection planning**

- **To provide flexibility** in handling matters specific to offshore trust administration.
- To alleviate the concern of **US settlors who were unwilling to cede total control of their assets to an unknown professional trustee in a foreign jurisdiction**.

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Where Were Trust Protectors First Used? (Cont'd)

d. In the 1980s and Early 1990s – US jurisdictions began enacting trust friendly provisions in their trust codes, among them provisions that addressed the use of trust protectors.

e. Legacy Trust Planning - TPs became instrumental in legacy trust planning to provide ongoing oversight for trusts of lengthy duration and as the rule against perpetuities began to be relaxed in many jurisdictions.

- The increased use of Trust Protectors in the US recognizes that the longer a trust is intended to last, the greater the need for modifications to account for changing times.

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Where Were Trust Protectors First Used? (Cont'd)

f. The allocation of trustee duties among "traditional trustees" and "trust advisors" created a larger group of people engaged in the administration of the trust.

- This also brought about the need to have someone who could oversee the various role players in any given trust arrangement.

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13

Terminology - Differentiating Among "Trust Advisors" and "Trust Protectors" and "Trust Directors"

- There is no consistent vocabulary used to describe the person other than a trustee who holds a power in a directed trust.
- Common terms used include "Trust Advisor," "Trust Protector" and "Trust Director."
- Some state statutes consider Trust Protectors and Trust Advisors as one and the same **(Tenn. Code § 35-16-108(b)** – which states that "For purposes of this subsection, the term 'advisor' includes a 'trust protector,' **and NH Rev. Stat. Ann. § 564-B:1-103** similarly defines these two terms as being identical.

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Terminology - Differentiating Among "Trust Advisors" and "Trust Protectors" and "Trust Directors" (Cont'd)

Other research suggests as follows:

a. Trust Advisors - are thought to have **some form of control over a trustee's powers and thus holds one or more powers that a trustee would typically hold:**

- Primarily - **investment decisions/powers** or **distribution powers.**
- Same **fiduciary duties** and **liability standard** as would apply to a trustee

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Terminology - Differentiating Among "Trust Advisors" and "Trust Protectors" and "Trust Directors" (Cont'd)

b. Trust Protectors - by comparison, have historically been given the power to perform certain delineated **non-administrative decisions** relating to a trust, **but not powers typically held by a trustee**.
   - Many TPs serve **per the trust instrument** in a **non-fiduciary capacity** and, in that case, the fiduciary or liability standard is not the same as a trustee – **liability in this case would be based upon a fraud standard**
   - **However, if the TP is considered a fiduciary, then liability would be the same as trustee/advisor role**

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16

Terminology - Differentiating Among "Trust Advisors" and "Trust Protectors" and "Trust Directors" (Cont'd)

- Therefore, **drafting attorneys usually provide in the trust instrument that a TP is not acting as a fiduciary,** because these powers are not typically traditional trustee powers.
- None of this means you could not have a Trust Protector that is considered to owe a duty to the beneficiaries (and not just the settlor) if the language in the appointing trust and the circumstances at hand both suggest that this was a power not just personal to the Trust Protector.
- All of this can be resolved by looking at the intention of the settlor in creating the power.

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17

The Implications of a Trust Director/Trust Protector or Trust Advisor Being Determined to Act as a Fiduciary or Non-Fiduciary

a. Fiduciary Capacity - Requires a person acting in a fiduciary capacity to act in accordance with the **settlor's intent** and **the best interests of the beneficiaries (not just settlor's intent).**
   - **Fiduciary capacity requires the TP to act in good faith and for the benefit of others with a duty of loyalty, impartiality, exercise of reasonable care, inform and report, etc.**

Non-Fiduciary Capacity – **the duty is owed only to the settlor**, **and not to the beneficiaries**.

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The Implications of a Trust Director/Trust Protector or Trust Advisor Being Determined to Act as a Fiduciary or Non-fiduciary (Cont'd)

b. Liability Standard

- ✓ **Fraud (higher threshold)** is the liability standard for a Trust Protector acting in a non-fiduciary capacity, whereas
- ✓ **Gross Negligence** or **Willful Misconduct (lower threshold)** is the standard for a TP acting in a fiduciary capacity.

c. Conclusion - The classification of the TP as a fiduciary or nonfiduciary is critical for establishing the standard of care owed to the trust and its beneficiaries and possible exposure to liability.

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The Implications of a Trust Director/Trust Protector or Trust Advisor Being Determined to Act as a Fiduciary or Non-fiduciary (Cont'd)

d. TP Having Personal Power v. Fiduciary Power

How this impacts on trustee –

- ✓ **If a TP power is personal (non-fiduciary), the only duty of the trustee is to follow the direction of the TP and ensure that the direction does not violate the terms of the trust.**
  - ➢ **A trustee responding to a personal power is not under a duty to consider the reasons for the exercise or non-exercise of a personal power held by the TP as long as the terms of the trust are not being violated.**
- ✓ **If the TP's power is held in a fiduciary capacity, the trustee's duty is to verify the direction does not violate a fiduciary duty owed by the TP to the beneficiaries.**

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The Implications of a Trust Director/Trust Protector or Trust Advisor Being Determined to Act as a Fiduciary or Non-fiduciary (Cont'd)

How this impacts on the Trust Protector

- **If the TP power is personal, the TP cannot be forced to exercise the power, it is not held in a fiduciary capacity, she owes no obligation to the beneficiaries, and she can determine whether to exercise her power on a mere whim, spite or malice – thus the power can be exercised solely in the discretion of the TP so long as no violation of public policy or fraud is involved.**

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The Implications of a Trust Director/Trust Protector or Trust Advisor Being Determined to Act as a Fiduciary or Non-fiduciary (Cont'd)

e. **Open Questions – if the advisor/protector/director is not acting in a fiduciary role, then what is it?**

If the beneficiaries are unhappy with the administration of the trust, who is responsible or liable?

Does the directed trust approach provide sufficient recourse to the beneficiaries in the event of misconduct?

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22

How Do We Really Know if a Trust Protector is a Fiduciary?

a. The statute defaults to the assumption that a TP is **NOT** a fiduciary
   - Theory - Encourages people (or trust companies) to serve without fear of litigation exposure
   - Allows for competition among states for trust administration business

b. The statute defaults to the assumption that a TP **IS** a fiduciary
   - Theory - Settlor would not want to appoint someone with great power over the trust who is unaccountable to the courts and possibly to beneficiaries.

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How Do We Really Know if a Trust Protector is a Fiduciary? (Cont'd)

c. The statute is **silent**
   - Therefore, a Trust Protector may be acting

as a fiduciary,

a non-fiduciary, or

a "quasi" fiduciary (even more ambiguous, maybe only with respect to certain powers),

depending on the powers granted in the trust and the statute itself to determine the correct determination of fiduciary status.

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BOTTOM LINE – BE CAREFUL

- KNOW THE STATE LAW THAT APPLIES IN YOUR CIRCUMSTANCES
- DRAFT THE TRUST AROUND THE STATUTORY FRAMEWORK IF STATUTE ALLOWS YOU TO OVERCOME STATUTORY DEFICIENCIES
- OR IF NOT, THEN CONSIDER ANOTHER JURISDICTION

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State Statutes and Uniform Acts

a. State Statutes

South Dakota was the first state to enact a trust protector statute (1997). Idaho, Alaska, Wyoming and Tennessee soon followed.

Today – only 3 states do NOT have a statute!

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State Statutes and Uniform Acts (Cont'd)

b. Uniform Trust Code § 808 (2000)

i. Creates a **rebuttable presumption** that a 3rd party power holder is a fiduciary.

However, **the trust instrument can modify this**.

NOTE – that Trust Protectors are treated the same as Advisors in the uniform acts.

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State Statutes and Uniform Acts (Cont'd)

ii. With the increasing use of directed trusts came numerous legal questions which were not addressed by existing state statutes and the UTC Section 808 and its many variations.

- ✓ How is fiduciary responsibility allocated between the trust protector and the trustee?
- ✓ How much information do the trust protector and the trustee need to share with one another?
- ✓ Can a trust protector receive compensation for its work?

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State Statutes and Uniform Acts (Cont'd)

The Uniform Directed Trust Act was drafted to address these and other issues that had arisen throughout the country as directed trusts gained popularity.

c. Uniform Directed Trust Act (2017)

i. Trust Director/Protector **has same fiduciary duty and liability as trustee**.

NOTE – here again, **you can draft around this presumption in the trust document**.

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State Statutes and Uniform Acts (Cont'd)

ii. Notable Provisions

- ✓ Adds definitions of **"directed trust",** a **"directed trustee",** and **"trust director"**
- ✓ **"power of direction"** is defined (power over investment, management, or distribution of trust property, a power to amend a trust instrument or terminate a trust, or a power over other matters of trust administration)
- ✓ **and enumerates what is specifically excluded** (powers of appointment, the power to remove or appoint a trustee or trust director, the power of a settlor over a trust while the trust is revocable, etc.).

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State Statutes and Uniform Acts (Cont'd)

- ✓ defines **"terms of a trust" to a include trust terms established by or amended by a trust director**
- ✓ **Limitations on trust director with powers relating to Medicaid payback** or a charitable interest is subject to the same rules as a trustee regarding those items.
- ✓ **Duties and liabilities of trust directors are the same as trustees – however, can be modified by the trust instrument**

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State Statutes and Uniform Acts (Cont'd)

- ✓ Requires trust director and trustee to provide information as it relates to powers or duties of both of them
- ✓ **Neither a trustee nor a trust director has a duty to monitor, inform or advise a settlor, beneficiary, trustee or another trust director as to how the trust director might have acted differently than a trustee or another trust director**
- ✓ Jurisdiction

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State Statutes and Uniform Acts (Cont'd)

d. Trustees subject to a third-party veto

would definitely have oversight responsibilities under the UTC

"A trustee who administers a trust subject to a veto power occupies a position akin to that of a co-trustee and is responsible for taking appropriate action if the third party's refusal to consent would result in a serious breach of trust ." **UTC Section 808**

The UDTA is not in agreement.

"A trustee that operates under this kind of veto or approval power has the normal duties of a trustee regarding the trustee's exercise of its own powers, **but has only the duties of a directed trustee regarding the trust director's exercise of its power to veto or approve."**

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State Statutes and Uniform Acts (Cont'd)

e. Bottom Line

- States vary as to the presumption of fiduciary v. non-fiduciary capacity of Trust Protector.
- See State Listing of Trust Protector statutes/Directed Trust statutes in material.

f. Problem – in states where a Trust Director/Trust Protector can serve as a non-fiduciary, the question becomes who's the party from whom a beneficiary can seek redress if the directed trustee is absolved from liability for following the trust director's instructions, and the trust director is not a fiduciary?

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The Uniform Trust Code Approach

a. Section 808 – Directed Trusts

i. If the terms of a trust confer a power to direct certain trustee actions, **the trustee must accept such direction.**

ii. The power to direct a trustee is clearly set forth as a **fiduciary power** in the UTC. **This is a rebuttable presumption.**

iii. Commentary notes that the use of the term Trust Protector (as opposed to "Trust Advisor") connotes the grant of greater powers, sometimes including the power to amend or terminate the trust.

iv. Commentary also clearly provides that the provisions of §808 can be modified in the trust document.

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The Uniform Trust Code Approach (Cont'd)

b. State Approaches to Adoption of Section 808 (about 30+ states have adopted some form of Section 808)

1. §808 is adopted by the state **and is the sole guidance on the subject**
2. §808 is adopted by the state **but statute provides further guidance for trust protectors**

Example - Arizona provides specifically for the appointment of a trust protector and creates a default treatment of the TP as a nonfiduciary, **or some states even create a default of fiduciary with exceptions for certain enumerated powers.**

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The Uniform Trust Code Approach (Cont'd)

3. States that have not adopted the UTC, but incorporate some provisions of §808 into their trust codes.

4. States that have not adopted the UTC and have no directed trust or trust protector statutes.

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Directed Trustee Protections

We have spoken about the protection of Trust Directors/Protectors/Advisors from owing a fiduciary duty and limiting liability, but what about the directed trustee?

a. **Uniform Trust Code – does not expressly exonerate a directed trustee.**
b. **Nevada and other states – provide that a directed trustee is not liable for loss in complying with a directed act.**
c. **Delaware – has a low liability statute which provides that a directed trustee is not liable as long as s/he does not act with willful misconduct.**

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Directed Trustee Protections (Cont'd)

d. **Uniform Directed Trust Act – uses the willful misconduct type language not quite the same as Delaware. It provides that a directed trustee will not be liable for reasonably complying with the directed act but must not carry out the directed act if doing so would be an act of willful misconduct.**

Confusion – this standard is criticized for uncertainty injected into determining whether complying with a directed act is itself willful misconduct. The criticism is that by making the directed trustee responsible for determining wither the director's instructions would constitute an act of willful misconduct, the trustee must evaluate the merits of the directed act.

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State Statute Variations

a. **All statutes give deference to the trust instrument itself** – so start looking at the trust document first, and then the statute

b. Notable Differences Among State Statutes
   - Some states use the term "Directed Trust Statute," but include a "Trust Protector" term in the definitions section of the statute, or maybe "Trust Advisor."
   - Some state statutes have a "non-inclusive" list of powers (some very short and some longer).
   - Some states do not offer a list of powers and authority – rather, these jurisdictions rely on the trust instrument itself

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Why Use a Trust Protector Today?

a. **Adds flexibility to the administration of a trust – avoid court involvement – oversee actions of trustee**
   - **Avoids costs and time-consuming process of court modification of trusts.**
   - **No longer limited to offshore asset protection trusts**
   - **Now typically used in more traditional estate planning strategies, including various irrevocable trusts that cannot be amended by grantor, Life Insurance Trusts, Irrevocable Gifting Trusts, and even Revocable Trusts**

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Why Use a Trust Protector Today? (Cont'd)

b. TP can address **family dynamics/conflicts without court intervention**
   - Example - TP can address **disputes between the trustee** and **family members/beneficiaries**

c. Can address/support a family member serving as trustee **who lacks higher level of sophistication** than the appointed Trust Protector

d. Can address a **corporate trustee that requires greater familiarity with family members to best administer the trust**

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Why Use a Trust Protector Today? (Cont'd)

e. Can address **changes needed to be made to the trust instrument without court intervention**.

- Nonjudicial modification to the trust instrument provides maximum flexibility.

f. Can assure the **trust instrument stands the test of time.**

- Particularly useful for so-called "dynasty trusts" which are intended to extend well into the future

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Why Use a Trust Protector Today? (Cont'd)

- Can you imagine a trust from the 1960s being able to address **Assisted Reproductive Technology** or **Gender issues** today?
- What about **cryptocurrency** or **legalization of marijuana**?

g. TP **can interpret the provisions of the trust for trustee and/or beneficiaries**

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Drafting Considerations

a. Should you allow the Grantor or a Beneficiary to have authority to remove a Trust Protector?

No. This power to remove and replace the Trust Protector may cause estate tax inclusion for the Grantor or Beneficiary. Instead, the trust document should provide that any Beneficiary will have the right to petition the court to remove or replace the Trust Protector.

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Drafting Considerations (Cont'd)

b. How do you limit the Trust Protector's Duty to Monitor or Keep Informed and Liability?

Example 1

The Trust Protector shall have no duty to monitor any trust created hereunder in order to determine whether any of the powers and discretions conferred under this Agreement should be exercised. Further, the Trust Protector shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss. Any exercise or nonexercised or the powers and discretions granted to the Trust protector shall be in the sole and absolute discretion of the Trust Protector, and shall be binding and conclusive on all persons. The Trust Protector is not required to exercise any power or discretion granted under this Agreement. **Absent bad faith on the part of the Trust Protector, the Trust Protector is exonerated from any and all liability hereunder arising from any exercise or nonexercised of the powers and discretions conferred under this instrument.**

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Drafting Considerations (Cont'd)

Example 2 – Limit Liability and No Duty to Monitor

Section X. Provisions for Trust Protector

The function of the Trust Protector is to direct my Trustee in matters concerning the trust and to assist, if needed, in achieving my objectives as manifested by the other provisions of my estate plan.

(a) Good Faith Standard Imposed

The authority of my Trust Protector is conferred in a nonfiduciary capacity, and my Trust Protector is not liable for any action taken in good faith. **My Trust Protector is not liable for any act, omission, or forbearance.** [Emphasis added]

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Drafting Considerations (Cont'd)

(b) No Duty to Monitor

My Trust Protector has no duty to monitor any trust created under this instrument in order to determine whether any of the powers and discretions conferred by this instrument on my Trust Protector should be exercised. Further, my Trust Protector has no duty to be informed as to the acts or omissions of others, or to take any action to prevent or minimize loss. Any exercise or non-exercise of the powers and discretions granted to my Trust Protector is in his or her sole and absolute discretion and will be binding and conclusive on all persons. **My Trust Protector is not required to exercise any power of discretion granted under this instrument.** [Emphasis added]

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Drafting Considerations (Cont'd)

c. **How do you state grantor's intention that the Trust Protector must take some affirmative action in protecting beneficiaries?**

It is grantor's intention that in exercising this power the Trust Protector shall consider and review on a periodic basis all relevant circumstances, including the trustee's performance in light of the purposes of the trust and the needs of beneficiaries, and shall use his best judgment in maintaining a qualified, suitable person or entity to serve as trustee hereof. The Trust Protector serving hereunder shall not be liable for any action or inaction except where there is found to be fraud, reckless or willful misconduct.

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Drafting Considerations (Cont'd)

But if you are going to give the Trust Protector fiduciary duties, then the drafting attorney should consider providing language in the trust instrument substantially protecting the Trust Protector:

a. The Trust Protector can be given an immediate and absolute right to require that the Trust defend the Trust Protector from any litigation (which substantially deters most frivolous lawsuits since the defense moneys are immediately paid from the Trust), and

b. The Trust can be required to pay for Errors & Omissions insurance for the benefit of the Trust Protector.

The worst thing that a drafter can do is to give the Trust Protector the bad half of the loaf, i.e., make the Trust Protector a fiduciary, but not protect the Trust Protector as a fiduciary.

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Drafting Considerations (Cont'd)

If a drafting attorney is going to make the Trust Protector a fiduciary, then those fiduciary duties need to be clearly and specifically set out -- otherwise, the Trust Protector has the potential to be sued if anything goes wrong with the Trust even if the Trust Protector did not know about it.

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Drafting Considerations (Cont'd)

d. Trust Protector Designator

You can appoint a TP Designator which could be any of the following:

- **The trustee**
- **The law firm/an attorney or other professional**
- **An Independent Person**

This assures there is an acting TP only when the need arises, but also requires drafting attorney to address issues of monitoring, compensation, when to appoint, etc.

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Drafting Considerations (Cont'd)

e. Appointing a Co-Trustee as an Alternative to Appointment of a Trust Protector

- **Appoint a co-trustee, which has the advantage of eliminating any ambiguity around whether the individual appointed owes a fiduciary duty to the beneficiaries.**
- **Similarly, however, there may be circumstances where the grantor or drafting attorney may not wish to appoint a co-trustee.**

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Drafting Considerations (Cont'd)

f. Power to Revoke Medicaid Asset Protection Trust?

"Hello Howie,

I hope you and the family are well. Can you please give me some guidance. I drafted an IRT with trust protector provisions. Under the agreement, the TP can revoke any trusts created under the agreement.

Since signing the trust, my client has had a falling out with her beneficiaries (grandchildren) and is now adamant that she wants to revoke the entire trust. I know this typically requires the consent of all beneficiaries, but if the TP has the power to revoke, can the revocation be done without the consent of the beneficiaries?

Thank you for any assistance you can provide."

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Who Should Serve as the Trust Protector

Someone who can be **objective** in evaluating the circumstances and **apply the grantor's intent** to the **family dynamics/issues presented** throughout the course of the trust administration

a. Use this appointment to fill a void in expertise

1) Such as **special needs planning** if the appointment of a family member requires the addition of specialized knowledge of government benefits rules

2) Grantor's Attorney – can sometimes serve if willing to do so. For Example - appointment of attorney as Trust Protector in MAPT cases

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Who Should Serve as the Trust Protector (Cont'd)

b. Generally – **stay away from grantors, beneficiaries, contingent beneficiaries or creditors from serving as TP**

c. Best to select an independent third party who can act without influence by beneficiaries

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Powers and Authorities Given to Trust Protectors

a. Power to remove and replace Trustees and Trust Advisors

- Trustee may no longer be a good fit, needs of trust administration have changed, bad actor, etc.

b. Power to select Trust Advisors not originally anticipated to be needed

c. Power to Review and Approve accountings

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Powers and Authorities Given to Trust Protectors (Cont'd)

d. Power to determine and/or negotiate Trustee (and other fiduciary) fees

- and settling issues with respect thereto

e. Power to Amend the Trust

- Typos – ambiguities – changes in the law
- MAPT – HRA experience re: Use and Occupancy of Homestead Property
- SNT – changes in POMS requires language changes in trust

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Powers and Authorities Given to Trust Protectors (Cont'd)

f. Power to Decant

g. Power to Terminate Trust

h. Power to Add/Remove Beneficiaries

i. Power to Grant a Power of Appointment (or modify or revoke a beneficiary POA)

j. Power to Change Situs

- **Especially where a corporate trustee is less likely to do so (loss of trusteeship is a conflict for corp. trustee to change situs)**

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Powers and Authorities Given to Trust Protectors (Cont'd)

k. Power to Address Changes in the Law

l. Power to Address Income and Estate tax changes

n. Power to Address Social Security Rule Changes

n. Power to Address Medicaid rule Changes

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Case Law Review

Robert T. McLean Irrevocable Trust v. Ponder, 418 SW 3d 482 (Mo. Ct. App., October 24, 2013)

1) Holding - Missouri Court of Appeals holds that Trust Protector does not have any responsibility – actual or implied – to **monitor** or **supervise** the activities of a trustee in determining whether to remove a trustee.
2) TP was designated a fiduciary and had the power to remove and replace the trustee, but he nevertheless allegedly stood by and watched the trustee totally dissipate the trust funds over a period of less than 24 months, which funds were intended to provide for the beneficiary during his anticipated life expectancy of over 25 years.
3) The successor trustee sued the trust protector for breach of duty for failing to remove the trustee and for the resulting damages. The protector argued that he had no duty to supervise or monitor the trustee, and thus, no liability for damages.

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Case Law Review *(McLean Cont'd)*

4) **This case had a SNT established for the beneficiary, Robert McLean. The Trust protector's authority was conferred in a fiduciary capacity under terms of the trust, but "TP shall not be liable for any action taken in good faith."**
5) Court stated – "While the Trust Protector has the right to fire such an errant Trustee, it should probably not be the job of the Trust Protector to constantly monitor the Trustee's activities or be responsible for losses. Instead, either the Beneficiaries should be charged with monitoring the Trustee's activities (for their own protection, if nothing else), or an independent Co-Trustee should be appointed for that specific purpose. These other parties can then complain to the Trust Protector, who can then investigate and fire the errant Trustee if warranted."

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Case Law Review

Minassian v. Rachins, 4th District Court of Appeal, Florida, December 3, 2014

- FACTS - Children of trust settlor brought action against trustee, who was settlor's wife, claiming breach of fiduciary duty. After, trustee appointed a Trust Protector to amend the trust, children filed supplemental complaint challenging the validity of amendments made by the TP, and the trustee and children each moved for summary judgment as to the validity of the amendments.
- The amendment adopted by the Trust Protector provided: "Upon the death of [the wife] and the termination of the [f]amily [t]rust as provided in [art. 10, §7] if there is any property remaining, it shall be disbursed to a new trust to be created upon the death of [the wife] with a separate share for each of the children."

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Case Law Review *(Minassian Cont'd)*

- Trust was ambiguous as to whether a common pot trust approach or a split-trust approach would be created for the benefit of the surviving spouse at the time of the husband's death, or if the Marital Trust would be funded first, and then the Family Trust fbo the children would upon the death of the surviving spouse be established fbo the children and be funded with whatever was left in the Marital Trust.
- If both would be funded simultaneously, this would allow the children to be considered contingent remainder beneficiaries of the spousal trust and impact on the amount of trust funds that could be used to maintain the wife's lifestyle.

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Case Law Review *(Minassian Cont'd)*

- HOLDING
  - ✓ Florida Trust Code provides "The terms of a trust may confer on a trustee or other person a power to direct the modification or termination of the trust." FS §736.0808(3). This is identical language to UTC §808(c).
  - ✓ Court holds that a trust code section allowing trust to confer power to modify its terms permitted trust provision authorizing appointment of trust protector to modify terms of trust, and
  - ✓ Trust agreement was ambiguous, so as to empower trust protector to exercise her authority to correct the ambiguity by modifying the terms of the trust.

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Case Law Review

In re Eleanor Pierce (Marshall) Stevens Living Trust and Eleanor Pierce Stevens Revocable Gift Trust, 159 So.3d 1101 (La.App. 3 Cir. February 18, 2015)

Holding – Enforcement of trust providing for appointment of a "trust protector" permitting the removal of a co-trustee did not violate public policy, even if trust gave trust protector authority to remove trustee; designation of trust protector allowed for better protection of settlor's interest in managing assets for benefit of beneficiaries, as beneficiaries were no longer saddled with responsibility of monitoring trustee for a breach of fiduciary duty.

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Case Law Review

Midwest Trust Company v. Brinton, 331 P.3d 834 (August 15, 2014), 2014 WL 4082219 (Kan. Ct. App., July 22, 2015)

Grantor established a trust under which his daughter had a special power of appointment to devise the trust assets to whomever she chose, but she was first required to consult with the designated trust protector and get his approval for the exercise of her appointment power.

In this case, daughter consulted Trust Protector # 2 (successor to TP # 1), and in so doing the court determined that she was required under the terms of the trust to consult with TP #1 according to the clear and unambiguous language of the trust – not # 2. Thus, her power of appointment failed.

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Actual Applications – The Trust Protector Saves the Day

a. Special Needs Trust - Change in POMS (Actual Case)

1) Mom died in 2010 leaving assets to her disabled daughter on SSI.
2) Court order dated July 1, 2010 directs (pre-dates SNT Fairness Act enacted in 2016) creation of D4A trust on behalf of the daughter rather than going to her outright.
3) July 20, 2010 – self-settled d4A trust fbo daughter is created and I am named as Trust Protector. Trust is immediately sent to both SSA and Medicaid for review.

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Actual Applications – The Trust Protector Saves the Day (Cont'd)

4) May 2012 – SSA changes POMS (SI 01120.201F.3.c) re: reimbursement of family members for travel expenses incurred in visiting a beneficiary of a 1st party special needs trust. SSA concluded that payment for such travel violates the sole benefit rule.
5) Thus, immediate family members who were authorized to receive reasonable out of pocket travel and lodging expenses for visits to the beneficiary at his home would no longer be permitted. So, while beneficiary expenses to visit relatives is permitted, this does not extend to paying for the family to visit or travel.

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Actual Applications – The Trust Protector Saves the Day (Cont'd)

6) May 2013 – SSA added two new examples where travel expenses would be allowed:

   a. The trust could reimburse family members when travel expenses were necessary for the "trust beneficiary to obtain medical treatment."
   b. The second exception applied where the trust beneficiary lived in an institution, nursing home, or other long-term care facility or supported living arrangement" and travel by family members was necessary "for ensuring the safety and/or medical well-being of the individual."

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Actual Applications – The Trust Protector Saves the Day (Cont'd)

7) July 17, 2013 – client calls my office and states she received a letter that her SSI benefits are being suspended by July 31, 2013 due to the defective trust that I drafted!

   My heart sank upon learning this news and I began to wonder how? How did I draft a defective trust? What did I fail to do?

8) The answer is – I didn't do anything to create a defective trust at the time it was established – rather, a change in the POMS caused the 2010 trust language to be ineffective and it took SSA 3 years to review my trust!
9) Thus, all that was needed was a modification to the trust. But how can I get that done by July 31, 2013, when benefits would be suspended?

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Actual Applications – The Trust Protector Saves the Day (Cont'd)

10) <u>Options</u>

   a. **Go to court and seek emergency relief to modify the trust**
      - ✓ **Unlikely to obtain court approval for necessary replacement language by the end of the month** (preparation of petition requires time, many judges on vacation during summer, court calendar, etc.; or

   b. **Exercise of Trust Protector to bring travel reimbursement language in line with new POMS.**

      Time Needed – about 10 minutes!

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Actual Applications – Maybe Not Such a Good Idea After All?

b. Phone call from Grantor of MAPT - "I No Longer Want One of My Co-Trustees to Serve – What Can I Do?"

1) Medicaid Asset Protection Trust established on April 6, 2011.
2) Co-Trustees are grantor's son and stepdaughter, with joint authority to act.
3) Section 2.11 of MAPT provides for appointment of drafting attorney as Trust Protector.
4) No communication with client after establishment of MAPT (about 13 years passes by).

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Actual Applications – Maybe Not Such a Good Idea After All? (Cont'd)

5) Son calls me and asks if I can help remove his stepsister as Trustee. I decline to render any advice because that would put me between 2 Co-Trustees. I also decline to represent the son to avoid any allegations from stepdaughter/stepsister since I was the drafting attorney.
6) I determine my obligation flows to the grantor, the mother in this case.
7) Mother (grantor) contacts me and affirms she wishes to remove her stepdaughter as a Co-Trustee of the MAPT. What can she do to make that happen?
8) Section 2.11(e) --- Authority to Remove and Appoint Trustees

"The Trust Protector may remove any Trustee of a trust created under this agreement, other than any of my descendants."

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Actual Applications – Maybe Not Such a Good Idea After All? (Cont'd)

8) Last I checked, a stepdaughter is not a descendant, so now I know I can remove stepdaughter as currently acting Trust Protector.
9) What Did/Should I Do?

a. Under Section 2.02 of the MAPT, it states that "[i]f any of my Initial Trustees fails to serve, the remaining Initial Trustees will continue to serve, without the necessity of a successor trustee."
b. So now I know that if I, as TP, remove stepdaughter, then grantor's son would continue to serve as Trustee alone.

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Actual Applications – Maybe Not Such a Good Idea After All? (Cont'd)

c. A long time ago I learned the following:
"Just Because You Can, Doesn't Mean You Should."

d. I didn't want to get involved in a potentially conflicted trust administration matter in case stepdaughter would refuse to bow out willingly.

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Actual Applications – Maybe Not Such a Good Idea After All? (Cont'd)

e. So now I ask the question, was it a good idea to allow myself to be appointed as Trust Protector? I'm in a pickle, aren't I?

f. Section 2.11(a) Saves the Day!

2.11(a) states "[t]he serving Trust Protector may appoint a successor Trust Protector in writing, which appointment will take effect upon the resignation, incapacity, or death of the appointing Trust Protector."

BINGO!

g. I called the mother and told her to find a replacement Trust Protector, I will resign and appoint the person of her choice, and the new Trust Protector will handle the trustee removal.

PROBLEM SOLVED!

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Resources

- *The Case Against the Trust Protector*, Alexander Bove, Jr., ACTEC Law Journal, Vol. 37:77, Summer 2011 (arguing against Trust Protectors being permitted to act in a non-fiduciary capacity)
- *Springing Protectors – Now You See 'em, Now You Don't*, Alexander Bove, Jr., Probate & Property, September/October 2024
- *The Uniform Directed Trust Act: Contents, Content and Critique*, Charles E. Rounds, Jr., Trusts & Estates Magazine, December 2017, page 24
- *Beyond UTC Section 808 and the Uniform Directed Trust Act*, Wayne E. Reames, ACTEC Law Journal, Volume 45, Number 1, Article 12, September 1, 2019

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Resources (Cont'd)

- *Peter Protector in Trust Neverland: The Real Story of the Trust Protector 1* (2003), Alexander A. Bove, Jr. & Melissa Langa, available at http://bovelanga.com/publications/news_briefs/trusts_and_estates_forum/Real%20Story%20Trust%20Protector.pdf
- *The Trustee and the Trust Protector: A Question of Fiduciary Power, Should a Trust Protector be Held to a Fiduciary Standard? Philip J. Ruce*, Drake Law Review, Vol.59, page 67, February 24, 2011 (arguing that Trust Protectors should be held to fiduciary standard).
- *Trust Protectors Under Current Florida Law: A Passing Trend or Valuable Planning Tool?* Jeffrey S. Goethe, Florida Bar Journal, Real Property, Probate and Trust Law Column, June 2017, 91-JUN Fla. B.J. 34
- *Trust Protectors*: Why They Have Become "The Next Big Thing," 50 Real Property, Trust and Estate J. 267

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Resources (Cont'd)

- *Trust Advisors*, 78 Harv. L. Rev. 1230 (1965)
- *When is a Trust Protector a Fiduciary*?, 27 Quinn. Prob. Law J., 277 (2014)
- *Trust Protectors for Special Needs Trusts*, Gregory Wilcox, The Voice, Special Needs Alliance, August 2017 – Vol. 11, Issue 5
- *Protectors and Directors and Advisers: Oh My! The New Florida Uniform Directed Trust Act*, Charles D. Rubin and Jenna G. Rubin, Florida Bar Journal, Vol 96, No. 2, March/April 2022, page 9
- *Trust Protectors: The Role Continues to Evolve*, Andrew T. Huber, Probate and Property Magazine, January/February 2017, Volume 31 No. 1, Section of Real Property, Trust and Estate Law, American bar Association

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Thank You!

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National Conference on Special Needs Planning and Special Needs Trusts

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The Nuts and Bolts of First Party Special Needs Trusts

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THE NUTS AND BOLTS
OF
FIRST PARTY SPECIAL NEEDS TRUSTS

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STETSON LAW
2024 National Conference on
Special Needs Planning and Special Needs Trusts

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I. INTRODUCTION

Before we dive into the world of first party special needs trusts, it is important to understand what a special needs trust is and why we use them. A special needs trust (also known as a supplemental needs trust or SNT) is a specific type of trust designed to preserve assets for individuals with disabilities without jeopardizing their eligibility for means-tested government benefits like Medicaid, Supplemental Security Income (SSI) and federal and state subsidized housing (under the new HOTMA regulations). Special needs trusts are extremely beneficial to ensure that disabled individual may have funds available for their benefit to give them a quality of life they may not have otherwise been afforded. Public benefits such as Medicaid and SSI provide the bare essentials needed for medical care and the necessities of daily living and sometimes not even that. For example, the current maximum SSI benefit for a recipient is $943 per month, from which the recipient must pay their rent (usually subsidized), utilities, food, and other essentials of daily living. That is not a lot of money with the cost of living today. In addition, an SSI recipient cannot have more than $2,000 in countable resources or assets ($3,000 for a couple both receiving SSI). Countable resources include things like cash, bank accounts, CD's, annuities, and life insurance policies. So, when a disabled individual stands to receive a personal injury settlement (PI settlement) or an inheritance from a family member who did not set up a third party SNT, a first party SNT will allow the disabled individual to maintain their public benefits and have the funds available for their needs.

There are three types of SNT's:

1. **First Party Special Needs Trusts** (also known as self-settled or d4A Trusts):

They are called first party trusts because they are funded with the assets of the individual with disabilities who is under age 65, often from inheritances, gifts, personal injury settlements, or resources in excess of $2,000. These trusts are designed to supplement, not replace, public benefits such as Medicaid and SSI and must include a payback provision to reimburse Medicaid upon the beneficiary's death or trust termination. A First party SNT must comply with the requirements set forth in 42 U.S.C. § 1396p(d)(4)(A), which states:

"(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter."

Now, thanks to Section 5007 of the 21st Century Cures Act of 2016 entitled "Fairness in Medicaid Supplemental Needs Trusts" effective December 23, 2016, a mentally capable disabled individual under age 65 may establish their own first party SNT.

2. **Third Party Special Needs Trusts**:

Established and funded by someone other than the beneficiary, typically parents or other family members and do not require a Medicaid payback provision.

3. **Pooled Trusts** (also known as d4C trusts):

These trusts are managed by nonprofit organizations. The funds of the individual beneficiaries are pooled together to maximize investment opportunities and provide management services. Although the funds are pooled, a separate account is maintained for each individual beneficiary.

These materials focus exclusively on the first party SNT.

II. CONSIDERATIONS BEFORE CREATING A FIRST PARTY SNT:

1. Be Familiar with the Laws Governing First Party SNTs:

It is critical to the success of any first party SNT (and to the success of your practice) to know and understand the relevant state and federal laws relating to first party SNT's. These laws are often subject to interpretation by the various government agencies involved with them. They are all intertwined and can be clear as mud. These are the relevant laws:

a. 42 U.S.C. § 1396p(d)(4)(A)

This statute is part of the Omnibus Budget Reconciliation Act of 1993 (a/k/a OBRA-93) and was the birth of the first party special needs trust. It originally codified the ability for a parent, grandparent, guardian (or conservator in many states), or a court to establish trusts that would not be counted as a resource for SSI and Medicaid eligibility provided the trusts met certain criteria discussed in further detail below.

b. 42 U.S.C. § 1382(b)(e)(5)

Also known as the Foster Care Independence Act of 1999 (FCIA-99), this statute outlines critical exclusions and considerations relating to an individual's resources under the SSI program. More particularly, that a transfer penalty will not apply to transfers made to a trust created under 42 U.S.C. § 1396p(d)(4)(A)**.**

c. 21st Century Cures Act of 2016

Section 5007 of this Act entitled "Fairness in Medicaid Supplemental Needs Trusts" took effect on December 23, 2016. It allows mentally capable disabled individuals under age 65 to establish their own first party SNT's.

d. Social Security Administration's Program Operations Manual System (POMS)

The POMS provide a comprehensive set of guidelines that determine how SNTs should be evaluated and managed to ensure compliance with SSI rules. But beware, the POMS are constantly changing, subject to interpretation and not always clear. It is a good practice tip to review the POMS frequently.

There are also additional SSI practices established through Social Security Rulings and Acquiescence Rulings. Although we won't focus on these today, it is important to note that SSR's set a legal precedent established by a court, usually involving a legal ambiguity. These Rulings are published in the Federal Register and become part of the SSA's procedures. Acquiescence Rulings deal with SSA changes in policy due to a ruling by a U.S. Circuit Court of Appeals. The ruling is only applicable to the circuit court setting forth the ruling. It is not applicable nationwide. Although not law, the SSA does have to follow the ruling.

e. State Law

Consult your state's laws regarding their interpretation of the federal SSI and Medicaid laws as well as their guardianship/conservatorship, power of attorney, probate and trust laws.

f. Case Law

Be aware of federal and/or state case law that may impact the preparation, execution and administration of a first party SNT.

2. Listen And Learn:

Every situation, every client is different. There is nothing cookie cutter about preparing a first party special needs trust. Potential beneficiaries and/or their families, guardians or other responsible parties, want to know they won't lose their benefits and can use the funds to give them a better quality of life. Take the time to listen to their concerns and hopes for the trust

funds. For example, could they benefit from specialized medical equipment that Medicaid does not cover, can they buy a house, or would they like to travel to New York City and see a Broadway play? Determine what the complexities of the trust administration will be so that you can advise as to whether a professional trustee may be a better option than a family member.

Knowing and understanding the rules and eligibility requirements for the various government benefits programs the disabled individual is receiving, or may become eligible for, is critical to creating the right type of special needs trust or whether certain provisions need to be modified to the circumstances. Often times the disabled individual or their families don't know exactly what programs they are in. They frequently confuse SSDI for SSI and don't know whether they are in a Medicaid waiver program. Taking the time to educate them on the distinction between the programs can help the client determine what benefits they receive. You may even need to obtain permission from the client to speak with various agencies like SSA, Medicaid or the local housing authority to get confirmation on the benefits they receive. This is time well spent to ensure your trust is properly drafted.

3. Determine Who Should Establish The Trust And How To Fund It:

POMS SI 01120.203.C.2 tells us that a first party SNT may be "established through the actions of the individual; a parent(s); a grandparent(s); a legal guardian(s); or a court." Determining which one shall establish the trust depends on the individual circumstances of each case. But establishing the trust and funding the trust are two different things. Be very careful when funding a first party SNT. This is a trap for the unwary. The person or court establishing the trust with the assets of the disabled individual must have legal authority to fund the trust. Funding the trust without the requisite legal authority will render the trust invalid under state law. (POMS SI 01120.203.C.2.c).

a. The Individual:

If the disabled individual is legally competent as determined by state law, they may establish for themselves and fund it with their own assets. If the disabled individual is not legally competent but executed a durable power of attorney (POA) before their incapacity, the attorney in fact may establish and fund the trust, provided the POA has the requisite authority.[1]

b. The Parent or Grandparent:

A parent or grandparent may establish the trust on behalf of the disabled individual, but they lack the authority to fully fund it, unless they are POA for the disabled individual. They may also provide "seed" money in a nominal amount to initially fund the trust, or may use an empty or dry trust, if state law allows. (POMS SI 01120.203.C.2a). Thereafter, the legally competent disabled individual or another party with legal authority, such as a POA or guardian/conservator, may fund the trust with the disabled individual's assets. Absent other options, consider obtaining a court order to fund the trust.

c. The Guardian:

Although POMS SI 01120.203.C.2 specifically states "a legal guardian" may establish the first party SNT, most states have expanded this definition to include a court-appointed conservator. If a guardian or conservator is establishing and funding the trust, then the disabled individual has been deemed to lack the legal capacity to do so. The guardian or conservator will typically need to seek a court order to establish ***and fund*** the trust with the disabled individual's funds. Trap for the unwary: Under state law a guardian/conservator does not automatically

[1] POMS SI 01120.203.C.2.b states: "A power of attorney (POA) can establish legal authority to act with respect to the assets of an individual. A trust established under a POA for the disabled individual will result in a trust that we consider to be established through the actions of the disabled individual themselves because the POA establishes an agency relationship."

possess the authority to fund a first party SNT. Therefore, it is critical that the guardian/conservator's court petition specifically request this authority.

d. The Court:

There are several circumstances where a court may authorize the establishment and funding of a first party SNT. The first is by the parent, grandparent, or court-appointed guardian or conservator as discussed above. This may be as the result of an inheritance received by the disabled individual, or to reduce their assets to become eligible to receive SSI or Medicaid. The second is because the disabled individual will receive a personal injury settlement (PI settlement). In this case, as part of the settlement, the disabled individual's attorney will ask the court to establish the trust and allow the funds to be paid to the trust directly. Alternatively, the judge, of their own accord, may require this as part of the settlement. The court decision to establish and fund the trust should be stated as an "Order" or "Judgment" and not an agreement between the parties.

Consult your state's laws to determine if there are other circumstances in which a court may establish and fund a first party SNT.

4. Who Are The Players In The Trust?

Clearly denote who the parties are at the beginning of the trust. This makes it easy for the government agency reviewing the trust to ascertain the establishment of the trust complies with the law. The players in a first party SNT are the Creator, the Grantor, the Trustee and the Beneficiary. Their roles are defined as follows:

a. Creator – person establishing the trust, ie. the disabled individual, parent, grandparent, guardian/conservator, or by court order.

b. Grantor – person funding the trust - always the disabled individual since trust is funded with their fund.

c. Trustee – the person or organization that holds and manages the assets in the trust for the benefit of the beneficiary. Trustees are responsible for ensuring that the assets are managed according to the terms set out in the trust and must act in the best interests of the beneficiaries.

d. Beneficiary – the person the trust is established for. This principal and income of the trust is utilized for the benefit of the Beneficiary. In a first party trust, this is always the disabled individual and they can be the only beneficiary during their lifetime.

Consider the following beginning trust provision which lists the various parties and makes it clear who the players are:

CREATOR:	John and Mary Smith, both of Stoneham, Massachusetts, as parents of the Beneficiary,
GRANTOR:	Robert Smith, of Stoneham, Massachusetts, individually as a disabled individual,
TRUSTEES:	Michelle Mulvena, Esq., of Stoneham, Massachusetts, as the independent Trustee,
BENEFICIARY:	Robert Smith, of Stoneham, Massachusetts.

> THIS TRUST AGREEMENT is made and entered into this 4th day of September, 2024, by and between **John and Mary Smith**, hereinafter referred to as Creators; **Robert Smith**, individually as a disabled individual, hereinafter referred to as Grantor; and **Michelle Mulvena, Esq**., hereinafter referred to as Trustee, regarding **Robert Smith**, hereinafter referred to as Beneficiary. At the time of its creation, **Robert Smith** is a disabled person as defined in the Social Security Act (42 USC Section 1382c(a)(3)).

III. WHAT ARE THE REQUIREMENTS OF A FIRST PARTY SNT:

1. The trust must be established for the sole benefit of the disabled individual. There can be no other beneficiaries to a first party SNT.

2. The beneficiary must be disabled as defined in 42 U.S.C. § 1382c(a)(3)(A):

> "Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this subchapter if he 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 which has lasted or can be expected to last for a continuous period of not less than twelve months."

3. The beneficiary must be under the age of 65 at the time the trust is established and funded. Funding of a first party SNT must be completed before the beneficiary reaches age 65. Thereafter, the trust may grow depending on its investment strategy but no further assets of the disabled beneficiary can be added. But one exception relates to structured settlements. Structured settlement payments may be made to the trust after age 65 if the trust is the beneficiary and the settlement agreement is made prior to age 65.
4. The trust must be irrevocable.
5. The trust must include a payback provision to reimburse ***any*** state Medicaid agencies upon the death of the beneficiary, or upon early termination of the trust, for benefits provided during the beneficiary's lifetime. This is a key requirement of a first party special needs trust. It is best to use the exact same language found in POMS SI 01120.203.B.8, which is:

> "Upon the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s)."

It is important to reference states plural, even if the beneficiary never moved to another state. Do not just name your state or the state of the situs of the trust. It must be all inclusive to pass SSI and Medicaid muster. In addition, SSA and Medicaid will only allow for certain administrative expenses to be paid from the trust upon the beneficiary's death before reimbursement to state Medicaid is made. Under POMS SI 01120.203.E.1, the only permissible administrative expenses 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.

No other expenses are permitted prior to reimbursement to the state Medicaid agency, including the following prohibited expenses and payments pursuant to POMS SI 01120.203.E.2:

- Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- Inheritance taxes due for residual beneficiaries;
- Payment of debts owed to third parties;
- Funeral expenses; and
- Payments to residual beneficiaries.

Be sure to list both allowable and prohibited expenses/payments verbatim from this POMS in your trust to give the trustee (especially a non-professional trustee) directions on what they can and cannot pay for upon the beneficiary's death or early termination of the trust, to avoid having your trust considered a countable asset by SSA and Medicaid.

IV. OTHER COMPONENTS OF A FIRST PARTY SNT:

1. The Disabled Individual Is Always The Grantor

As stated above, the creator establishes the trust but the grantor is the person who is contributing their own assets to the trust. In a first party SNT, this will always be the disabled individual. You do not want to comingle assets of other people, such as parents or other family members, in a first party SNT because those assets would just be paid to the state upon the death of the beneficiary. Instead, family members should establish a third party SNT, which does not require a payback provision. Although not the subject of these materials, there is a presentation on third party SNT's at this and is year's Stetson conference and should be in your materials.

2. Income Tax Treatment Of The Trust

Part of preparing a first party SNT is considering the tax consequences of the trust. It is commonly thought that income from first party SNT's is not taxable, primarily when they are

funded with PI settlements. That is true to an extent. It is true that PI settlements are not taxed for income tax purposes when the settlement is first received. However, if they are invested and accrue interest or dividend income, that income has to be taxed. Uncle Sam wants his money.

A first party SNT is treated as a "grantor trust" for income tax purposes because the beneficiary funded the trust with their own assets and those assets are used exclusively for their benefit. For this reason, even though the trust is irrevocable, it will be taxed as a grantor trust. All of the income, whether distributed out or retained in the trust, will be taxed to the beneficiary as the grantor and reported on their personal return. The trust will file an informational Form 1041 with the IRS and state taxing authority to show that all income was reported on the beneficiary's return. It is beneficial to the beneficiary and the life of the trust to have the income taxes reported on the beneficiary's personal income tax return because individuals are taxed at lower income tax rates than trusts. But won't that negatively impact the beneficiary's continued eligibility for SSI or Medicaid? Not necessarily. This is another reason why it is critical to understand the eligibility requirements of the means-tested government benefits the beneficiary is receiving. The definition of "income" varies widely between various government agencies. Not all "taxable income" is "countable income" for SSI, Medicaid purposes, and federal/state housing benefits. SSI will consider shelter payments as unearned income but not other in-kind distributions such as payments for private caregivers. Whether Medicaid will consider certain taxable income as "countable income" will depend on state law.

3. Early Termination

A first party SNT may include the power to terminate the trust before the beneficiary's death in the event there is a change in circumstances such as the beneficiary is no longer disabled, or it is no longer economical to justify the continuance of the trust. Early termination

clauses have been the subject of much scrutiny by SSI. If you intend to use one, it is best practice to follow the POMS directly. POMS SI 01120.199.E sets forth the three requirements that must be met for an early termination clause to be valid, otherwise your trust will be a countable resource for SSI purposes.

> "A trust that contains an early termination provision may not be excepted from the SSI resource counting rules at section 1613(e) of the Act unless it satisfies the requirements in either section 1917(d)(4)(A) or section 1917(d)(4)(C). Additionally, the trust must satisfy the resource counting rules in SI 01120.200D and SI 01110.100B in order not to be a countable resource. To meet those requirements, all of the following criteria must be met:
>
> - Upon early termination (i.e., termination prior to the death of the trust beneficiary), the State(s), as primary assignee, would receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s); and
>
> - Other than payment for the administrative expenses listed in SI 01120.199E.3 in this section and in SI 01120.201F.4, no individual or entity other than the trust beneficiary may benefit from the early termination (i.e., after reimbursement to the State(s), **all** remaining funds are disbursed so as solely to benefit the trust beneficiary); and
>
> - The early termination provision gives the power to terminate to an individual or entity other than the trust beneficiary." POMS SI 01120.199.E.

Much like the payback provision, this is another instance where it is best to quote the POMS verbatim in your trust. POMS SI 01120.199.G2 gives us an example of an acceptable early termination clause.

> "upon early termination, the State(s) will first be reimbursed for the amount of medical assistance paid on behalf of the trust beneficiary, and any remaining assets will be distributed to the beneficiary."

In some cases, you may not want to include an early termination clause or you may want a clause that specifically prohibits early termination. But bear in mind this will reduce the flexibility of the trust to be able to accommodate changing circumstances of both the beneficiary and the financial health of the trust.

4. Trust Distribution Standard

A first party SNT should have a fully discretionary distribution standard as opposed to an ascertainable standard used in other types of trusts. Discretionary means that the trustee has the authority to decide when and how much to distribute from the trust for the benefit of the beneficiary. The trustee will make decisions regarding distributions in their "sole and absolute" discretion bearing in mind the means-tested government benefits the beneficiary is receiving. A discretionary distribution standard will give the trustee flexibility to make distributions in the best interest of the beneficiary, even if it results in a reduction of benefits. A discretionary distribution standard may look something like this:

> The Trustees may pay or apply for the Beneficiary's benefit during the Beneficiary's lifetime such amounts of principal or income, or both, of the Trust for the satisfaction of the Beneficiary's supplemental care, as the Trustees, in the Trustees' ***sole and absolute discretion***, may from time to time deem reasonable or necessary. (emphasis added).

Some trusts may employ a strict distribution standard. However, this is not advisable, unless required under state law. As the name implies, it can be ***too*** restrictive and may be misinterpreted by SSI as requiring payments for things that SSI or Medicaid is already paying or providing. This type of standard limits the trustee's authority and the flexibility of the trust to roll with changes in beneficiary circumstances or laws. For example, it may prohibit the trustee from making in-kind distributions of shelter, even though this will result in a reduction in SSI benefits, that will provide a substantial benefit and perhaps better, safer quality of life for the beneficiary.

5. Supplement but not Supplant Standard

Another key component of the trust distribution standard is the trustee's authority to "supplement but not supplant" (or similar language) services, benefits, and medical care available to the Beneficiary through any public benefits, such as SSI or Medicaid. This phrase, or similar wording, must be present in a first party SNT. But what does it mean to supplement but not supplant? The primary purpose of a first party SNT is to supplement public benefits. Basically, the trust funds should enhance the beneficiary's quality of life by paying for such things as travel, entertainment, private-pay medical services and other benefits not provided by government programs. The term "supplant" means that trust funds should not be utilized to replace any public benefits the beneficiary is already receiving. Instead, it should complement them. Consider the following sample provision:

> The Trustees may supplement but may not supplant services, benefits, and medical care available to the Beneficiary through any governmental sources . . . It is the intention of the Creators to create a supplemental fund for the benefit of the Beneficiary, and not to substantially displace any assistance that might otherwise be available from any public or private sources. The Trustees may supplement such sources, but the Trustees should not make distributions from the trust that supplant services, benefits or medical care that are otherwise available to the Beneficiary from any governmental resources.

6. Ability to Amend the Trust

The trust should grant the trustee the authority to amend the trust, without court authority to the extent possible and under limited circumstances such as:

- **a.** later changes, interpretations, or state variations in federal or state law involving public benefits to better effect the purposes of the trust;
- **b.** Preserve public benefits eligibility for the beneficiary;
- **c.** Administrative changes;
- **d.** Correct mistakes or ambiguities in the trust.

If the trust does not clearly set forth the trustee's authority to amend, then it will be necessary to seek court approval of any amendments. Of course, if the trust was established under court order, then the court may require that any changes be approved by the court anyway. Amending the trust via a court order should be the avenue of last resort. While going to court is neither time nor cost efficient, it is best to leave that avenue available to the trustee or to the beneficiary or their personal representative. Be sure to check state law as well because state laws may vary as to what authority the trustee may have to amend.

Consider this example of a limited power to amend:

> 13.1 TRUSTEE'S AMENDMENT. The Trustee may, in the Trustee's sole and absolute discretion, amend the trust to conform with later changes, interpretations, or state variations in federal or state law involving public benefits to better effect the purposes of the trust. A Court may require the Trustee as a condition of approval of this Trust to seek Court approval of any amendments. No amendment may change the requirement that the state medical assistance agency, or specifically the <State of _____>, shall be paid back for medical assistance paid on behalf of the beneficiary.
>
> 13.2 COURT AMENDMENT. The Trustee or an interested person may apply to a <State> Probate Court, or a court where the Beneficiary lives with jurisdiction over trust matters, or to a court where the trust has property, for authority to amend the trust to better effect the purposes of the trust, including but not limited to the reasons stated in Article 13.1 herein, except that no amendment may change the restrictions or notice requirements as stated in Article 13.1 and which also apply herein. The applicant shall give notice of the proposed amendment to other interested persons.

For a broader power to amend, consider the following;

1. **Authority to Amend**: The Trustee shall have the power to amend this Trust, in whole or in part, without court approval, as deemed necessary or advisable to:
   a. Ensure the Trust remains compliant with applicable laws and regulations.
   b. Preserve the eligibility of the Beneficiary for public benefits.
   c. Address changes in the Beneficiary's needs or circumstances.
   d. Correct any errors or ambiguities in the Trust document.

2. **Limitations on Amendments**: Any amendment made by the Trustee shall not:

a. Alter the primary purpose of the Trust, which is to provide for the Beneficiary's supplemental needs without disqualifying the Beneficiary from public benefits.
b. Change the Beneficiary of the Trust.
c. Result in the Trust's assets being used for purposes other than those intended to benefit the Beneficiary.

3. **Procedure for Amendments**: The Trustee shall:
   a. Provide written notice of any proposed amendment to the Beneficiary (or, if not competent then to the Beneficiary's legal representative) and any other interested parties as required by law.
   b. Obtain any necessary consents or approvals from the court or other relevant authorities, if required.
   c. Execute a written instrument setting forth the amendment, which shall be attached to and made a part of this Trust.

4. **Effective Date of Amendments**: Any amendment made pursuant to this Article shall become effective on the date specified in the written instrument of amendment, or if no date is specified, on the date the amendment is executed by the Trustee.

7. Trust Protector

In some situations, it may be a good idea to add a trust protector. A trust protector is an individual or entity appointed in the trust to oversee and safeguard the interests of the beneficiary. A trust protector can be an attorney, a family member, a trusted family advisor, a guardian or conservator, or an organization. It can be one person or several. For example, there can be a committee made up of a family member, guardian or conservator, and a financial advisor. They serve as an additional layer of oversight, ensuring that the trust is administered according to its primary intent and in the best interests of the beneficiaries. This can be particularly helpful in a first party SNT where a family member is serving as trustee and may not fully understand the intricacies and interplay of public benefits to the trust. A trust protector can advise a family trustee with regard to investment strategies and how and when to make appropriate distributions for the benefit of the beneficiary. The role of the trust protector can be as limited or broad as needed under the circumstances. Some duties might include the following:

a. **Oversight of the Trustee**: They may review the trustee's records and annual accountings and challenge any discrepancies.

b. **Power to Remove and Replace the Trustee**: If the trustee is not performing their duties correctly, the trust protector can remove them and appoint a new trustee.

c. **Power to Amend or Terminate**: They may have the authority to amend the trust to address changes in law or circumstances, and terminate the trust.

d. **Distribution Powers**: They may advise the trustee in making appropriate distributions or may override a trustee's decision with regard to making or not making distributions from the trust.

e. **Investment Powers**: They may have the authority to oversee the trust investments or change the investment strategy,

f. **Dispute Resolution**: They can resolve disputes between trustees and beneficiaries.

If adding a trust protector, be sure to contemplate the additional costs that may be incurred to the trust for utilizing this role. If a professional is serving in this position, they will charge for their services. It may also increase the trustee fees if the trustee has to respond to voluminous requests or interjections by a trust protector. Whether to include a trust protector in the trust takes careful thought and will depend on the circumstances.

V. TRUSTEE SELECTION

The selection of the trustee is key to the success of the trust and the protection of its assets. The wrong trustee can cause the trust to fail as a protected resource for the beneficiary, fail to make appropriate distributions, make poor investment choices, misappropriate funds, and neglect the beneficiary and their needs.

The trustee can be a trusted family member, friend, professional trustee, attorney, certified public accountant, bank, trust company, or other financial institution. The disabled individual cannot be the trustee. Serving in this role would give the disabled individual too much control over the trust and would result in the trust assets being a countable resource.

The benefit to having a family member or trusted friend serve as trustee is that they are known to the disabled beneficiary, often have their trust and confidence, are aware of their needs, and typically compensate themselves very little or not at all. The downside is that they don't know the first thing about being a fiduciary. They don't know the government benefit regulations. They don't know what they can use the trust funds for or how much they can distribution on behalf of the beneficiary (they often think they can give money directly to the beneficiary).

A professional trustee with government benefits knowledge (such as an attorney whose practice area includes disability and special needs planning) is usually the best situation if the trust has sufficient assets to cover the trustee fees. But sometimes having a family member and professional fiduciary serve as co-trustees can provide the best of both worlds. The family member can manage the care-giving services and the professional fiduciary can manage the financial side (payment for services, investments, tax returns, bookkeeping).

Regardless of who the trustee is, they have certain fiduciary duties to the beneficiary. The main ones are:

a. **Duty to Follow the Terms of the Trust** – the trustee must adhere to the specific terms of the trust. Always being cautious not to cause the trust assets to become a countable resource to the beneficiary.
b. **Duty of Loyalty** – the trustee must act solely in the best interest of the beneficiary, avoiding any conflicts of interest.
c. **Duty of Prudence** – the trustee is required to manage the trust property with reasonable care, skill and caution as a prudent person would manage their own affairs.

d. **Duty to Inform and Account** – the trustee must keep accurate records and keep the beneficiary, or their legal representative (guardian, conservator, or power of attorney) reasonably informed as to the status of the trust and its finances.

IV. CONCLUSION

First party SNT's are not fill in the blank trusts. There are many factors to consider when drafting. Keep the following helpful hints in mind when drafting:

1. To the extent possible, try to create flexibility in the trust. This trust may be around for many years and there are sure to be changes in the law and in the beneficiary's circumstances. A flexible trust will allow the trust to roll with those changes.

2. Less is more. Cover the main points discussed above in your trust. Too much information or creative language can draw the questioning eye of social security or Medicaid.

3. Be clear. State who the main players are in the trust. State that the regulations when necessary and state it is a first party payback trust up front.

The Nuts and Bolts of First Party Special Needs Trusts

Stetson Law
2024 Nation Conference on
Special Needs Planning and Special Needs Trusts

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Three Types of SNT's

- First Party SNT (a/k/a self-settled or d4A trusts):
  - Established by disabled individual, parent, grandparent, guardian/conservator, or court
  - Funded with assets of disabled individual
  - Under age 65
  - Supplement not supplant
  - Must include a payback provision to reimburse Medicaid

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Three Types of SNT's

- Third Party SNT:
  - Established and funded by someone other than the disabled person
  - Does not require a Medicaid payback provision
- Pooled Trusts:
  - Managed by nonprofit organizations
  - Beneficiary funds are pooled to maximize investment options

3

Considerations Before Creating a First Party SNT

- Be familiar with the laws governing first party SNT's:
  - 42 U.S.C. § 1396p(d)(4)(A)
  - 42 U.S.C. § 1382(b)(e)(5)
  - 21st Century Cures Act of 2016
  - Social Security Administration's Program Operations Manual System (POMS)
  - State Law
  - Case Law

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4

Considerations Before Creating a First Party SNT

- Listen and learn
  - Take the time to listen to the beneficiary and their family
  - Take the time to learn exactly what public benefits they receive or maybe eligible for
  - Every situation/client is different
  - Nothing cookie cutter about preparing a first party SNT
  - Educate
  - Set expectations with beneficiary and their family

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5

Considerations Before Creating a First Party SNT

- Determine who should establish and fund the trust
  - Trap for the unwary – establishing and funding the trust are two different things. Make sure creator has authority to fund.
  - The Individual – must be legally competent or POA can create and fund
  - The Parent or Grandparent – can create but can't fund without a court order or POA can fund, if applicable
  - The Guardian or Conservator – can create and fund with a court order
  - The Court – Upon petition by any of the above, the court can order the creation and funding of the trust

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Considerations Before Creating a First Party SNT

- Who are the players:
  - Creator – person establishing the trust, ie. the disabled individual, parent, grandparent, guardian/conservator, or by court order
  - Grantor – person funding the trust - always the disabled individual since trust is funded with their funds
  - Trustee – holds and manages the trust assets for benefit of the beneficiary
  - Beneficiary – person the trust is established for
- Clearly denote who the players are at beginning of the trust

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7

Requirements of a First Party SNT

- Established for the sole benefit of the disabled individual
- Beneficiary must be disabled as defined in 42 U.S.C. § 1382c(a)(3)(A)
- Beneficiary must be under age 65 at time the trust is established and funded
  - Trust fund may increase but no further assets added
  - Structured settlement exception – payments after age 65 ok as long as trust is the beneficiary and settlement agreement is executed prior to age 65

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8

Requirements of a First Party SNT

- The trust must be irrevocable
- The trust must include a payback provision to reimburse ***any*** state Medicaid agencies upon death of the beneficiary or upon early termination of the trust, for benefits provided during the beneficiary's lifetime:
  - Key requirement
  - Use exact language from the POMS
  - Important to reference state(s) in plural, even if the beneficiary never moved to another state

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9

Requirements of a First Party SNT

- Include permissible administrative expenses upon death or early termination, prior to reimbursement to the state Medicaid agency, per POMS 01120.203.E.1
  - Taxes due from the trust to the state or federal gov't due to the death of the beneficiary
  - Reasonable trust administration fees
  - That's it!

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Requirements of a First Party SNT

- Include prohibited expenses/payments upon death or early termination, prior to reimbursement to the state Medicaid agency, per POMS 01120.203.E.2
  - Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate
  - Inheritance taxes due from residual beneficiaries
  - Payment of debts owed to third parties
  - Funeral expenses
  - Payments to residual beneficiaries

11

Other Components of a First Party SNT

- The disabled individual is always the Grantor because they contribute their own assets to the trust
- Consider the income tax treatment of the trust on the beneficiary's government benefits
  - Grantor trust tax status
  - Not all "taxable income" is "countable income"
- Early termination clause
  - Subject of much scrutiny by Social Security
  - Must meet 3 requirements per POMS SI 01120.199.E
    - State Medicaid agency is paid back first
    - After allowable administrative expenses, only the trust beneficiary maybe benefit from early termination
    - Power to terminate must be exercised by someone other than the beneficiary

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Other Components of a First Party SNT

- Fully discretionary distribution standard
  - The trustee, in their "sole and absolute discretion" decides when and how much to distribute from the trust
  - Gives the trustee flexibility
  - Trustee takes into consideration the affect of distributions on the means-tested benefits the beneficiary is receiving
- Supplement but not supplant standard
  - Key component of the trust
  - The trust funds should be used to enhance the beneficiary's quality of life but should not be used to replace any resources being provided by means-tested government programs

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Other Components of a First Party SNT

- Ability to amend the trust
  - Trust should grant the trustee the authority to amend the trust under limited circumstances without court authority
    - Comply with later changes in the law that impact the trust
    - Preserve beneficiary's public benefits eligibility
    - Administrative changes
    - Correct mistakes or ambiguities in the trust
- Trust Protector
  - An optional provision – depending on circumstances
  - An individual or entity appointed in the trust to oversee and safeguard the interests of a beneficiary
  - Creates an additional layer of oversight
  - Their role can be limited or broad

14

Trustee Selection

- Key to the success of the trust
- The beneficiary cannot be the trustee
- Can be a family member, trusted friend, attorney, trust company, financial institution
- Determine whether having co-trustees is appropriate

15

Trustee Selection

- Trustee fiduciary duties
  - Duty to follow the terms of the trust
  - Duty of loyalty
  - Duty of prudence
  - Duty to inform and account

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Conclusion

- First party SNT's are not cookie cutter
- Many factors to consider when drafting
- Try to create flexibility – roll with the changes
- Less is more
- Be clear and concise

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Intersection of SNT and ABLE Accounts

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2024 National Conference on Special Needs Planning and Trusts

Stetson University

I. Introduction[1]

The Stephen Beck Jr. Achieving a Better Life Experience (ABLE) Act (the "Act") was passed by the 113th United States Congress and signed into law by President Barack Obama on December 19, 2014. There have been significant changes to the Act since its passing, which will also be addressed in this presentation. As the Act itself states, it is meant to "(1) encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life," and "(2) provide secure funding for disability-related expenses of beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, title XVI (Supplemental Security Income) and title XIX (Medicaid) of the Social Security Act, the beneficiary's employment, and other sources." (Achieving a Better Life Experience Act ("ABLE Act"), Pub. L. No. 113-295 § 101). According to the Social Security Administration's (SSA) Monthly Statistical Snapshot for June 2024, over 5.3 million Americans receive Supplemental Security Income (SSI) benefits and just shy of 2.7 million Americans receive SSI coupled with their traditional Social Security benefits. As such, close to 8 million people with disabilities in the United States can potentially benefit from this monumental Act. Thanks to the tireless work of many advocacy organizations, lawmakers have recognized and attempted to address the significant costs and burdens inherent to people living with a disability.

This presentation will provide an overview of ABLE accounts and their utility in trust administration and planning for people with disabilities. Coordination with Special Needs Trusts (a/k/a Supplemental Needs Trusts and Disability Trusts) administration will be evaluated as well as ABLE accounts' effect on both short- and long-term planning. Analysis of ABLE Act changes and facets of beneficiary distribution mechanisms and public benefits eligibility will be provided, along with recent case law. In other words, all aspects of ABLE accounts will be covered - including The Good, The Bad and the Unknown.

II. Overview

[1] The author gratefully acknowledges the contribution to this presentation by Peter J. Wall, Director of Fiduciary Services, True Link Financial Advisors, LLC.

The ABLE Act is named after the late National Down Syndrome Society's Vice Chairman and quarterback of the legislation, Stephen Beck, Jr. - a father of a daughter with Down syndrome. The Act amends the Internal Revenue Code (IRC) Section 529 by adding Section 529A, creating a tax-free savings account option for people with disabilities. At its core, the ABLE Act provides an avenue for people with disabilities to save funds in excess of the $2,000 resource cap in order to qualify for SSI and preserve their other vital public benefits such as Medicaid. ABLE accounts have become an incredible option not only as savings vehicles, but also to empower and promote independence for people with disabilities. Additionally, all income earned within an ABLE account can grow tax-free if properly administered. A copy of the applicable IRC section (26 U.S. Code § 529A) may be found in Appendix A.

In March of 2015, the U.S. Department of the Treasury, in collaboration with the Internal Revenue Service (IRS) issued Internal Revenue Bulletin 2015-18 providing authority for states to establish ABLE programs before full federal guidance on IRC § 529A. The majority of states who have established an ABLE program have done so through their State Treasurer or their state's existing 529 Qualified Tuition Program (QTP). Other states have authorized governmental agencies, such as their Department of Health and Human Services, to provide ABLE account administration services. It is important to note that the original Act language indicated that qualified individuals were only allowed to open ABLE accounts in their specific state of residence. However, that regulation was amended to remove the beneficiary residency requirement in the Consolidated Appropriations Act of 2016 (Pub. L. No. HR 2029 § 303). This means that people with disabilities can open an ABLE account sponsored by any state, regardless of their residence.

Some of the more salient features of ABLE accounts presented throughout this presentation include:

- Income and capital gains (as applicable) are non-taxable if the account is properly administered
- Contributions of up to $18,000 per year (2024), $19,000 (2025) may be made by any "person"

    - Includes ABLE account beneficiary third parties, trusts
    - Contributions are not tax deductible
- ABLE accounts do not count as a resource for SSI and Medicaid determination
- Limited eligibility: the onset of an ABLE account beneficiary's disability must have occurred prior to age 26
- State law governs whether an ABLE account is subject to estate recovery.
- ABLE accounts may only be used to pay for Qualified Disability Expenses (QDEs)
- The maximum amount that may be held in an ABLE account without a potential reduction in an account holder's public benefits is $100,000 (2024)

III. ABLE Account Qualifications

The Act limits eligibility in its program to individuals with disabilities who can prove that their disability had an age of onset before 26. A common misconception is that a person with a disability must be under the age of 26 to open an ABLE account, which is not true - the ABLE account holder must only be able to prove that their disability had an onset before age 26. If individuals with disabilities meet this age requirement and already receive SSI or Social Security Disability Insurance (SSDI) benefits, they automatically qualify for participation in an ABLE program.

However, if an individual with a disability is not a recipient of either SSI or SSDI, they may still qualify to open an ABLE account. This may be achieved by submitting a letter of disability certification from a licensed physician (a Doctor of Medicine (M.D.) or Doctor of Osteopathic Medicine (D.O.)). It may behoove the applicant to follow the procedures outlined in the Disability Evaluation Under Social Security process. More information on this process and qualifications may be found at https://www.ssa.gov/disability/professionals/bluebook. It is important to note that should the person with a disability qualify for an ABLE account by submission of a doctor's certification, this does not mean that they are qualified to receive SSI or SSDI benefits. Rather, they must apply for such benefits separately.

Limiting ABLE accounts to people with disabilities that have an onset before age 26 truly curbs the effectiveness and utility of this potent tool. Advocacy groups such as the National Academy

of Elder Law Attorneys (NAELA) and the ABLE National Resource Center (www.ablenrc.org) continue to push for legislation that would adjust this age requirement. Current proposed legislation in Congress suggests an extension of this age requirement to age 46 from age 26.

IV. Contributions

In its simplest terms, a "contribution" to an ABLE account is the payment of funds, regardless of source, into an ABLE account. Contributions may be made by any "person." This includes third party monies (e.g. from a relative of the ABLE account holder), first party monies (e.g. the ABLE account holder's personal funds received from wages, inheritances, public benefit programs, etc.), or trust vehicles. In 26 CFR 301.7701-6(a), the Internal Revenue Code (IRC) defines "person" to include "an individual, ***trust***, estate, partnership or corporation" [emphasis added] Transfers from an SNT to an ABLE account are certainly allowable and the effectiveness of such transfers will be addressed further herein.

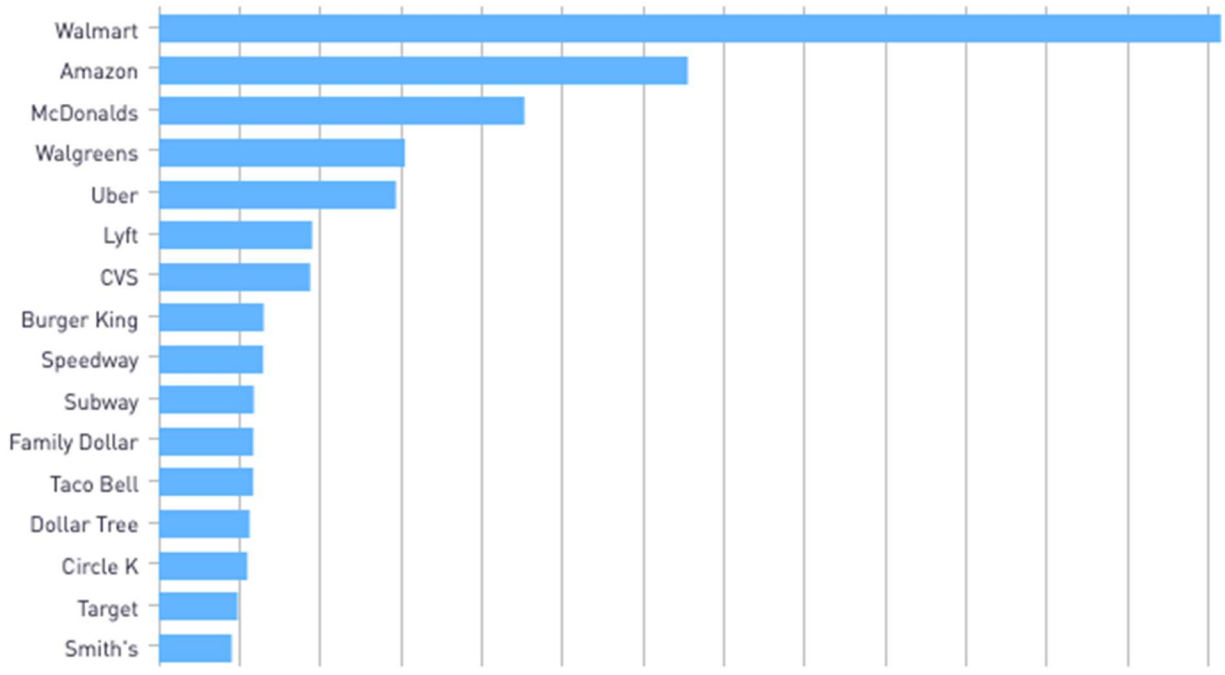
More information for treatment of deposits into an ABLE account may be found in the Social Security Administration (SSA) Program Operations Manual System (POMS) SI 01130.740.B.2, which states (in part) that:

- Contributions are payments of funds into an ABLE account
- Contributions may be made by any person. (Again, "person," as defined by the Internal Revenue Code (IRC), includes an individual, ***trust,*** estate, partnership, association, company, or corporation.) [emphasis added]
- The total annual amount of contributions from all sources is limited to the amount of the per-donee gift-tax exclusion in effect for a given calendar year.

The amount of funds allowable for contribution to an ABLE account in any calendar year is currently set at $18,000 (2024), subject to additional situations that will be subsequently reviewed. As stated above, this amount coincides with the federal gift tax exclusion amount. This contribution limit is applicable per ABLE account beneficiary, and not per donor to the ABLE account. This is important to note as it is a deviation from the rules governing 529 QTPs.

Per POMS § SI 01130.740.A.1 “a designated beneficiary is limited to one ABLE account, which a qualified ABLE program administers. Except in the case of a rollover or program-to-program transfer, if a designated beneficiary has an additional account, it generally will not be treated as an ABLE account, and will be subject to normal resource counting rules.” However, should an ABLE account holder have more than one ABLE account, they have 90 days from the latest ABLE account opening to close or transfer one of the accounts and avoid the extra ABLE counting as a resource. Again, the overall contribution limit of $18,000 annually is applicable in aggregate across all accounts.

Section 103 of the Act “requires amounts in ABLE accounts to be disregarded in determining eligibility for means-tested federal programs except...for amounts in an ABLE account exceeding $100,000.” (Pub. L. No. 113-295 § 103). However, funds in an ABLE account tend to be transitory in nature. In other words, funds deposited to an ABLE account are typically expended on the ABLE beneficiary’s needs more often than they are used as a savings vehicle. Research provided by True Link Financial, LLC (True Link), extracted from their data as the True Link Protection Visa Prepaid Card (True Link Card) provider for the STABLE program through January 16, 2024, shows that most purchases made from the ABLE accounts analyzed are for daily necessities at low-cost merchants and food vendors:



Additionally, this transitory money theory is further illustrated in the chart below, which shows that the average ABLE account size nationally is only approximately $5,000:

As of September 30, 2018	Plan Type	Launch Date	Accounts	Accounts (%)	Assets	Assets (%)	Average Account
STABLE Account (12)			**8,324**	**28%**	**$42,107,507**	**29%**	**$5,059**
Ohio	National	6/1/2016	5,426		$30,941,841		$5,703
Kentucky	State	12/13/2016	260		$1,229,372		$4,728
Vermont	State	2/22/2017	211		$684,299		$3,243
Missouri	State	4/24/2017	786		$3,421,898		$4,354
Georgia	State	6/14/2017	392		$1,374,114		$3,505
South Carolina	State	11/16/2017	442		$1,569,916		$3,552
New Hampshire	State	12/15/2017	129		$534,644		$4,145
New Mexico	State	1/18/2018	156		$565,833		$3,627
West Virginia	State	2/9/2018	75		$154,647		$2,062
Wyoming	State	3/2/2018	54		$153,760		$2,847
Arizona	State	3/5/2018	296		$1,238,404		$4,184
Oklahoma	State	5/31/2018	97		$238,779		$2,462
National ABLE Alliance (15)			5,129	17%	$27,051,129	19%	$5,274
Alaska	National	12/15/2016	197		$925,716		$4,699
Colorado	National	8/23/2017	327		$1,618,229		$4,949
Delaware	National		13		$60,646		$4,665
District of Columbia (DC)	National	7/27/2017	33		$135,762		$4,114
Illinois	National	1/26/2017	519		$2,825,937		$5,445
Indiana	National	7/27/2017	217		$762,948		$3,516
Iowa	National	1/26/2017	336		$1,754,338		$5,221
Kansas	National	1/26/2017	233		$1,149,132		$4,932
Minnesota	National	1/26/2017	648		$3,382,724		$5,220
Montana	National	7/27/2017	135		$567,093		$4,201
Nevada	National	1/26/2017	308		$1,355,671		$4,402
New Jersey	National	6/18/2018	60		$242,150		$4,036
North Carolina	National	1/26/2017	450		$2,248,464		$4,997
Pennsylvania	National	4/3/2017	1,550		$9,539,173		$6,154
Rhode Island	National	12/15/2016	103		$483,146		$4,691
Other Partnership States (2)			1,190	4%	$6,403,609	4%	$5,381
Nebraska	National	6/30/2016	1,065		$5,945,437		$5,583
Alabama	State	2/27/2017	125		$458,172		$3,665
Florida	State	7/1/2016	2,521	8%	$10,611,710	7%	$4,209
Louisiana	State	6/28/2017	129	0%	$396,679	0%	$3,075
Massachusetts	National	5/10/2017	1,771	6%	$11,611,534	8%	$6,556
Maryland	National	11/28/2017	762	3%	$3,428,184	2%	$4,499
Michigan	National	11/1/2016	1,265	4%	$6,234,904	4%	$4,929
New York	State	8/10/2017	489	2%	$2,471,003	2%	$5,053
Oregon		12/6/2016	1,713	6%	$8,289,988	6%	$4,839
	National		1,355		$6,495,034		$4,793
	State		358		$1,794,954		$5,014
Tennessee	National	6/10/2016	1,821	6%	$12,217,135	8%	$6,709
Texas	National	5/8/2018	261	1%	$424,547	0%	$1,627
Virginia		12/19/2016	4,230	14%	$12,593,117	9%	$2,977
	National		4,173	14%	$12,290,454	9%	$2,945
	Advisor		57	0%	$302,663	0%	$5,310
Washington	National	7/23/2018	102	0%	$186,991	0%	$1,833
Totals			**29,707**	**100%**	**$144,028,040**	**100%**	**$4,848**

Ignoring the aforementioned $100,000 cap for SSI, the total limit over time that can be made to an ABLE account is subject to the individual state program and their limit for 529 QTPs. This aspect of ABLE accounts, compounded by the $18,000 annual contribution limit, most likely indicates that it will be quite some time before any practitioners or planners will ever have to address any negative consequences to ABLE beneficiaries as they relate to this overall limit. For example, the maximum amount one can contribute to a 529 QTP in Colorado is $400,000. Assuming $18,000 per year in contributions to a Colorado ABLE account (and disregarding any investment growth, and change in annual contribution limitation), it would take just over 22 years to exceed that limit. Additionally, if these contributions were, for example, third party contributions, there are most likely better planning options available - such as a third party SNT (especially given estate recovery considerations). Lastly, there are no "catch up" or "lump-sum" contribution provisions to ABLE accounts as there are for contributions to 529 QTPs.

Contributions to an ABLE account must also always be after-tax dollars, and thus grow tax-free similar to 529 QTPs and Roth IRAs. Per POMS SI 01130.740.B.2, "contributions must be in cash and may be made in the form of cash or a check, money order, credit card, electronic transfer, Gift of Independence card, or a similar method." Transfer of securities or other investments into an ABLE account is unallowable. In other words, donors looking to pass highly appreciated assets on to beneficiaries for tax planning purposes should review other avenues to achieve their goals.

The vast utility of ABLE accounts is beginning to manifest itself in unique and creative ways throughout the country. In *Warchol v Kings County Office of Education,* 2018 WL 118 5052 (ED Calif, March 6, 2018), the plaintiff (a minor who had "previously been diagnosed with autism and is non-verbal") alleged that over the course of a school year they had been subjected to verbal and physical abuse by the defendant. The settlement provisions in the case stipulated in part that settlement proceeds were to be placed in an ABLE account for the plaintiff, staggered in roughly $18,000 amounts annually over a period of four years.

In a 2015 child support proceeding (*Kirby v Semeyn,* 2017 Ark App 556, 531, S.W. 3d 462 (October 25, 2017)), the custodial parent petitioned the court for an increase in child support

payments as well as requesting child support payment in arrears. The custodial parent argued that the original child-custody agreement required annual computations of child support and contained an automatic escalation clause. Further, the custodial parent took the position that the non-custodial parent had a duty to revise their income figures annually and adjust their child-support obligation accordingly, which had not been done. The claim for child support in arrears totaled $255,000. To further complicate the issue, the parents had a child with special needs. They had previously agreed to set up a trust for the benefit of their child with disabilities, with each party funding the trust with three percent of their gross income. It came to light during the proceedings that the trust had never been established nor funded. As such, part of the order of the lower court ordered both parties to establish an SNT for the child and pay their past due amounts into the trust. The order of the lower court also erroneously held that these payments constituted child support. Statutorily, child support is paid by the noncustodial parent to the custodial parent - not to a trust, and not by each party. Additionally, funding the SNT with child support payments comes with its own set of problems and potentially confusing the important distinction between first-party and third-party money. Parental income is deemed to the child for SSI and most Medicaid programs. In other words, the parents' income is considered the child's own income when determining the child's financial eligibility for means-tested benefits. Additionally, child support payments are considered unearned income to the child on whose behalf the payments are made, thus potentially further reducing their SSI benefits. While the particulars associated with the child's needs and planning are unknown in this case, there may have been a creative way to use an ABLE account to satisfy some of the complexities of the child support payments. The point of this section is to emphasize that planners and attorneys have a tool at their disposal in ABLE accounts and should always be looking for opportunities to use it.

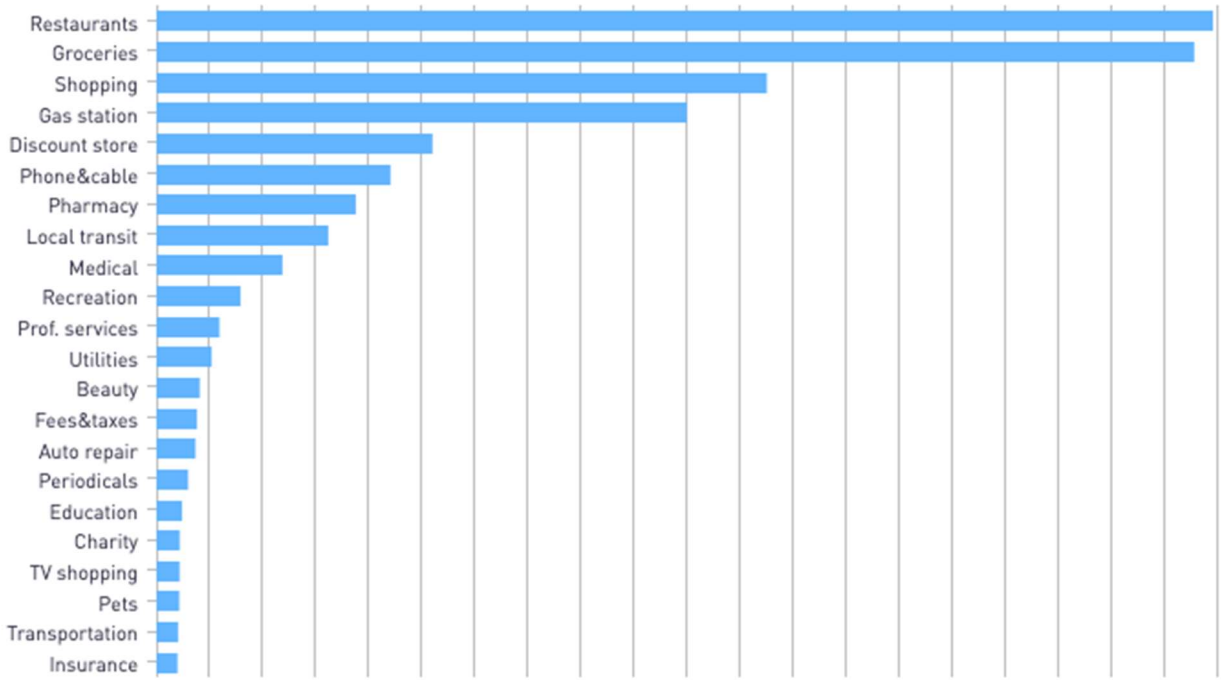
V. Qualified Disability Expenses

Distributions from an ABLE account are to be used for a Qualified Disability Expense (QDE) only. Thankfully, QDEs cover a vast number of categories and allowable distributions which should greatly increase ABLE's efficacy in empowering individuals with disabilities and assisting them in achieving a better quality of life.

POMS SI 01130.740.B.8 indicates that a "QDE includes, but is not limited to, an expense for":

- Education
- Housing
- Transportation
- Employment training and support
- Assistive technology and related services
- Personal support services
- Health
- Prevention and wellness
- Financial management and administrative services
- Legal fees
- Expenses for ABLE account oversight and monitoring
- Funeral and burial
- Basic living expenses

Of note, POMS SI 01130.740.B.9 clarifies that "for ABLE purposes, food is considered a qualified disability expense (basic living expense)." The payment of food has been eliminated as part of ISM. In general, the POMS defines ISM as unearned income in the form of shelter to the recipient and/or beneficiary. In many cases, receipt of ISM by an SNT beneficiary from their SNT would result in a reduction of their SSI benefit amount. See POMS SI 00604.058 for ISM attribution specifics.

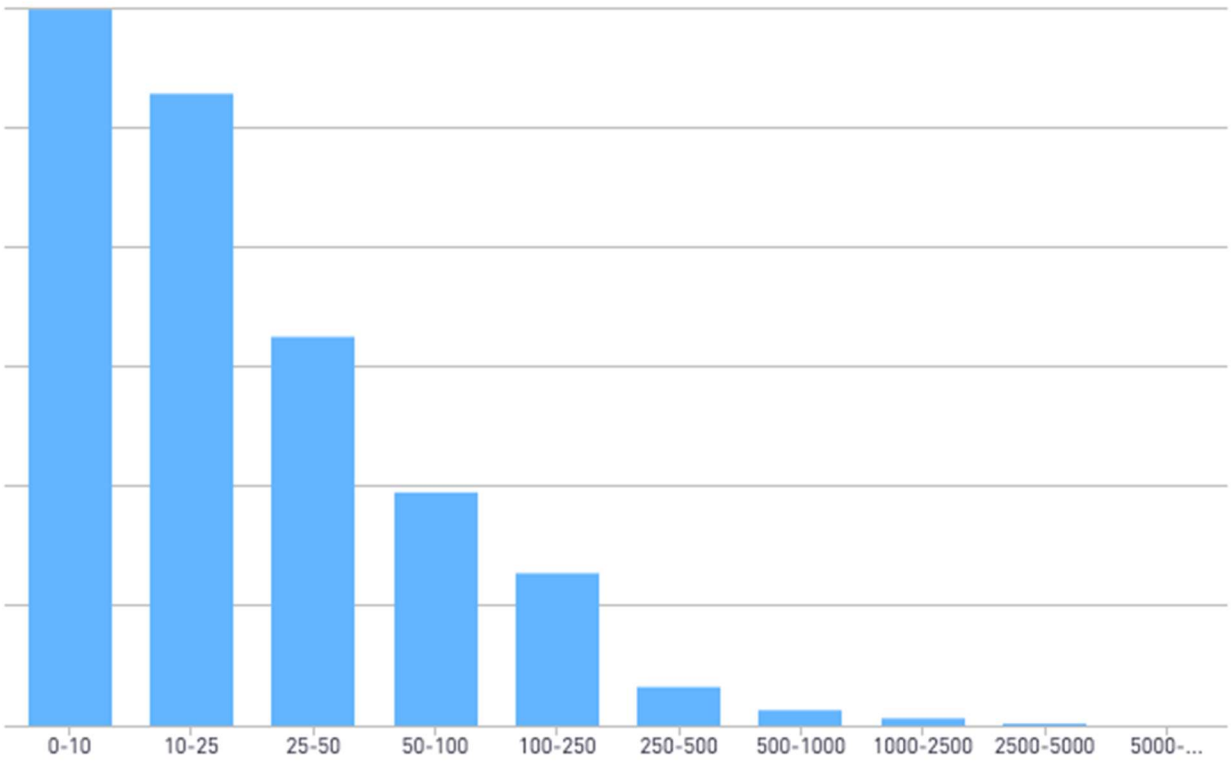


The payment of housing expenses is another way in which ABLE account administration differs from ISM attribution. When computing household operating expenses for ISM the following categories are typically considered (again, please note POMS SI 00604.058 for ISM attribution specifics):

- Rent
- Heating fuel
- Electricity
- Water
- Mortgage (including property insurance required by the mortgage holder)
- Real property taxes
- Gas
- Sewage
- Garbage removal

Interestingly, POMS SI 01130.740.B.9 defines allowable housing distributions from an ABLE account as "similar to household costs for in-kind support and maintenance purposes" and lists the exact same categories above as QDEs. Here again, whereas the SNT trustee is limited in their

avenues of paying for housing or shelter without potentially negatively impacting their beneficiary's SSI amount via ISM attribution, an ABLE account beneficiary has no such barriers. However, as per the data provided from True Link's analysis, it does appear that the payment of rent is a widely adopted practice from ABLE accounts. The chart below shows that ABLE beneficiaries are typically using their accounts to make purchases of $25 or less, and overwhelmingly for transactions $250 or less. Because rent payments are typically much higher than $250 per month, it may be inferred that rent payments from the ABLE accounts analyzed are not common.



Purchase Amounts

Along this vein, an ABLE account may be invaluable to beneficiaries with an SNT in certain states. Some states Medicaid programs highly scrutinize or even disallow any payments (prepaid or otherwise) from an SNT for funeral and burial expenses. For reference, the specific payment of funeral and burial expenses is not only cited in POMS SI 01130.740.B.8, but also in the Act itself (Pub. L. No. 113-295 § 102).

The Internal Revenue Service (IRS) is the auditing body for ensuring that ABLE funds are expended on QDEs. It is recommended that all ABLE beneficiaries keep detailed records of all purchases (including receipts) in case of an audit. Additionally, should an ABLE account holder use their ABLE account to make a non-QDE purchase, the ABLE account earnings attributable to that withdrawal are subject not only to regular income tax, but also to a 10% penalty. It is important to note that in addition to this 10% federal penalty, such non-QDE purchases may be subject to state-specific penalties as well.

VI. ABLE Advantages (a/k/a - "The Good")

One of the main advantages of ABLE accounts is their previously unavailable ability to provide people with disabilities a tax-free vehicle for their savings. Before the ABLE Act, many people with disabilities on means-tested public benefits were forced into the untenable position of being unfairly impoverished (e.g. having to potentially frivolously waste monies at month end to meet their $2,000 resource cap). For this reason alone, the ABLE Act is a monumental step forward for disability rights advancement.

Additionally, allowing people with disabilities to pay for shelter/housing expenses from their ABLE accounts without any ISM reduction to their SSI benefits is a tremendous game changer - not only for the individual with a disability, but also for planners, attorneys and trustees. Family members are now able to contribute their own funds to their loved one's ABLE account and have those monies used for rent without worrying about running astray of public benefits regulations, albeit only up to the $18,000 annual contribution limit.

Most contributions to an ABLE account do not count as income to the beneficiary for SSI determination purposes. In addition to contributions of the ABLE beneficiary's social security funds and contributions from any "person" (to include third parties and trusts - see above), POMS SI 01130.740.C.1 excludes the following contributions as countable income for the ABLE beneficiary:

- Rollovers from a family member's ABLE account
- Rollovers from a 529 qualified tuition plan

- Contributions in excess of the $18,000 annual limit if the ABLE beneficiary worked and did not contribute in the same taxable year to a defined contribution plan, annuity contract under section 403(b) of the IRC, or eligible deferred compensation plan
- Contributions from an employed ABLE beneficiary annually up to the lesser of:
    - Federal Poverty Level (FPL) for a one-person household for the preceding calendar year
    - The amount of the ABLE beneficiary's earnings and other compensation

However, POMS SI § 01130.740.C.1 goes on to state that "income received by the designated beneficiary and deposited into his or her ABLE account is income to the designated beneficiary." In other words, making a deposit of income to an ABLE account does not remove its treatment as income for public benefit qualification purposes. POMS SI 01130.740.C.1.a makes it clear that "an individual cannot use direct deposit to avoid income counting". Lastly, POMS SI 01130.740.C.2 states that income earned on investments within the ABLE account does not count as income for the ABLE account beneficiary.

The financial independence and empowerment for people with disabilities achieved through the ABLE Act is also tremendous in the ease and facility of simply paying for goods and services. Many people without disabilities take for granted the fact that they can easily pay for goods and services using a credit card, cash or other forms of payment. For beneficiaries of a SNT, this is not always the case. Oftentimes, an SNT beneficiary must coordinate with the vendor and the SNT trustee to arrange for payment. Thankfully, many states' ABLE programs offer credit cards or checks to their beneficiaries. STABLE (www.stableaccount.com), the largest national provider of ABLE accounts, offers fee-free True Link cards to its beneficiaries. With its online account management and tracking of distributions, a True Link card may be a very valuable tool in case of an IRS audit of a beneficiary's QDE compliance. Additionally, True Link cards are noted as a viable distribution mechanism in POMS SI 01120.201. I.1.e.

A distribution from an ABLE account does not count as income to the beneficiary for public benefits qualification purposes. POMS SI 01130.740.C.4 states that a "distribution from an ABLE account is not income but is a conversion of a resource from one form to another…." This is further confirmed in POMS SI 01110.600B.4. Additionally, distributions from an ABLE account

do not count as income of the designated beneficiary, even if the distributions are for a QDE that is not related to housing, are for a housing expense, or for a non-qualified expense. Grandparents (or any family, individual, or SNT) funds an ABLE account. Adult disabled beneficiary receiving SSI lives with parents. ABLE account pays the parents a monthly rent that equals to or exceeds the one-third federal benefit rate plus $20. Since the rent payments are being made to parents from the ABLE account, the beneficiary's SSI is not reduced by PMV.

- The payment of rent from the ABLE account allows beneficiary to retain his or her full SSI payment. The parents receive a rental payment to offset monthly costs for housing the beneficiary.
- If the Beneficiary's SSI application is pending, an ABLE account can be used to pay rent for the beneficiary so that if a back benefit is awarded it will not be reduced by 1/3 for ISM.

Example 1.

Eric takes a distribution of $500 from his ABLE account in June 2024 to pay for a health-related QDE. His health-related expense is not due until September, so Eric deposits the distribution into his checking account in June. The distribution is not income in June. Eric maintains his ABLE account at all relevant times, and the distribution is both unspent and identifiable until Eric pays his health-related expense in September. The $500 is excluded from Eric's countable resources in July, August, and September. Since other expenses are being paid from Eric's account, he may have difficulty maintaining the necessary identity of the $500 ABLE distribution.

Example 2.

Sam takes a distribution of $25,000 from his ABLE account to modify a specially equipped van in May. He pays a $10,000 deposit to the repair shop. While waiting for delivery of the van, Sam takes a trip to a local casino in July, and loses $1,000 of his remaining $15,000 ABLE distribution gambling. The $1,000 he lost gambling is a countable resource in July. The other $14,000 Sam retains is an excluded resource while it meets the requirements of SI 01130.740C.5.a.'

Example 3.

In June, Jennifer takes a $7,000 distribution from her ABLE account to pay her college tuition which qualifies as a QDE. Her tuition payment is due in September. In August, Jennifer receives a job offer and decides not to return to school. Since Jennifer no longer intends to use the $7,000 for tuition, the $7,000 becomes a countable resource in September unless Jennifer redesignates it for another QDE or returns the funds to her ABLE account prior to September. How is Jennifer to redesignate her QDE from tuition to another QDE?

VII. Disadvantages (a/k/a "The Bad")

The full utility of ABLE accounts is somewhat hampered by their limited scope. These limitations include:

- $100,000 balance disqualification for SSI benefits;
- State balance disqualifies for Medicaid;
- Small annual contribution limits ($18,000 annually);
- Age restrictions (must be able to prove onset of disability before age 26)-age 46 in 2026;
- Non-SSI/SSDI recipients must obtain a doctor's (M.D. or D.O.) certification of disability;
- Various state-to-state differences in administration of ABLE plans;

Additionally, financial fraud and exploitation is one of the largest issues for older adults and people with disabilities. According to the National Adult Protective Services Association, 1 in 20 older adults or people with disabilities reports some form of financial exploitation. That number may in fact be even higher as some studies indicate that only 1 in 44 cases such as these are actually even reported. Financial exploitation may include instances where trusted individuals force a person with a disability to take cash from an ATM using their ABLE account funds or even obtaining a financial power of attorney from the person with a disability, allowing the fraudster potential unfettered access to their ABLE account. Individuals with disabilities are sometimes more trusting and may not realize that they are being taken advantage of. Coupling this trusting nature with a person with a cognitive disability makes it more likely that such predatory behaviors will go unreported. As such, the "pros" of empowerment and financial independence must be carefully weighed against the potential for fraud and exploitation when considering opening an ABLE account.

More States have eliminated the estate recovery rule for ABLE accounts. A State that requires estate recovery of funds within an ABLE account must also be considered a disadvantage. A prudent planner or attorney will almost certainly advise family members or other potential third-party donors to an ABLE account to consider a third-party SNT or other vehicle when contemplating estate planning of larger funding amounts.

Although an ABLE account is not considered an asset or resource for SSI determination, it may certainly be considered as such in a creditor proceeding. Of note, the Act itself removes an ABLE account from bankruptcy proceedings in certain circumstances. Pub. L. No. 113-295 § 104 amends the bankruptcy code to exclude ABLE account funds from a person's estate if "(1) the designated beneficiary of such account was a child, stepchild, grandchild, or step grandchild of the debtor; (2) such funds are not pledged or promised to any entity in connection with any extension of credit and are not excess contributions to an ABLE account; and (3) such funds do not exceed $6,225 during a specified time period." That noted, there are no such exclusions for other creditor proceeding A distribution from an ABLE account is not income, but it may be a conversion of an exempt resource to a non-exempt resource. A distribution for a housing-related QDE or for an expense that is not a QDE is a countable resource if the beneficiary retains the distribution into the month following the month of receipt. If the beneficiary spends the distribution within the month of receipt, there is no effect on eligibility. If the distribution is a non-QDE, there may be tax consequences to the beneficiary.
s such as divorce or foreclosure.

Distributions for a non-housing related QDE are excluded from the designated beneficiary's countable resources (other than housing) if he or she retains the distribution beyond the month received. This exclusion applies while:

> The designated beneficiary maintains, makes contributions to, or receives distributions from the ABLE account;
>
> The distribution is unspent;
>
> The distribution is identifiable. (NOTE: excludable funds commingled with non-excludable funds must be identifiable.); and

The individual still intends to use the distribution for a non-housing related QDE.

Example 1.

In June, Martha takes a $2000 distribution from her ABLE account to pay her security deposit and first month rent for her new apartment which is a QDE. Her landlord notifies Martha that her apartment will not be ready for occupancy until August. Martha keeps the $2,000 in her checking account until August. Because Martha did not return the $2,000 distribution to her ABLE account in June, the $2,000 is a resource to her in July. If Martha has more than $500 in her checking account August 1, she will be over resourced.

Example 2.

In June, Jennifer takes a $7,000 distribution from her ABLE account to pay her college tuition - a QDE. Her tuition payment is due in September. However, she needs to make a $750 advance rent payment to her landlord for her college apartment in August. She uses $750 of the distribution she took in June to make the rent payment – a housing-related QDE. The $750 is a countable resource in August. The remaining $6,250 of the retained distribution is excluded while it continues to meet the requirements of SI 01130.740C.5.a.

VIII. Trust Coordination

As noted throughout this presentation, ABLE accounts offer maximum flexibility in terms of distributions not generally afforded to SNT trustees without consequences to the beneficiary's public benefits. The ability to pay for ISM items from an ABLE account with no negative effect to the beneficiary's public benefits is enviable to the SNT trustee. Thankfully, transfers from SNT to an ABLE are allowable, providing the SNT trustee with unique planning and distribution opportunities.

As noted previously, funds transferred from a trust account are excluded as being counted as income to the trust and ABLE beneficiary. Recall that POMS SI 01130.740.B.2, which states (in part) that "contributions [to an ABLE account] may be made by any person. ("Person," as defined by the Internal Revenue Code (IRC), includes an individual, ***trust***, estate, partnership, association, company, or corporation.) [emphasis added]. As such, should there be a viable and prudent need

for a beneficiary's SNT trustee to distribute funds for the beneficiary's food or shelter, they may do so via a transfer to a beneficiary's ABLE account.

Caution must be taken by the trustee to assess all of the beneficiary's public benefits before making any discretionary distribution. It is unclear if distributions from an ABLE account will be treated as income for HUD (a/k/a Section 8) waiver programs. It should be noted that it is the general practice of some housing authorities to count regular distributions from an SNT as income when determining a beneficiary's ongoing or initial waiver eligibility. Therefore, it may be in the best interest of the trust beneficiary to establish an ABLE account to pay those expenses per the HUD Notice H-2019-06.

Certainly, transferring funds from an SNT to an ABLE account is not a panacea. For example, should the beneficiary be susceptible to exploitation or undue influence, the issues mentioned in the previous section in regards to fraud remain. Additionally, the trustee should carefully consider their potential liability in changing the nature of funds under their full discretion to funds controlled only by the beneficiary. Such a transfer of discretionary authority may be challenged generally, including a potential violation of settlor intent (especially in third-party trust situations). It is highly recommended that drafting attorneys discuss ABLE options with settlors and include language permitting transfers from the trust vehicle to ABLE accounts in the trust document.

IX. Recent ABLE Act Changes

Passed in December of 2017, the Tax Cuts and Jobs Act (TCJA) provided some interesting planning opportunities for ABLE account beneficiaries. Of note, all of the following provisions expire or "sunset" after 2025.

The first change for ABLE accounts in the TCJA allows a rollover of limited amounts from a 529 QTP account of a designated beneficiary to the ABLE account of the same designated beneficiary, as per the guidelines found in IRC § 529(c)(3)(C)(i)(III). This change also allows a designated beneficiary of a 529 QTP to make a transfer of funds from the QTP account to an ABLE account for a member of their family. Such transfers are not subject to income tax as long as the distributed funds are contributed to an ABLE account within 60 days of their withdrawal and, when added to all other contributions to the receiving ABLE account for the taxable year, are within the

limitations set forth in IRC § 2503(b) (the annual gift tax exclusion amount, or $18,000 for 2024). Should such a direct transfer (or, in the case of a rollover, a contribution) exceed the annual gift tax exclusion amount, it is subject to income tax and a 10% additional tax under IRC § 529(c)(6), as applicable. This change allows attorneys and planners yet another creative avenue to provide funds for a person with a disability the ability to spend funds on ISM-related items.

The second improvement enacted in the TCJA for ABLE accounts provides for a Saver's Credit for ABLE account beneficiaries. Basically, the Saver's Credit is a tax credit that offsets income if a person makes eligible contributions to an IRA or employer-sponsored retirement plan. This credit is now available for contributions to an ABLE account for the designated beneficiary. In order to qualify for this credit, an ABLE account beneficiary must be age 18 or older, not be a full-time student, and not be claimed as a dependent on another person's tax return. The amount of the credit can range from 10-50% depending on the ABLE account beneficiary's adjusted gross income (AGI) reported on their 1040 tax return. The maximum contribution amount that can apply for the credit is $2,000 for an individual, and $4,000 if the ABLE account beneficiary files their 1040 as "married filing jointly". As such, the maximum amount for the Saver's Credit tops out at $1,000 ($2,000 x 50%), or $2,000 if married filing jointly ($4,000 x 50%). Rollover contributions from a QTP do not qualify for the credit. A chart illustrating the Saver's Credit specifics follows:

2024 Tax Saver's Credit

Credit Rate	**Married Filing Jointly**	**Head of Household**	**All Other Filers**
50% of contribution	AGI no greater than $46,000	AGI no greater than $34,500	AGI no greater than $23,000
20% of contribution	AGI $46,001 - $50,000	AGI $34,501 - $37,500	AGI $23,001 - $25,000
10% of contribution	AGI of $50,001 - $76,500	AGI of $37,501 - $57,375	AGI of $25,001- $38,250

With access to the Saver's Credit, people with disabilities are finally now afforded greater retirement savings opportunities commensurate with credits previously only afforded to people without an ABLE account.

Finally, the ABLE to Work Act (AWA) assisted people with disabilities in being able to contribute more than the $18,000 annual limit to their ABLE account if they are working. This act also sunsets in 2025. The AWA allows employed ABLE beneficiaries who do not or cannot participate in an employer pension plan to make additional contributions to their ABLE account up to the lesser of the Federal Poverty Level (FPL) or the account beneficiary's compensation for that taxable year. The 2024 FPL limits are as follows:

- 1-person family/household: $15,060
- 2-person family/household: $20,440
- 3-person family/household: $25,820
- 4-person family/household: $31,200
- 5-person family/household: $36,580
- 6-person family/household: $41,960
- 7-person family/household: $47,340
- 8-person family/household: $52,720

The AWA allows people with disabilities to work and save their way out of unfairly imposed poverty by permitting them to save more of their earnings. Additionally, it provides an avenue for people with disabilities to potentially become less dependent on governmental support without risking the loss of their vital public benefits.

X. "ABLE vs. SNT"

The benefits and utility of ABLE accounts are certainly clear. However, ABLE accounts are limited to contributions and are not a replacement for a SNT. as stated previously, an ABLE account is not a cure-all and may not be the best planning vehicle in all cases.

See below for a brief analysis of ABLE accounts versus SNTs.

	ABLE Account	**SNT**
Age limit	No maximum, must be disabled before age 26	1st party - pre-65 3rd party - none

Can be managed by a beneficiary/owner with a disability	Yes	No
Maintain public benefits eligibility	Yes	Yes
Annual contribution limits	$18,000 (excluding ABLE to Work)	No
Tax-free growth	Yes	No
Unlimited number of accounts	No	Yes
Medicaid Estate Recovery	Yes (with CA exception)	1st party - yes 3rd party - no
ISM payments w/o SSI reduction	Yes	No
SSI disqualification amount	Over $100,000	None
Fraud/exploitation concerns	Yes	Minimized when administered by professional trustee

Additionally, SNTs may offer other tax-related benefits to the settlor as well as potentially qualifying for the Qualified Disability Trust (QDT) tax exemption of $5,050 (2024).

Lastly, not all SNT trustees or ABLE account programs offer the same benefits. Before establishing either vehicle, beneficiaries and their advocates must consider the ease of account opening, the ongoing costs of administration, investment options and returns, and the ease or difficulty of obtaining and requesting distributions. Beneficiaries and their advocates should also scrutinize the ABLE account plan or trustee's leadership, expertise, knowledge and tenure in the field, and their values or the overarching mission of the organization. Being trapped with an organization that does not share in the goal of empowerment and enhancement of quality of life for people with disabilities will at the least be unfruitful and at the worst cause legal, tax or health issues for the beneficiary. A great resource for research and guidance on ABLE program providers may be found at www.ablecompare.org.

X. Conclusion

ABLE accounts offer tremendous benefits and planning opportunities for people with disabilities. Coordinated correctly, ABLE accounts can be quite a valuable tool and resource. However, as with all vehicles related to planning for people with disabilities - beneficiaries, trustees, planners and attorneys must be prudent and cautious when using ABLE accounts. The ABLE Act continues to be a true blessing for people with disabilities, especially as amendments to its scope and limitations continue to be reevaluated and hopefully expanded over time.

POA Provision for an Eligible Individual

To establish, execute and fund a qualified ABLE account under Section 529(A) of the Internal Revenue Code on my behalf upon such terms and conditions as my Agent shall deem appropriate. My agent is authorized to establish, fund and sign for me as a designated beneficiary. To make withdrawals, investment decisions, receive account information and to exercise all other powers regarding such 529A account, including but not limited to, the power to rollover such account to another qualified 529A account or to a 529A account to another eligible individual as defined under Section 529A(c)(1)(C)(ii). Notwithstanding any authority granted to my agent under this document, my agent shall not acquire any beneficial interest in the 529A account during my lifetime and must administer the account for the benefit of me as required by Section 529A and corresponding regulations and such rules and regulations as imposed by any applicable state 529A plan.

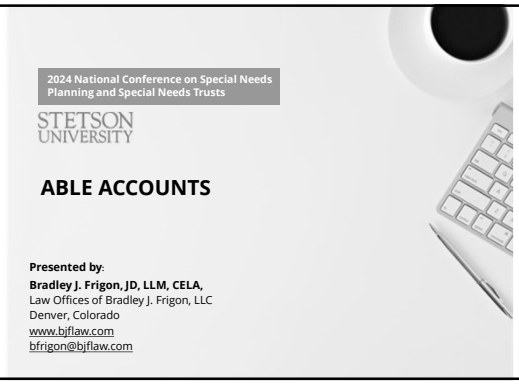
I further authorize my agent to provide, access and sign any disability certification to verify that I am an eligible individual as defined under 529A(e)(1) that has been diagnosed with a disability prior to the age of 26 years old, who has a medically determined physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months or is blind. (Document should include HIPPA authorization to obtain medical records).

POA Provision for a Parent or Family members to authorize agent under POA or a Trustee of Revocable Trust to make contributions to ABLE Account

To make a contribution or contributions to a qualified ABLE account on behalf of any eligible individual as defined under Section 529A(e)(1) of the Internal Revenue Code. All contributions shall be made in cash. Any contribution to any one eligible individual shall not exceed such annual contribution limits (from all sources) as imposed by Section 529A(b)(2)(B) and the aggregate excess limitations (from all sources) as imposed by 529A(b)(6).

Trust Distribution Provision to Authorize a Trustee to make Contributions to ABLE Account for an Eligible Beneficiary

To distribute income or principal on behalf of the beneficiary to a qualified ABLE account provided the beneficiary is, at the time of any such distribution, an eligible individual as defined under Section 529A(e)(1) of the Internal Revenue Code. All distributions of principal and income made on behalf of the beneficiary shall be made in cash directly to the qualified ABLE account. A distribution for the benefit of the beneficiary to a qualified ABLE account shall not exceed such annual contribution limits (from all sources) as imposed by Section 529A(b)(2)(B) and the aggregate excess limitations (from all sources) as imposed by 529A(b)(6).



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PRESENTER'S BIO

Bradley J. Frigon, JD, LLM, CELA, 43 years as a practicing attorney

- Extensive experience in estate planning, estate and probate litigation, special needs planning, elder law, guardianship and conservatorship; Medicaid, and taxation;
- Master of Laws in Taxation;
- Licensed to Practice Law in Colorado, Wyoming and Kansas;
- Co-Author Fundamentals of Special Needs Trusts;

Associations:

- Past-President of the National Academy of Elder Law Attorneys (NAELA);
- NAELA Fellow;
- Appointed member of the Special Needs Alliance for Colorado and Wyoming;
- 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);
- Colorado, Wyoming and Kansas Bar Associations.

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About ABLE

- June 2024 - Social Security Administration's Monthly Statistical Snapshot:-More than 7 million individuals receive SSI;
- IRC Section 529A;
- Internal Revenue Bulletin 2015-18 provides state authority to run ABLE programs;
- Consolidated Appropriations Act of 2016 (Pub. L. No. HR 2029 § 303);
- Allows people with disabilities to open an ABLE account in any state, regardless of residence;

Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act

"(1) encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life," and "(2) provide secure funding for disability-related expenses of beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, title XVI (Supplemental Security Income) and title XIX (Medicaid) of the Social Security Act, the beneficiary's employment, and other sources."

Achieving a Better Life Experience Act ("ABLE Act"), Pub. L. No. 113-295 § 101

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About ABLE

Tax-advantaged savings accounts for individuals with disabilities

- Income earned is non-taxable;
- Contributions (up to $18,000/year total – 2024, $19,000 - 2025) may be made by any "person;"
- ABLE account does not count as resource for public benefits determination;
- Limited eligibility: Onset of disability before age 26, **age 46 starting 1/1/2026;**
- Medicaid Estate Recovery? Depends on State;
- Distributions for "Qualified Disability Expenses" ("QDEs").

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Achieving a Better Life Experience (ABLE) Act

Enacted D 19, 201

Amends S 9 of the Inter ue Code

4

ABLE Eligibility

Eligible individuals must meet two requirements:

Age	Disability Determination
Must be disabled before age 26 **(age 46 starting 1/1/2026)**	Must have been determined to meet the disability requirements for Supplemental Security Income (SSI) or Social Security disability benefits OR Must submit a doctor's certification (M.D. or D.O.) that meets criteria (essentially equal to Social Security "listings" level of disability, including a physician's diagnosis, see here: https://www.ssa.gov/disability/professionals/bluebook/)

I.R.C. § 529A(e)(2) defines a "disability certification" to be a physician's certification that the individual is disabled as that term is defined in the Social Security Act. The statute makes clear that the physician's certification for this purpose may not then be used to compel a decision that the person is disabled for purposes of becoming entitled to a disability benefit under the Social Security Act.

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Definition of Disabled - Secure ACT

- The definition of "disabled" varies depending on whether at the time of the owner's death, the beneficiary is over age 18 or not. If the beneficiary has already been determined to be disabled for the purposes of qualifying for Social Security disability benefits, the beneficiary does not need to separately convince the IRS or the plan administrator of his or her disability "An individual who, as of the date of the owner's death, **is age 18 or older** is disabled if, as of that date, the individual is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration." Prop. Reg. § 1.401(a)(9)-4(e)(4)(ii).
- "An individual who, as of the date of the owner's death, **is not age 18 or older** is disabled if, as of that date, that individual has 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." Prop. Reg. § 1.401(a)(9)-4(e)(4)(iii).
- "If the Commissioner of Social Security has determined that, as of the date of the employee's death, an individual is disabled within the meaning of 42 U.S.C. 1382c(a)(3), then that individual will be deemed to be disabled within the meaning of this paragraph (e)(4)." Prop. Reg. § 1.401(a)(9)-4(e)(4)(iv).

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Contributions

POMS SI 01130.740.B.2:

- Contributions are payments of funds into an ABLE account.
- Contributions may be made by any person.
  - IRC 26 CFR 301.7701-6(a) "Person" defined as "an individual, trust, estate, partnership, association, company, or corporation."
- The total annual amount of contributions from all sources is limited to the amount of the per-donee gift-tax exclusion in effect for a given calendar year.
  - $18,000 (2024), $19,000 (2025)

Program Operations Manual System (POMS)

POMS SI 01130.740.B.2:

- "[A] designated beneficiary is limited to one ABLE account, which a qualified ABLE program administers. Except in the case of a rollover or program-to-program transfer, if a designated beneficiary has an additional account, it generally will not be treated as an ABLE account, and will be subject to normal resource counting rules."

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CONTRIBUTIONS

ABLE Contributions are after-tax dollars with tax deferred growth.

Aggregate contributions to an ABLE account subject to the overall limit matching the state limit for Section 529 accounts.

- Colorado ABLE limit is $400,000
- $400,000 / $18,000 = 22+ years
- No "catch-up" or "lump-sum" contributions as in QTPs

Some payments cannot be directly contributed to an ABLE. Examples of payments that cannot be contributed to an ABLE account after receipt but *still are counted as income as they otherwise would be*:

- Wages;
- Benefit payments (Title II, Veterans Administration, PETI, pensions, etc.);
- Alimony-Maintenance Payments;
- Child Support Payments;

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ABLE and SSI Eligibility

- If the beneficiary is receiving Supplemental Security Income (SSI) benefits, when the assets in the ABLE account total $100,000, the beneficiary's monthly SSI benefits will be placed in suspension.
- Once the ABLE Account is below $100,000, the SSI benefit suspension ceases and any SSI benefit resumes.
- The beneficiary will not have to reapply for SSI benefits once the account drops back below the $100,000 threshold.

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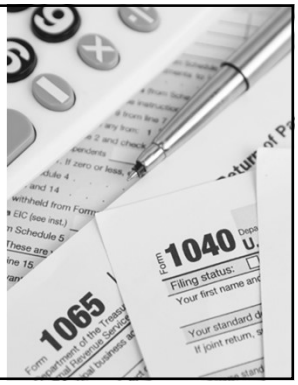
Contributions

POMS SI 01130.740.B.2: "Contributions must be in cash and may be made in the form of cash or a check, money order, credit card, electronic transfer, or a similar method."

- No appreciated assets;
- No stocks, securities, etc.;
- Life Insurance;

The total amount of annual contributions that an ABLE account can receive from all sources is limited to the amount of the per-donor gift-tax exclusion in effect for a given calendar year $18,000 for 2024, $19,000 for 2025.



10

Contributions

- POMS SI 01130.740.B.2 - "Contributions [to an ABLE account] may be made by any person. ("Person," as defined by the Internal Revenue Code (IRC), includes "an individual, ***trust***, estate, partnership, association, company, or corporation.)"
- A person with signature authority can establish and administer an ABLE account for a designated beneficiary who is a minor child or is otherwise incapable of managing the account. Signature authority is not the equivalent of ownership. The person with signature authority must be the designated beneficiary's agent acting under power of attorney, or if none, a parent or legal guardian of the designated beneficiary. Always consider the designated beneficiary to be the owner of the ABLE account, regardless of whether someone else has signature authority over it.

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Best Uses for ABLE Accounts

- Unexpected gifts/inheritence of modest amounts;
- Excess monthly earnings;
- Distributions from SNTs;
- Alternate to College 529 Plan for individuals who are unlikely to attend college;
- Savings account for families not ready to fund SNT;
- Alternative to SNT for families with very modest means;
- Minimizing ISM.

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Qualified Disability Expenses

POMS SI 01130.740.B.8

Expenses related to the blindness or disability of the designated beneficiary and for the benefit of the designated beneficiary. In general, a QDE includes, but is not limited to, an expense for:

- Education
- Housing
- Transportation
- Employment training and support
- Assistive technology and related services
- Personal support services
- Health
- Prevention and wellness
- Financial management and administrative services
- Legal fees
- Expenses for ABLE account oversight and monitoring
- ***Funeral and burial***;
- Basic living expenses.

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Liberal Application Applied to Distributions to be Classified as QDEs

The ABLE regulations provide that QDEs are not limited to the items listed in the Code Section and regulations. The intent is to be liberal in classifying distributions from a ABLE accounts as a QDE.

Even though distributions may be classified as a QDE, the distribution may impact a beneficiary's SSI/Medicaid. There are many eligibility traps for the unwary and overly complicated.

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Qualified Disability Expenses

When computing household operating expenses for ISM the following **10 items** are the only ones used in the applicable computations:

- Food –No longer counted as ISM
- Mortgage (including property insurance required by the mortgage holder)
- Real Pr[illegible]xes
- Sewer
- Gas
- Electricity
- Water

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Example of an Excluded Distribution

Eric takes a distribution of $500 from his ABLE account in June 2024 to pay for a health-related QDE. His health-related expense is not due until September, so Eric deposits the distribution into his checking account in June. The distribution is not income in June. Eric maintains his ABLE account at all relevant times, and the distribution is both unspent and identifiable until Eric pays his health-related expense in September. The $500 is excluded from Eric's countable resources in July, August, and September.

Since other expenses are being paid from Eric's account, he may have difficulty maintaining the necessary identity of the $500 ABLE distribution.

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Example of a previously excluded distribution used for a non-QDE

Sam takes a distribution of $25,000 from his ABLE account to modify a specially equipped van in May. He pays a $10,000 deposit to the repair shop. While waiting for delivery of the van, Sam takes a trip to a local casino in July, and loses $1,000 of his remaining $15,000 ABLE distribution gambling. The $1,000 he lost gambling is a countable resource in July. The other $14,000 Sam retains is an excluded resource while it meets the requirements of SI 01130.740C.5.a.

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Example of a change of intent on the use of a distribution

- In June, Jennifer takes a $7,000 distribution from her ABLE account to pay her college tuition which qualifies as a QDE. Her tuition payment is due in September. In August, Jennifer receives a job offer and decides not to return to school. Since Jennifer no longer intends to use the $7,000 for tuition, the $7,000 becomes a countable resource in September unless Jennifer redesignates it for another QDE or returns the funds to her ABLE account prior to September.
- How is Jennifer to redesignate her QDE from tuition to another QDE?

18

Distributions for a non-housing related QDE

Distributions for a non-housing related QDE are excluded from the designated beneficiary's countable resources (other than housing) if he or she retains the distribution beyond the month received. This exclusion applies while:

* The designated beneficiary maintains, makes contributions to, or receives distributions from the ABLE account;
* The distribution is unspent;
* The distribution is identifiable. (NOTE: excludable funds commingled with non-excludable funds must be identifiable.); and
* The individual still intends to use the distribution for a non-housing related QDE.

19

Count as a resource retained distributions for housing-related QDEs or expenses that are not QDEs

A distribution from an ABLE account is not income, but it may be a conversion of an exempt resource to a non-exempt resource. A distribution for a housing-related QDE or for an expense that is not a QDE is a countable resource if the beneficiary retains the distribution into the month following the month of receipt. If the beneficiary spends the distribution within the month of receipt, there is no effect on eligibility. If the distribution is a non-QDE, there may be tax consequences to the beneficiary.

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Example Housing Related -QDE

- In June, Martha takes a $2000 distribution from her ABLE account to pay her security deposit and first month rent for her new apartment which is a QDE. Her landlord notifies Martha that the her apartment will not be ready for occupancy until August. Martha keeps the $2,000 in her checking account until August. Because Martha did not return the $2,000 distribution to her ABLE account in June, the $2,000 is a resource to her in July. If Martha has more than $500 in her checking account August 1, she will be over resourced.

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Example of a previously excluded distribution used for a housing-related QDE

In June, Jennifer takes a $7,000 distribution from her ABLE account to pay her college tuition - a QDE. Her tuition payment is due in September. However, she needs to make a $750 advance rent payment to her landlord for her college apartment in August. She uses $750 of the distribution she took in June to make the rent payment – a housing-related QDE. The $750 is a countable resource in August. The remaining $6,250 of the retained distribution is excluded while it continues to meet the requirements of SI 01130.740C.5.a.

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Avoiding ISM

- Grandparents (or any family, individual, or SNT) funds an ABLE account. Adult disabled beneficiary receiving SSI lives with parents. ABLE account pays the parents a monthly rent that equals to or exceeds the one-third federal benefit rate plus $20. Since the rent payments are being made to parents from the ABLE account, the beneficiary's SSI is not reduced by PMV.
- The payment of rent from the ABLE account allows beneficiary to retain his or her full SSI payment. The parents receive a rental payment to offset monthly costs for housing the beneficiary.
- If the Beneficiary's SSI application is pending, an ABLE account can be used to pay rent for the beneficiary so that if a back benefit is awarded it will not be reduced by 1/3 for ISM.

23

Tax Consequences for Non QDE Distributions.

- IRC § 72 (relating to annuities)
- If distributions do not exceed beneficiary QDEs, no amount is included in gross income.
- If distributions exceed beneficiary QDEs, amount included in gross income:
  - Reduced by ratio of QDEs to total distributions
  - 10% penalty
- Ex: ABLE account with $100,000 balanced ($50,000 = contributions)
  - Distributes $10,000 to beneficiary who has only incurred $6,000 of QDEs
  - IRC § 72 - ½ $10,000 distribution amount ($5,000) included in gross income
  - This $5,000 is reduced by $3,000 ($6,000/$10,000 or 60% of total distributions multiplied by $5,000 gross income amount).
  - $2,000 is included in gross income
  - Plus tax of $200 (10% of $2,000)
  - Contributions to an ABLE account are not tax deductible.

24

Change in an Individual's Status as an Eligible Beneficiary

If at any time a designated beneficiary no longer qualifies as an eligible individual, his or her ABLE account remains an ABLE account to which all of the provisions of the ABLE Act continue to apply, and no (taxable) distribution of the account balance is deemed to occur.

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Change In Eligible Individual Status (cont.)

The intent of the regulations is to prevent a deemed distribution of the ABLE account and preserve the account's qualification as an ABLE account for all purposes if, for example, the beneficiary's impairment goes into a temporary remission, and to preserve the ABLE account with its tax-free distributions for qualified disability expenses if the impairment resumes and once again qualifies the designated beneficiary as an eligible individual.

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Change in eligible individual status (cont.)

Note that a distribution will not be a qualified disability expense if made at a time when a designated beneficiary is neither disabled nor blind within the meaning of §1.529A-1(b)(9)(A) or §1.529A-2(e)(1)(i).

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Change In Eligible Individual Status (cont.)

The regulations provide that, beginning on the first day of the taxable year following the taxable year in which the designated beneficiary ceased to be an eligible individual, no contributions to the ABLE account may be accepted.

If the designated beneficiary subsequently becomes an eligible individual, then additional contributions may be accepted subject to the applicable annual and cumulative limits.

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Change In Eligible Individual Status (cont.)

Example:

- Jennifer has been on SSI for many years and has an ABLE Account that her parents and other family members have been contributing into annually. In 2024 total contributions of $14,000 were made and the account now has $50,000.
- Jennifer gets a job, and is being paid a salary of $34,000 a year.
- Since Jennifer is working, she no longer qualifies under the definition of "disabled" under the first category as an eligible designated beneficiary since she no longer receives SSI benefits or disability benefits under Title II of the Social Security Act.

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Change in eligible individual status (cont.)

- Jennifer can still qualify as an eligible disabled beneficiary under the doctor certification process. If Jennifer does not qualify under the certification process, then contributions cannot be made to the ABLE account beginning with the first day of the following year in which she no longer qualified as a disabled beneficiary.
- For 2024, another $4,000 of contributions could be made to the ABLE account.

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ABLE participants use cards primarily for day-to-day spending

Overview of True Link ABLE Visa Card usage

Spending money	$49	average dollar amount per purchase*
	34	average number of purchases made per True Link ABLE Visa*
Loading money	$300	median amount transferred to card each time the card is loaded*
	$650	average amount transferred to card each time the card is loaded*

*research provided by True Link Financial - STABLE historical transactions through 10/30/2023

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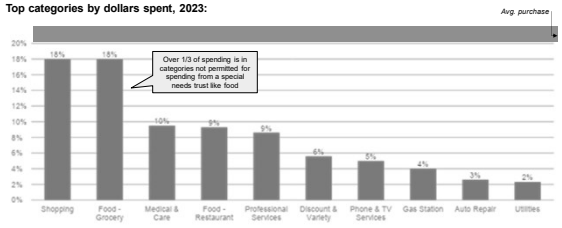
Top spending categories largely center on necessities and purchases not permitted with funds from a special needs trust

Top categories by dollars spent, 2023:

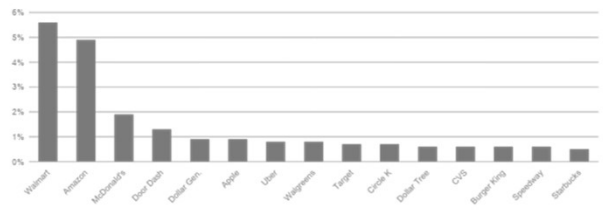


*research provided by True Link Financial - STABLE historical transactions through 10/30/2023

32

The most popular 15 merchants represent 61% of purchases, with Amazon and Walmart accounting for almost 46% of purchases

Percent of total purchases at top 15 merchants, 2023:



*research provided by True Link Financial - STABLE historical transactions through 10/30/2023

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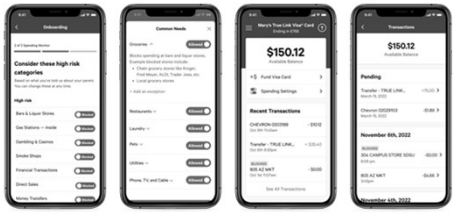
True Link Visa® Prepaid Card

Promoting Beneficiary Independence



The True Link Visa Prepaid Card is issued by Sunrise Banks N. A., Member FDIC, pursuant to a license from Visa U.S.A. Inc. This Card can be used everywhere Visa debit cards are accepted. Use of this card constitutes acceptance of the terms and conditions stated in the Cardholder Agreement.

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ABLE Changes – Tax Cuts and Jobs Act SUNSETS AFTER 2025

529 QTP Rollover

- Rollover limited amounts of a QTP to an ABLE account of same beneficiary;
- IRC § 529(c)(3)(C)(i)(III);
- Rollover limited amounts of a QTP to an ABLE account of a family member of the same beneficiary provided the rollover beneficairy is disabled as defined by ABLE;
- Not subject to income tax if distributions are contributed to an ABLE account within 60 days;
- Subject to annual gift-tax exclusion amount (IRC§ 2503(b): $18K for 2024);
- Should transfer or contribution plus all other contributions exceed $18,000 in a tax year, rollover is subject to income tax and 10% additional tax under IRC § 529(c)(6), as applicable.

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Member of Family Defined

IRC § 529(c)(3)(C)(i)(III);

The term "member of the family" means, with respect to any designated beneficiary— (A) the spouse of such beneficiary; (B) an individual who bears a relationship to such beneficiary which is described in subparagraphs (A) through (G) of section 152(d)(2); (C) the spouse of any individual described in subparagraph (B); and (D) any first cousin of such beneficiary.

Section 152(d)(2);

- **(A)** A child or a descendant of a child.
- **(B)** A brother, sister, stepbrother, or stepsister.
- **(C)** The father or mother, or an ancestor of either.
- **(D)** A stepfather or stepmother.
- **(E)** A son or daughter of a brother or sister of the taxpayer.
- **(F)** A brother or sister of the father or mother of the taxpayer.
- **(G)** A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law

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ABLE Recent Changes – Tax Cuts and Jobs Act SUNSETS AFTER 2025

- People with disabilities who work can contribute more than $18,000/year (2024)-$19,000 (2025)
- Cannot contribute to an employer-sponsored retirement plan.
- Can make contributions up to the lesser of the Federal Poverty Level (FPL) or beneficiary's taxable year compensation.

2024 FPL LIMITS:

1 Person family/household	**$15,060**	5 Person family/household	**$36,580**
2 Person family/household	**$20,440**	6 Person family/household	**$41,960**
3 Person family/household	**$25,820**	7 Person family/household	**$47,340**
4 Person family/household	**$31,200**	8 Person family/household	**$52,720**

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ABLE vs. SNT

ABLE Account

- Tax-advantaged savings accounts for individuals with disabilities
- Person with disabilities can manage their own account or it can be managed by an authorized representative
- Savings without affecting SSI, Medicaid, and other need-based benefits (up to account maximum)
- Funds in account can be used for QDEs with no impact on benefits (shelter)
- Can enroll in any state's program

SNT

- A legal arrangement wherein a trustee manages assets on behalf of a beneficiary (note: must be managed by someone other than the individual with a disability)
- Funds can be used for allowable expenses without affecting SSI, Medicaid, need-based benefits
- Funds cannot be used for shelter without affecting benefits (In-Kind Support & Maintenance or "ISM")
- 3rd-party SNT qualifies for QDT Exemption ($4,300)
- Key terms: 1st-party, 3rd-party, Pooled

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Overview of ABLE vs. SNTs

	ABLE Account	Standalone SNT	Pooled SNT
Contribution Amount	$18,000/year	Unlimited	Unlimited
Shelter Payments w/o SSI reduction	YES	NO	NO
Taxable Income	NO	YES	YES
Beneficiary Eligibility Requirements	Must be disabled before age 26	Federal definition of disability before age 65 (3rd party-any age)	Federal definition of disability before age 65 (3rd party-any age)
Medicaid Recovery	Depends on State	YES: 1st-Party NO: 3rd-Party	YES: for PSNT NO: 3rd-Party
Disqualification from SSI	Account balance over $100,000	NONE	NONE
Abuse / Vulnerability	Fraud, coercion, disqualification from benefits	MINIMIZED if administered by professional trustee	MINIMIZED

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POA Provision for an eligible Individual

- To establish, execute and fund a qualified ABLE account under Section 529(A) of the Internal Revenue Code on my behalf upon such terms and conditions as my Agent shall deem appropriate. My agent is authorized to establish, fund and sign for me as a designated beneficiary. To make withdrawals, investment decisions, receive account information and to exercise all other powers regarding such 529A account, including but not limited to, the power to rollover such account to another qualified 529A account or to a 529A account to another eligible individual as defined under Section 529A(c)(1)(C)(ii). Notwithstanding any authority granted to my agent under this document, my agent shall not acquire any beneficial interest in the 529A account during my lifetime and must administer the account for the benefit of me as required by Section 529A and corresponding regulations and such rules and regulations as imposed by any applicable state 529A plan.
- I further authorize my agent to provide, access and sign any disability certification to verify that I am an eligible individual as defined under 529A(e)(1) that has been diagnosed with a disability prior to the age of 26 years old, who has a medically determined physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months or is blind. (Document should include HIPPA authorization to obtain medical records).

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POA Provision for a Parent - Family members to authorize agent under POA or a Trustee of Revocable Trust to make contributions to ABLE Account

To make a contribution or contributions to a qualified ABLE account on behalf of any eligible individual as defined under Section 529A(e)(1) of the Internal Revenue Code. All contributions shall be made in cash. Any contribution to any one eligible individual shall not exceed such annual contribution limits (from all sources) as imposed by Section 529A(b)(2)(B) and the aggregate excess limitations (from all sources) as imposed by 529A(b)(6).

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Trust Distribution Provision to Authorize a Trustee to make Contributions to ABLE Account for an Eligible Beneficiary

To distribute income or principal on behalf of the beneficiary to a qualified ABLE account provided the beneficiary is, at the time of any such distribution, an eligible individual as defined under Section 529A(e)(1) of the Internal Revenue Code. All distributions of principal and income made on behalf of the beneficiary shall be made in cash directly to the qualified ABLE account. A distribution for the benefit of the beneficiary to a qualified ABLE account shall not exceed such annual contribution limits (from all sources) as imposed by Section 529A(b)(2)(B) and the aggregate excess limitations (from all sources) as imposed by 529A(b)(6).

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November 21, 2024

ISM Contracts as a Special Needs Planning Tool

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ISM Contracts as a Special Needs Planning Technique to Shelter Excess Resources

and

The New National SSI Rental Subsidy Policy to Avoid ISM/PMV Income Reductions

by David Lillesand, Esq.

This session discusses ISM Contracts in the context of the 2024 regulations removing food from ISM and allowing rental subsidies to quash PMV reductions from SSI cash payments. SSI benefits start at the maximum Federal Benefit Rate, but SSA staff must subtract from that benefit earned income and unearned income. A form of unearned income is Inkind Support and Maintenance (ISM) required under either the VTR rule or the PMV rule. The regulatory removal of "Food" does not affect the VTR determination or its prepayment in ISM Contracts. Any goods or services can be prepaid, including food as well as shelter. If the SSI claimant prepays their own food and shelter, there is no ISM deduction. And there is no transfer penalty if the POMS on ISM Contracts are followed.

ISM Contracts as a Special Needs Planning to Eliminate Excess Resources

When a person on SSI-disability or SSI-elder benefits receives an unexpected inheritance or proceeds from a lawsuit, the event calls for special needs planning to continue the SSI monthly checks and state Medicaid without going over the $2,000 countable resource limit. Many practitioners think the best or only answer is an individual or pooled special needs trust (SNT). That is not necessarily the case. This article discusses the advantages of an ISM Contract for a term of months or for a lifetime to transfer substantial amounts of cash to trusted relatives transfer-penalty-free following the SSA published example. The ISM Contract, where appropriate, has significant cash and other benefits over a personal services contract or an SNT.

Transfer of Resources Re-instituted. In 1999 Congress changed the Social Security Act to impose a Supplemental Security Income (SSI) transfer of resources penalty for a maximum of months 36 months for transferring assets for less than fair market value (FMV). Foster Care Independence Act of 1999 (P.L. 106-169). Before this change, persons with disabilities in the forty 1634 states could simply give away excess resources and continue to receive SSI cash benefits which would trigger continuation of Medicaid by law. Social Security Act, Section 1634(a). Every one of the now forty-one 1634 states have a state statute, Medicaid rule, or agreement with DHHS in the Medicaid State Plan, or all three, to provide mandatory Medicaid to every person who is eligible for at least one dollar of SSI cash benefits or is deemed to be "otherwise eligible for SSI" benefits without even filing a Medicaid application. Life was simple.

Fair Market Value. In response to the 1999 Congressional amendment, the Social Security Administration (SSA) immediately added SI 01150.005 to the Program Operations Manual System (POMS) to explain how the agency will assess Fair Market Value and to delineate the exceptions to the transfer penalty, giving the special needs attorney some additional and often better tools to maintain public benefits when an additional resource (asset) arrives.

The issue for transferring money penalty-free from the SSI beneficiary to another depends on whether the transfer results in "Fair Market Value." SSA defines Fair Market Value in a long POMS SI 01150.005 as "the current market value (CMV) at the time the resource transfers," noting that CMV is the going price at which the resource could reasonably be expected to sell on the open market in the local area. POMS SI 01150.005.B.1. SSA defines compensation as the cash or other valuable consideration provided in exchange for the resource, paid by cash or real or personal property received in exchange. SI 01150.005.B.2.

The value of the compensation received by the SSI claimant is determined by looking at the legally binding agreement between the SSI claimant-transferor and the person or entity receiving the resource. Particularly important is the POMS statement that:

> "A transferor receives compensation when they receive something of value **pursuant to a legally binding agreement** (**e.g., a contract**, a bill of sale, a deed) that was in effect at the time of transfer. The transferor may actually receive the compensation **before, at, or after the actual time of transfer**." POMS SI 01150.005.C.2. (*Emphasis added*).

That simple sentence also forms the basis for elderly people over 65 to transfer funds without penalty to a pooled special needs trust if the anticipated date of spending all the money in the pooled trust occurs before the date of expected death based on the SSA Chief Actuary's estimated life expectancy webpage.

In determining whether the SSI claimant can receive an SSI check, and the amount of the SSI check, if any, SSA has to subtract countable earned an countable unearned income each month.

Inkind Support and Maintenance (ISM) is defined as unearned income in the form of food or shelter. The Social Security Act (the Act) considers ISM, along with other forms of unearned income, when determining supplemental security income (SSI) eligibility and payment amounts. 20 CFR §416.1130. Specifically, ISM Contracts, also called "food and shelter" or "room and board" contracts, may provide all the alternative distribution needed to avoid the transfer penalty if the transferred amount is valued at its full CMV multiplied by the length of time for which the ISM is to be provided under the agreement, as long as the amount paid does not exceed the life expectancy of the SSI transferor.

Is "food" as a household expense really gone from SSA calculations? No. It's still retained for VTR calculations and it is still a future expense that can be prepaid via an ISM Contract. The title of the relevant POMS section SI 01150.005 is "**Determining Fair Market Value."** You can prepurchase many types of goods or services, not just food and shelter. For example, the POMS in subparagraph c, includes the "value of services" with the following example:

> **Example: Determining the value of services**
>
> In exchange for $9,000 cash, the individual contracts for yard maintenance services for 5 years. The maintenance company charges $150 per month ($1,800 per year). Five years of maintenance at $1,800 per year equals $9,000.

Another example:

> **b. Document the agreement for services**
>
> Verify the agreement to provide services by getting a copy of the services contract or a signed statement from the person getting the transferred resource that shows the type, frequency, and duration of the services provided. If the agreement does not specify the frequency, but rather that the person receiving the resource will provide services on an "as needed" basis, the statement must include their expectations as to the frequency of the services and the basis for the expectation.
>
> **Example: Compensation Received as Services**
>
> Linden transferred livestock valued at $2,000 to their neighbor. As compensation, the neighbor agreed to put a new roof on Linden's home. The claims representative (CR)

> contacted a local roofing contractor and found that the cost of a new roof would be about $2,100. The compensation Linden received was valued at $2,100. Therefore, the CR determines that Mr. Linden received FMV for his livestock.
>
> **NOTE**: The fact that the new roof's value ($2,100) exceeded the value of the livestock ($2,000) does not result in income to Linden for SSI purposes. For information on conversion or sale of a resource, see SI 00815.200.

That is how a personal services contract is specifically allowed.

What is ISM? ISM is defined as unearned income in the form of shelter but capped at the Presumed Maximum Value rule (one third of the Federal Benefit Rate plus $20). Under SSA's old, old rules, ISM included "food, clothing, and shelter" and counted ISM received as unearned income, which may affect a person's eligibility (if the SSI payment is less than the PMV amount) or reduce their payment amount by the PMV.

"Clothing" was removed by federal regulation beginning March 9, 2005. This year, on March 27, 2024, the Social Security Administration (SSA) finalized a rule called "Omitting Food from In-Kind Support and Maintenance (ISM) Calculations" that took effect on September 30, 2024.

"Food" as a category of ISM was removed as part of Inkind Support and Maintenance disqualifying calculations effective September 30, 2024.

You should always determine the "pro rata share of household operating expenses" using the new federal regulation without adding "food" to the calculation of "household expenses". However, in determining the amount of an ISM Contract, you can use both prepaid food as well as prepaid household expenses to determine that the transfer of the contract amount is not greater than the Fair Market Value of the amount transferred by the SSI claimant in prepayment for the two items. Food is food and your estimate must be reasonable; but shelter is specifically defined by SSA policy. Household operating expenses do not include all home-related expenses that some of us may include in our own financial planning, such as the cost of pest control, swimming pool

maintenance, yard maintenance, cable TV and streaming services, internet, etc. But for ISM Contract purposes, household expenses are limited to those in subparagraph (c) below:

> **20 CFR 416.1133 What is a pro rata share of household operating expenses.**
>
> (a) **General**. If you pay your pro rata share toward monthly household operating expenses, you are living in your own household and are not receiving in-kind support and maintenance from anyone else in the household. The one-third reduction, therefore, does not apply to you. (If you are receiving ~~food or~~ shelter from someone outside the household, we value it under the rule in § 416.1140.)
>
> (b) **How we determine a pro rata share**. Your pro rata share of household operating expenses is the average monthly household operating expenses (based on a reasonable estimate if exact figures are not available) divided by the number of people in the household, regardless of age.
>
> (c) **Average household operating expenses**. Household operating expenses are the household's total monthly expenditures for ~~food,~~ rent, mortgage, property taxes, heating fuel, gas, electricity, water, sewerage, and garbage collection service. (The term does not include the cost of these items if someone outside the household pays for them.) Generally, we average household operating expenses over the past 12 months to determine a pro rata share.
>
> *Amendment to the federal regulation published at 89 FR 21201 on March 27, 2024, effective September 30, 2024.*

Note, however, that clothing is not and never has been a part of household operating expenses, and therefore should not be added in when creating an ISM Contract under the SSI rules.

Secondly, the new regulation maintains an old pre-existing POMS that says that household expenses are to be averaged over the previous past 12 months. Therefore, get and use the past year's data before doing your calculations to determine the ISM Contract and include that data with your computations you file with SSA when notifying them of the ISM Contract.

Existing POMS Example – Value of ISM non-cash compensation for a term of years or months. SSA provides a helpful example in POMS SI 01150.005(C)(3)(b) of an ISM contract for a period of years:

> **b. In-kind support and maintenance (ISM)**
>
> We value compensation received in the form of ISM at its full CMV (monthly or annually depending upon the agreement) multiplied by the length of time for which it is to be

provided under the agreement. We do not cap the value of the compensation at the value of the one-third reduction (VTR) or presumed maximum value (PMV).

Example: Determining whether ISM applies

Thomas transfers $30,000 cash to their sibling based on a written contract that they would provide Thomas with food and shelter for 5 years. The sibling values the food and shelter at $500 per month. The CR develops Thomas' living arrangements and determines that Thomas has a flat fee arrangement with their sibling and required to pay $500 per month. The food and shelter for 5 years is worth $30,000 (5 years x $6,000 per year). Therefore, Thomas received FMV for the $30,000 they transferred. ISM is not counted because the individual has prepaid for their food and shelter with the $30,000 they transferred. For procedure on determining an individual's contribution toward household operating expenses, see SI 00835.480D.

NOTE: Using the same facts as in the preceding example, assume that the CR is conducting a redetermination 2 years later and the sibling providing the ISM alleges that the value of the food and shelter they provide has increased to $650 per month. Since Thomas entered into an agreement that the $30,000 covered their food and shelter for 5 years, do not re-open the LA/ISM determination due to breakpoints that may occur in that household such as an increased flat fee charge. Assume that the individual is not getting ISM for the duration of the 5 years unless the individual moves from that household to a new residence.

Removing "food" from the list of ISM items does not mean that the cost of buying food cannot be included in the ISM contract. To set the value of the compensation in the agreement, SSA staff must use the *actual* value of the ISM as defined in the 20 CFR 416.1133 and not the one-third reduction or presumed maximum value (PMV). POMS SI 01150.005.D.3. Staff are further instructed to obtain a statement from the ISM provider to confirm the ISM is being provided using SSA's form 8011-F3 (Statement of Household Expenses and Contributions). Note, however, that going to the SSA forms webpage, we are told that form 8011-F3 is not available to the public online. Be prepared to provide whatever information SSA staff ask for on whatever form they provide.

Should the valuation be annual or by month? For ease of both calculation and to align with SSI's requirement that every month is a separate SSI qualification period, it would be easiest to just use the number of months into the future that the rent is prepaid. The example with Thomas was created 24 years ago. Using a more realistic number, suppose the FMV of the rent is $800 per

month and the food is $400 per month. Thus the $30,000 transferred to the sibling is now valued at $1,200 per month (the Current Market Value of receiving room and board in the sibling's home). Thomas is only prepaying for 25 months into the future not the 60 months (five years) as calculated in the 1999 example. In drafting, specify the date of the transfer and the number of months into the future that are covered, and include the specific beginning and ending dates.

Existing POMS example of ISM for Life. What about a legally binding agreement that in exchange for some real property, personal property, or cash, the SSI claimant will receive ISM for his or her life. How is the amount properly calculated?

SSA staff are instructed to multiply the yearly CMV of the ISM provided by the SSI claimant's "years of life remaining" per the SSI claimant's gender and age data as found in POMS SI 01150.005F which in turn directs you to the SSA Chief Actuary's webpage. Log on the Chief Actuary's webpage at https://www.ssa.gov/oact/population/longevity.html and select gender and date of birth, and it instantly gives you the "additional life expectancy" for the claimant in years. It does not and should not factor in current health or family history that could increase or decrease life expectancy. The Chief Actuary's webpage notes that "the estimates of additional life expectancy do not take into account a wide number of factors such as current health, lifestyle, and family history that could increase or decrease life expectancy." The fact that your client is in hospice with terminal cancer and is predicted to have less than six months to live does not matter in the calculations permissible under the rules; you are required by the POMS to use the results in your ISM Contract calculations.

Note that the SSA Chief Actuary's estimate of life expectancy may be different from the life expectancy charts in the state Medicaid Manuals or private life insurance company charts. You must use the SSA estimate to qualify for SSA's SSI benefits.

Print out the SSA Life Expectancy Calculator result to send to SSA with your faxed Notice of Changed Financial Circumstances informing SSA of the inheritance or personal injury award, and your ISM Contract showing SSA the calculations of estimates of value of food and household expenses used in the ISM Contract.

SSA gives two useful examples, one approved and one denied, showing the effect of an agreement to provide ISM for life to show the impact of life expectancy.

> **POMS SI 01150.005.D.3.c**
>
> **Example 1: Total value of ISM results in FMV compensation**
>
> Valerie Payne transfers non-home real property valued at $185,000 to her sister. As compensation, her sister agrees to provide Valerie with room and board in the sister's home for the rest of Valerie's life. ISM development shows that the sister's total household expenses are $1,500 per month. The household consists of three persons, including Valerie who was age 53 at the time of the transfer. The CMV of the ISM is $6,000 per year ($1,500/3 = $500 per month x 12 months = $6,000). Then, $6,000 x 31.61 (average years of life remaining at age 50) = $189,660 compensation. In this case, Valerie received FMV for the transferred resource. We do not count ISM because the individual prepaid for her own food and shelter with the value of the home she transferred. For the procedure on determining an individual's contribution toward household operating expenses, see SI 00835.480D.
>
> **Example 2: Total value of ISM results in uncompensated value**
>
> Assume the same case facts as in Example 1 except that Valerie Payne is 80 years old at the time of the transfer. As in Example 1, the ISM is worth $6,000 per year. At 80 years of age, the life expectancy table indicates 7.16 years. Multiplying 7.16 years times $6,000 results in compensation of $42,960. In this case there is uncompensated value of $142,040 ($185,000 minus $42,960). Therefore, Valerie is subject to a period of ineligibility for SSI because she transferred the house for less than FMV.

With an SSI-elderly claimant, you may need to use a combination of special needs planning techniques – some aggressive spend-down (buy a $100,000 new car), pay off credit card debts, make a maximum ABLE contribution if eligible, and the remainder balance in an ISM Contract for the 80 year SSI-elderly client as long as the numbers work out. Remember also that the examples were created a quarter century ago, in 1999. Current actual costs will yield a FMV much higher and that's good. It means you can transfer more to the sister.

When to use the ISM Contract and when not to. The best scenario is one that occurred organically – that is, that the SSI claimant and a family member had previously decided to live together. For example, the agreement between Valerie Payne, the SSI claimant, and her sister could arise in a couple of ways. Perhaps Valerie and her sister have already been living together for years when suddenly Valerie inherits her deceased mother's home (described in the example as "non-home real property"). Or perhaps Valerie has been living in her own home, and now that she is becoming more physically frail, she wants to sell it for net cash sales proceeds of $185,000 and move in with her sister who can help care for her. Regardless, Valerie tells you at a conference, "I just want to give the money to my sister." Valerie's former home had become a disqualifying "countable resource" since it was no longer her primary residence. If it is sold, the net sales proceeds are over the $2,000 SSI asset limit. You can fix her ineligibility by transferring the cash to her sister in an ISM Contract.

A current client is receiving a Federal Tort Claims Act settlement and is in the United States alone. The only person she would contemplate prepaying years and years of ISM to is her non-relative landlady. Obviously, there are risks and we do not recommend an ISM Contract in this scenario.

What are the options to deal with the new asset? At this point Valerie decides to sell for cash or transfer the real property to her sister and continue to live with her sister, or to move in with her sister if she has not been living with her before. Remember, there is no deeming of sister's income and assets to Valerie, the SSI claimant. How does the ISM Contract measure up to the other options?

Option 1: Just give the money to her sister and go off benefits for three years. If Valerie sells the house, receives the $185,000 sales proceeds, and gives the money to her sister with no

agreement for anything in return, the transfer penalty applies in full. The penalty of loss of SSI is the amount transferred ($185k) divided by the Federal Benefit Rate (currently $943 per month) resulting in a penalty calculation of 196 months, but the penalty is capped by statute at 36 months from the date of transfer (the maximum penalty under the Foster Care Independence Act). While that choice results in a loss of approximately $11,316 tax free income per year for three years, or $33,948 total (without COLAs), the more significant potential loss is the SSI-related mandatory Medicaid health insurance coverage in the forty-one §1634(a) states.

Option 2: Use a special needs trust. If Valerie sells the home, receives $185,000, and puts the funds in a SNT with the trust paying Valerie's share of the household expenses triggering the PMV loss, the trust's contribution triggers the ISM reduction by the PMV amount , currently the reduction of $334.33 per month in 2024 from her $943 SSI check. She loses over $3,780 per year in tax-free SSI benefits by having a trust because her SSI check is reduced from $943 to $628.67 per month. And she incurs attorney fees to create the SNT, trustee fees to administer the SNT, and CPA fees for the SNT tax returns, and if she uses a pooled or individual SNT, a potential startup fee as well. The result is that Valerie has more expenses and less tax-free income than if she used the ISM Contract. At 31 years of life expectancy, the one-third loss of tax-free SSI income amounts to $117,180 in unpaid SSI benefits, and the trustee fee could amount to losing thousands of dollars at 2.95% over the 31 years.

Option 3: Use a personal services contract. Instead, Valerie decides to engage in other special needs planning and transfers the sales proceeds to her sister in an agreement for personal services to be received in the future. Personal service contracts (PSC) are specifically allowed under the same Fair Merket Value POMS at SI 01150.005.D.4.

How to draft and apply the Fair Market Value rule in a Personal Services Contract is laid out in an SSA Atlanta Regional Chief Counsel Precedent (opinion letter) at **PS 01820.011 Florida, *PS 14-102 Supplemental Security Income Resource Determination—Validity of Personal Services Contract***. The big problem is the amount Valerie's sister receives from the PSC is IRS-taxable income of $185,000 which results in a potential substantial loss of $33,939 (at 24%) to the government if using the standard deduction and the sister having no other taxable income. For a recent physician client of mine providing a PSC to his mother would result in a 38% tax bracket loss of $70,300 more federal income taxes. Using the ISM Contract resulted in 0% more taxes.

Option 4: Use the ISM Contract for pro rata household expenses detailed above. The benefit to Valerie of using the SSA-approved option of transferring all the real estate cash sales proceeds or transferring title to the non-home property to the sister include avoiding:

- personal federal income taxes of the sister to the federal and possibly the state governments if the PSC is one of the alternatives;
- the ISM deduction from Valerie's SSI checks;
- attorney fees for trust preparation; and
- lifetime trustee fees and expenses.

Once the sister receives the payment under the terms of the ISM Contract, she can spend the funds any way she likes and does not have to account further for the funds and does not have to hold them to meet future contractual requirements. Sharing of actual expenses (at "cost") per the Internal Revenue Code is not a taxable event since there is no "profit" involved. The sister is required under the ISM Contract to provide food and shelter for Valerie, but she does not need to keep an account of doing so nor report to SSI or Medicaid in the future. Ongoing accounting fees for the funds received are also eliminated.

There is no added income taxes owed. Three separate tax experts have advised our office in three separate cases that the room and board contract to share food and shelter expenses results in no federal income tax consequences for the person who receives the funds and agrees to provide the food and shelter at cost. Thus, the $36,011 federal income tax loss incurred by using the PSC is eliminated by the prepaid ISM Contract. The substantial tax loss is even more if you live in a state with state income taxes as well.

Special needs planning should not be one shoe fits all, nor should special needs planners apply only a single technique to a particular SSI claimant's situation. Combinations of appropriate spend down (paying off credit card bills; paying down mortgages; purchasing new appliances, vehicles, clothes, computers, dental care, and infinitely more), ABLE accounts for those eligible, some funds in ISM contracts, etc., can make clients extremely happy to have a special needs plan tailored to meet their individual needs.

ISM Contracts can effectively manage small or larger amounts of funds since such contracts can be for a term of several months, several years, or as described by SSA in the POMS example, for a lifetime. Additionally, ISM Contracts increase the amount of SSI check by avoiding the ISM deduction resulting in the full SSI benefits because the SSI claimant is paying her fair share of shelter costs.

ISM Contracts are not appropriate in every case, but where they are, the advantages over SNTs and PSCs are substantial.

The New National SSI "Rental Subsidy" Policy To Avoid ISM/PMV Income Reductions

A client, Victoria, this month called because her mother, Anna, lost Anna's SSI-elderly payment of $45 per month because SSA was subtracting the ISM provided by the adult daughter to her mother. Anna had a small Title 2 retirement check and an even smaller private pension that ony left $45 of SSI owed. But the client had moved from her condo apartment on the second floor that Anna owned, to a first floor apartment that Victoria rented for her. As a result, the client was notified that Victoria's Inkind Support and Maintenance (ISM) meant that after subtracting the ISM amount, Anna lost th $45 SSI check and the resulting SSI-related Medicaid. Fortunately, SSA had issued new federal regulations on rental subsidy policies that became effective September 30 2024, that solves the client's problem.

What happens next? Anna is receiving food stamps and so the PMV rule applies.

Pursuant to the new rental subsidy regulation, Anna and Victoria entered into a "business arrangement" (written lease) with Anna paying $350 per month. Under the proposed rule, this means that Anna will continue to receive the SSI check $45 with no further reduction for ISM.

The background of the new national "rental subsidy policy." A month after issuing the new proposed regulations eliminating "food" as an ISM category, SSA also published a second Notice of Proposed Rule Making, 88 FR 57910, to expand its favorable SSI rental subsidy policy from seven states mandated by the federal courts (Connecticut, Illinois, Indiana, New York, Texas, Vermont, and Wisconsin) to nationwide. In those states, rental assistance, such as renting at a discounted rate, was less likely to affect a person's SSI eligibility or payment amount from the full SSI check to an amount reduced by the Presumed Maximum Value rule. This new SSA regulation extends the same helpful policy to all SSI applicants and recipients nationwide. This will increase

the SSI cash payment amount some people are eligible to receive and will allow more people to qualify for critical SSI payments and at a higher rate.

SSA provided in the April 2024 Notice of Proposed Rule-Making to the federal regulations the following examples to make clear the adverse impact of the old, former policy versus the new policy.

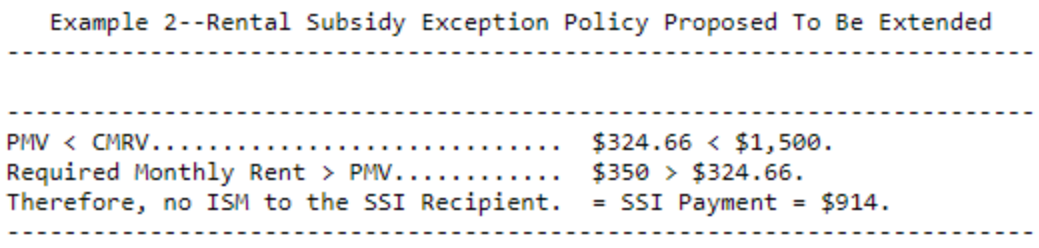
Impact of former policy explained in the Notice of Proposed Rule-Making. A disabled adult son with a wife and child was renting a home from his mother at $350 per month. The Current Market Rental Value was $1,500 per month. SSA used to count the difference as Inkind Support and Maintenance (ISM) and applied the Presumed Maximum Value (PMV) rule and reduced the claimant's SSI check in 2023 from $914 per month to $589.34 per month, the rates in effect the year of the example:

Example 1-- Current General Rental Subsidy Policy

Equation	Application of the example
CMRV-Required Monthly Rent = Household ISM.	$1,500 - $350 = $1,150.
Household ISM/Number of people in household = ISM/Rental Subsidy to the SSI Recipient.	$1,150/3 people in household = $383.33.
ISM is capped at the PMV.....	$383.33 > $324.66.
SSI payment = FBR-PMV.....	SSI payment = $914 - $324.66 = $589.34.

Screen capture from NPRM. NOTE: "CMRV" is the acronym for Current Market Rental Value.

Under the new regulation. As long as a "business arrangement" (lease) exists between the mother and disabled son for an amount of rent equal to or greater than the PMV amount, there is no reduction in the disabled son's SSI disability check. See Example 2:



Screen capture from NPRM.

The new federal regulation at §416.1130(b)(1), effective September 30, 2024, on In-Kind Support and Maintenance, amends paragraph (b) by revising new paragraph (b)(1) to read:

> (1) We calculate in-kind support and maintenance considering any shelter that is given to you or that you receive because someone else pays for it. Shelter includes room, rent, mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewerage, and garbage collection services. You are not receiving in-kind support and maintenance in the form of room or rent if you are paying the amount charged under a business arrangement. A business arrangement exists when the amount of monthly required rent to be paid equals or exceeds the presumed maximum value described in § 416.1140(a)(1). If the required amount of rent is less than the presumed maximum value, we will impute as in-kind support and maintenance the difference between the required amount of rent and either the presumed maximum value or the current market rental value (see § 416.1101), whichever is less. In addition, cash payments to uniformed service members as allowances for on-base housing or privatized military housing are in-kind support and maintenance.

The key part of the new "business arrangement" provisions is:

> You are not receiving in-kind support and maintenance in the form of room or rent if you are paying the amount charged under a business arrangement. A business arrangement exists when the amount of monthly required rent to be paid **equals or exceeds the presumed maximum value**. *Emphasis added.*

In adopting the proposed rule as the new final federal regulation, 89 FR 25507, SSA offered another example of the former rental subsidy rule in the first paragraph versus the current national rental subsidy rule in the second paragraph below:

> To illustrate, if the owner of an apartment would rent that property to any potential tenant for $800 per month, then the CMRV is $800 per month. Consequently, in this example, if an SSI applicant or recipient agrees to pay the landlord rent in the amount of $800 per month, a "business arrangement" would exist and the SSI applicant or recipient would not be receiving ISM in the form of room or rent. The SSI applicant or recipient in this example would thereby—absent any other countable income or resources—receive the Federal Benefit Rate (FBR). Conversely, if the SSI applicant or recipient agrees to pay the landlord less than the CMRV of $800 per month (for example, $400 per month), we would impute the difference between the CMRV and the monthly required rent as ISM received by the

> applicant or recipient in the form of room or rent (up to the PMV, which is $334.33 in 2024). In this example, the landlord agrees to accept a rent of $400 per month instead of the CMRV of $800. The rental subsidy amount is $400. However, the PMV is $334.33 in 2024, so only $314.33 would be counted as ISM (after we subtract the $20 general income exclusion from the PMV and assuming there is no other income). Consequently, in this example the SSI recipient would receive $628.67 as a monthly payment in 2024 (the 2024 FBR ($943) minus the PMV and minus the general income exclusion ($314.33 (or $334.33–$20)) = $628.67).
>
> Application of this [new] rental subsidy exception tends to reduce or eliminate the amount of ISM counted towards an individual's SSI payment, which generally results in a higher SSI payment amount. In the example, discussed above, an SSI applicant or recipient…who agrees to pay $400 per month for an apartment with a CMRV of $800 per month would not be charged ISM because their monthly required rent is more than the PMV ($334.33 for 2024). Consequently, the SSI applicant or recipient would continue to receive the FBR (provided they did not have any other countable income or resources for SSI purposes).

However, the week before the beginning of the new rental subsidy policy, the local Boca Raton Florida SSA office, denied eligibility based on their believe that a mother and daughter could not have a "business arrangement."

Fortunately, SSA revised the POMS on September 20th and issued an Emergency Memorandum, EM 24047, that among other things, addressed the mother/daughter business arrangement issue:

> 3. Rental Subsidy
>
> Effective September 30, 2024, in rental subsidy situations **where someone in the household is related to the landlord as parent or child**, we consider a business arrangement exists when the verified required rent or flat fee equals or exceeds the lessor of the applicable presumed maximum value (PMV) or current market rental value (CMRV). If the required rent or flat fee equals or exceeds either the PMV or CMRV, no further development is needed, and no rental subsidy applies. If the required rent or flat fee is less than both the PMV and CMRV, complete development to determine if ISM applies following instructions in SI 00835.380.
>
> This process currently exists in the Second and Seventh circuit states and Texas but is now being expanded nationwide. Current states include Connecticut, New York, and Vermont (Second Circuit); Illinois, Indiana, and Wisconsin (Seventh Circuit); and Texas.
>
> EXAMPLE: Billie receives SSI and pays their mother, who is also their landlord, $350 in monthly rent. The rent exceeds the 2024 PMV of $334.33; therefore, no rental subsidy is charged even though the CMRV is $500 per month. No other development is needed.

The PMV changes nearly every year when the Federal Benefit Rate (the maximum SSI check) goes up with the cost-of-living-adjustment to the Federal Benefit Rate. The formula for calculating the PMV every year is one third the FBR + $20. Rather than playing as close to the penny as possible, our office has decided to round up to $350 monthly rent in a business lease and use the exact amount in the NPRM so that the claimant is above the PMV and therefore the claimant's check is NOT reduced and SSA staff will approve it because it is just like the NPRM example. The relative receiving the $350 rent can do anything with it: spend it on themselves, add to the SSI claimant's ABLE account, use it to provide additional non-countable goods or services to the SSI claimant, or add it to an SNT – just don't give it back as cash to the SSI recipient.

Trustees, family members, disabled and elderly SSI claimants and their attorneys should now review their files and see if any claimants are having their SSI check reduced by the PMV amount because of the old method to determine the existence of ISM. Create a lease to show the "business arrangement" in writing. Advise SSA of the change and request that the SSI claimant's check be increased from $628 to $943. You are adding an additional tax-free $3,780 per year ($943 minus $628 = $315 per month x 12 = $3,780) to the claimant's SSI check.

Be a hero for your clients. Do the lease.

ISM Contracts

SPECIAL NEEDS PLANNING TO SHELTER EXCESS RESOURCES

1

ISM Contracts in the context of penalty-free transfers of huge amounts of excess resources

versus

Costs and limitations of PSCs, SNTs, and other planning alternatives

2

Historical and Legal Basis

- How many of you use Personal Services Contracts?
- Why? What is the historical and legal basis for a Personal Services Contract being an exception to the SSI transfer of assets penalty?

ANSWER:

- The 1999 Foster Care Independence Act
- No federal regulations, but an
- SSA POMS SI 01150.005 – titled "the definitions of Fair Market Value."

3

POMS SI 01150.005

- There was no transfer of assets penalty from 1988 to 12/14/1999
- FCIA resulted in immediate issuance of **SSA POMS SI 01150.005 (1/1/2000)** titled **"Determining Fair Market Value"**
  - It defines how to determine "current market value"
  - To determine "compensated" value versus the "uncompensated" value for the resource transferred
  - Note that **"Compensation" may be in cash, real or personal property, assumption of a legal debt, services, or ISM for a term or ISM for life."**

4

The Rule in two sentences:

"A transferor [SSI claimant] receives compensation when they receive something of value

- **pursuant to a legally binding agreement**
- (**e.g., a contract**, a bill of sale, a deed) that was
- **in effect at the time of transfer**.
- The transferor may actually **receive the compensation**
- **before, at, or after the actual time of transfer**."

POMS SI 01150.005.C.2. (*Emphasis added*)

5

POMS-provided examples of FMV:

- **Example: Compensation Received as Services**

  "Linden transferred livestock valued at $2,000 to their neighbor. As compensation, the neighbor agreed to put a new roof on Linden's home. Received roofing valued at $2,100. Therefore, the CR determines that Mr. Linden received FMV for his livestock."

- **Services for life**

  "If the agreement provides services for the life of the claimant or recipient, determine the yearly value of the services. When determining the value of compensation for life services, **use the life expectancy table in SI 01150.005F.**"

6

POMS SI 01150.005.F. Life Expectancy table

"SSA's Office of the Chief Actuary maintains yearly life expectancy tables on the agency's public-facing website.

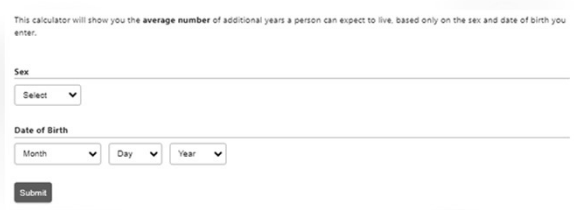
"Use the most recent table on that website to determine the value of compensation of **services for life** and **ISM for life**.

"After you determine the yearly value of services (or ISM), multiply it by the "life expectancy" (which means the average years of life remaining) for the year corresponding to the individual's age and gender."

7

Life Expectancy Rule – changed from table to SSA Chief Actuary Calculator

https://www.ssa.gov/oact/population/longevity.html or Google "SSA Life Expectancy Calculator"



8

ISM Contract – POMS SI 01150.005.D.3 rules a, b & c

a. General procedure for documenting the value of ISM

To determine the value of the compensation the individual receives in the form of ISM follow the instructions in SI 00835.001.

Use the actual value of the ISM. For the definition of actual value, see SI 00835.020B.1.

Do not use the value of the one-third reduction (VTR) or the presumed maximum value (PMV) to set the value of the compensation.

9

ISM Contract – POMS SI01150.005.D.3. – rules a, b & c

b. Obtain statement from ISM provider

Obtain a statement either signed or recorded on a Report of Contact page from the individual providing the ISM to verify that they are providing the ISM in exchange for the transferred resource.

On systems, use the Person Statement page. On paper, use an SSA-795 (Statement of Claimant or Other Person) or the SSA-8011-F3 (Statement of Household Expenses and Contributions) if used to document the ISM determination.

10

ISM Contract – POMS SI 01150.005.D.3 – rules a, b & c

c. ISM for life of eligible individual

If the agreement states that the receiver of the property will provide ISM for the life of the eligible individual, you should determine the total value of ISM using the table in SI 01150.005F.

Multiply the yearly CMV of the ISM provided by the figure in the "Years of Life Remaining" column which corresponds to the age (or next lower age) of the eligible individual as of the last birthday at the time the resource was transferred.

11

ISM Contract – Examples in the POMS

POMS SI 01150.005.D.3.c

Example 1: Total value of ISM for life results in FMV compensation

- "Valerie Payne **transferred nonhome real property valued at $185,000 to their sibling**.
- "As compensation, their **sibling agreed to provide Payne with room and board** in the sibling's home for the rest of Payne's life. ISM development showed that their sibling's total **household expenses were $1,500 per month**.
- "The **household consisted of 3 persons**, including **Payne who was age 53** at the time of the transfer. The CMV of the ISM was $6,000 per year ($1,500/3 = $500 per month X 12 months = $6,000).
- "Then, $6,000 X 31.61 (average years of life remaining at age 50) = $189,660 compensation. In this case, **Payne received FMV for the transferred resource**.
- "**We do not count ISM because the individual prepaid for their own food and shelter** with the value of the home they transferred. For procedure on determining an individual's contribution toward household operating expenses, see SI 00835.480D."

12

ISM Contract – the Bad Example

POMS SI 01150.005.D.3.c.

Example 2: Total value of ISM results in uncompensated value

"Assume the same case facts as Example 1 except that **Payne is 80 years old** at the time of the transfer.

"As in Example 1 the ISM is worth $6,000 per year.

"At 80 years of age the life expectancy table indicates 7.16 years. Multiplying 7.16 years times $6,000 results in compensation of $42,960.

"In this case **there is uncompensated value of $142,040** ($185,000 minus $42,960). Therefore, Payne is subject to a period of ineligibility for SSI because they transferred the house for less than FMV."

13

ISM Contract – SSA Example:

Prepaying food and shelter for Term of Years

POMS SI 01150.005.C.3.b

"Thomas transfers $30,000 cash to their sibling based on a **written contract** that they would **provide Thomas with food and shelter for 5 years**.

"The **sibling values the food and shelter at $500 per month**.

"The CR develops Thomas' living arrangements and **determines that Thomas has a flat fee arrangement with their sibling** and required to pay $500 per month.

"The **food and shelter for 5 years is worth $30,000** (5 years x $6,000 per year).

"Therefore, **Thomas received FMV** for the $30,000 they transferred.

"ISM is not counted because the individual has prepaid for their food and shelter with the $30,000 he transferred."

14

Other specific **prepayment examples** in the POMS

- Prepaying $3,000 for **nursing services** by contract, and none performed to date – OK – look at terms of document – "before, at, or after" contract
- Contracting for **yard maintenance** for five years; $150 per month ($1,800 per year = $9,000 lump sum payment
- **Claimant Can no longer make payments** on real property loan with CMV of $12,000; equity of $2k; transferred title to brother for $10,000 remaining payments; value of uncompensated transfer is $2k creating a penalty of two months ($10k divided by $943 = 2.12 months, round DOWN to whole number = 2 months)
- **Claimant's Home for sale** on open market at asking price; **seller accepts lower offer**; the "**price paid on the open market establishes the CMV** for that item. If the property was sold on the open market, assume that the individual received FMV."
- **Property with no value** – transferring a resource with no value = zero uncompensated value
- If individual asks and still owns the property, POMS says **inform of conditional benefits rules see SI 01150.200**

15

ISM Contract – the Mechanics

Elements/steps:

- **Do the calculations** – total the nine "household expenses" divided by number of residents in house = transferor's share; get and document proof of each; add in non-ISM items – lawn service, pool service, cable TV and Streaming Services; phone, etc.
- **Create a written contract** for ISM for a term, or for life; if using "food" call it room and board contract; include the calculations in the contract; birthdate of transferor; date of contract; signatures of each party
- **If for life, get the SSA Chief Actuary Life Expectancy data** and print out, attach to contract
- **Document** where the excess funds came from and the transfer to the ISM provider
- **Advise transferee** that SSA will call to confirm
- **Provably notify SSA**

16

ISM Contract – When to Use

David's Rule (not in the POMS):

YES – when the living arrangement arises organically
No – when it's a landlord not related to the SSI claimant

My Case Examples:

- **$300,000 - Orlando doctor, Denver elderly mom**
- **$260,000 - St Pete Sister attorney, Asperger's syndrome brother**
- **$130,000 - Single mom/deemor of disabled child, no family, suggests her landlady**

17

ISM Contracts compared to SNTs, PSKs, and other planning alternatives

Gifting the house or money - Valerie gives the money, or the nonhome real estate to her sister - $185k divided by $943 = 196 months, capped at 36-month penalty; loses $33,948 tax-free SSI dollars of income.

Use a special needs trust – incurs Medicaid payback; incurs trustee fees, attorney fees, and CPA fees and potential income taxes on earnings.

Use a Personal Services Contract – Disaster! In Orlando doctor case, the transfer of $300,000 taxed at his already high rate of $38% = additional tax bill of $114,000. **HUGE federal income taxes.**

18

Consequences of ISM Contract

Federal Income tax on ISM Contract = ZERO! (Assuming no profit, cost basis)	The transfer is complete; no ongoing SSI requirement for ISM accountings;	No reporting or review by SSI after initial approval;	ISM is paid in full with no 1/3 PMV deduction from future SSI benefits;
Smaller attorney fee for preparation of simple ISM Contract;	No ongoing trustee fees;	No Medicaid repayment at death!!!!!!	**MOST IMPORTANT:** It is what each of the clients wanted to do with their excess funds!!!

19

Effect of the new federal reg elimination of "food" on ISM Contracts

- **"Food" eliminated from ISM**, along with nationalization of Rental Subsidy Agreements
- **Can you still add "food"** and other non-ISM list items in the Contract?
- **Answer: Yes.** The POMS at 01150.005 is titled "Determining Fair Market Value." Lots of things can be purchased for value – see the POMS list – roof repairs, nursing services, lawn maintenance, CMV of board and room (includes food) etc.
- **Do the math**, try to stick within the examples of ISM Contracts with ISM items only, but if not, call them "room and board contracts" and apply the same principles adding in the share of food, lawn service, pool service, cable TV, internet services, etc.

20

SSA Extending Rental Subsidy Income Policy

BEFORE, APPLIED IN ONLY 7 STATES

NOW, REGULATION - APPLIES NATIONALLY

21

SSA Example of old policy

A disabled adult son with a wife and child was renting a home from his mother at $350 per month. The Current Market Rental Value was $1,500 per month. SSA used to count the difference as Inkind Support and Maintenance (ISM) and applied the Presumed Maximum Value (PMV) rule and reduced the claimant's SSI check in 2023 from $914 per month to $589.34 per month, the rates in effect the year of the example:

Example 1-- Current General Rental Subsidy Policy

Equation	Application of the example
CMRV-Required Monthly Rent = Household ISM.	$1,500 - $350 = $1,150.
Household ISM/Number of people in household = ISM/Rental Subsidy to the SSI Recipient.	$1,150/3 people in household = $383.33.
ISM is capped at the PMV.....	$383.33 > $324.66.
SSI payment = FBR-PMV.....	SSI payment = $914 - $324.66 = $589.34.

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SSA Example of new regulation

As long as a "business arrangement" (lease) exists between the mother and disabled son for an amount of rent equal to or greater than the PMV amount, there is no reduction in the disabled son's SSI disability check. See Example 2 in SSA Notice of Proposed Rule Making:

Example 2--Rental Subsidy Exception Policy Proposed To Be Extended

PMV < CMRV.....	$324.66 < $1,500.
Required Monthly Rent > PMV.....	$350 > $324.66.
Therefore, no ISM to the SSI Recipient.	= SSI Payment = $914.

23

20 CFR 416.1130(b)(1) – New reg!

- (1) We calculate in-kind support and maintenance considering any ~~**food or shelter**~~ that is given to you or that you receive because someone else pays for it. Shelter includes room, rent, mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewerage, and garbage collection services.
- You are not receiving in-kind support and maintenance in the form of room or rent if you are paying the amount charged under a business arrangement. A business arrangement exists when the amount of monthly required rent to be paid equals or exceeds the presumed maximum value described in § 416.1140(a)(1).
- If the required amount of rent is less than the presumed maximum value, we will impute as in-kind support and maintenance the difference between the required amount of rent and either the presumed maximum value or the current market rental value (see § 416.1101), whichever is less. In addition, cash payments to uniformed service members as allowances for on-base housing or privatized military housing are in-kind support and maintenance.

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New SSI **Rental Subsidy Policy** to avoid ISM INCOME reductions

- **Suppose SSI-elderly Anna inherited $175,000**. She gave it all to her wealthy daughter/landlord living in a mansion to prepay ISM, but at the end of the ISM Contract for term of years, Anna's still living with her daughter but no longer paying her fair share of the rent.
- **The Rental Subsidy contract effective 9/30/24 to the rescue**
  - As long as she pays the PMV amount by written lease (the "business arrangement" of the new federal regulations), there is no reduction from Anna's check for ISM in any amount.
  - The value to Anna of the written lease is nearly $4,000 per year additional tax-free cash SSI payments.
- **Be a hero to your clients, do the lease!!**

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Questions?

If not answered today, email
David@LillesandLaw.com

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National Conference on Special Needs Planning and Special Needs Trusts

November 21, 2024

Representing the Special Needs Family: What You and Your Clients Need to Know

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Table of Contents

Representing the Special Needs Family: What You and Your Clients Need to Know

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I. Introduction:

In today's complex and rapidly evolving healthcare landscape, seniors and individuals with special needs face a series of challenges within the Medicaid funded service delivery system. With more and more Americans facing unique health concerns and increased vulnerability, navigating a system that is meant to provide essential support have led to a host of obstacles. From limited access to specialized care to bureaucratic hurdles and fluctuating funding, the intersection of aging and disability within the Medicaid framework presents pressing concerns that demand comprehensive attention and real solutions. This writing will address the multifaceted challenges that seniors and those with special needs encounter, shedding light on the urgent need for reforms to ensure equitable and effective healthcare provisions for this ever growing population.

II. Demographics

A. Seniors

With a population of over 55 million Americans aged 65 and above, comprising 17% of the nation, the significance of addressing this demographic's healthcare needs cannot be overstated. An astonishing 25% of these individuals are projected to reach the age of 90, while 10% are anticipated to surpass the age of 95. The landscape is set to witness a significant shift, with expectations that the over 65 population will soar to approximately 73 million by 2050, accounting for 22% of the total population and growing at a rate of 10,000 individuals per day. Notably, the most rapidly expanding segment within this group is those aged 85 and older.[1]

The impending challenges of providing adequate care to this population is compounded by the prevalence of Alzheimer's Disease, affecting over 6 million Americans currently. This number is projected to triple by 2050, with a concerning subset of approximately 250,000 cases diagnosed in individuals under the age of 65. In the year 2020 alone, 20 million adults needed assistance in performing activities of daily living. Among these, 1.5 million were residing in nursing homes, one million in residential care, while the remaining 17 million were living in the community.[2] This demographic shift is set to have a profound impact on the healthcare landscape, particularly in rural areas where over 65 individuals are

[1] Administration of Community Living: 2021 Profile of Older Americans (November 2022), *available at* https://acl.gov/aging-and-disability-in-america/data-and-research/profile-older-americans (last visited August 7, 2024).
[2] Caring for the Future: The Power and Potential of America's Direct Care Workforce (2021)PHI, *available at* phinational.org (last visited August 7, 2024).

expected to comprise 38% of the population by 2030[3], as the caregiver population, which is already under great strain, continues to decrease.

B. Individuals with Disabilities

More than 60 million Americans are currently living with a disability, representing 18% of the nation's population. This demographic encompasses a diverse spectrum, including one in six children aged 3 to 17 who are diagnosed with a developmental disability. As of 2020, one in 36 children is diagnosed with an autism spectrum disorder.[4] As more individuals are diagnosed with developmental disabilities while life expectancies for this population continues to rise, the role of Direct Support Professionals (DSPs) takes on added urgency as does the need for a clear understanding of the interplay between aging and disability-related issues in accessing care.[5]

An illustration of the challenges lies in the waitlists for state Home and Community-Based Services (HCBS) observed at the close of 2021. An increase of approximately 17,000 individuals with Intellectual and Developmental Disabilities (IDD) was recorded on these waitlists, culminating in a total of 481,601 nationwide.[6]

C. Birth Rate/Caregiver Workforce

The dynamics of the current demographic landscape are marked by a series of shifts that hold critical implications for the provision of care and support for seniors and individuals with disabilities. One prominent trend is the staggering 20% decline in the US birth rate since 2007, a pattern mirrored internationally. This decrease in birth rates corresponds to a smaller workforce, contributing to a reduction in available family caregivers. This transformation is evidenced by a 6% rise in caregivers managing the responsibilities of more than one person between 2015 and 2020, underscoring the evolving caregiving landscape.[7]

A significant aspect of this evolution is the increased demand for skilled caregivers, a result of the shifting emphasis from post-acute care in nursing homes to community-based settings.[8] With care periods lengthening – the average duration now standing at 4.5 years – and 29% of caregivers extending their support for five years or more, up from 24% in 2015, the need for able-bodied and compassionate caregivers grows ever more critical.[9] The smaller workforce combined with the aging population is poised to exert fiscal pressure on vital social insurance programs such as Social Security, Medicare and Medicaid, which rely heavily on tax revenues for funding. In response to this coming challenge, some states are considering different approaches, such as Long-Term Care insurance funded through employee

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[3] Id.
[4] *See* Centers for Disease Control and Prevention, Data and Statistics on Autism Spectrum Disorders, April 2023, *available at* https://www.cdc.gov/ncbddd/autism/data.html (last visited August 7, 2024).
[5] *See supra* n. 2.
[6] 2023: The Case for Inclusion: Making Good on Our Nation's Promise of Community Inclusion for All, *available at* https://caseforinclusion.org/ (last visited August 7, 2024). Interpreting the true significance of this surge can be intricate, given the variation in waitlist criteria across different states.
[7] Caregiving in the U.S. 2020, AARP National Alliance for Caregiving, *available at* https://www.aarp.org/ppi/info-2020/caregiving-in-the-united-states.html (last visited August 7, 2024).
[8] *See supra* n. 2.
[9] *See supra* n. 7.

contributions. Washington state, for instance, has initiated this model with contributions commencing in July 2023, and benefits projected to be accessible to qualified individuals by 2026.[10]

The necessity for private funding in support and care for seniors and individuals with disabilities is apparent. A quarter of family caregivers currently report out-of-pocket expenses related to their caregiving responsibilities, with a significant 20% indicating substantial financial strain resulting from their caregiving roles.[11] As this landscape continues to evolve, it is evident that a multi-faceted approach (both with public funds and private funds) will be required to provide care and support to this vulnerable demographic across all domains.

D. The Care Industry

The landscape of caregiving and long-term support services (LTSS) is undergoing significant transformations, with far reaching implications. An alarming projection indicates a steep decline in the caregiver support ratio, plummeting from 31:1 in 2016 to 12:1 by 2060, reflecting the proportion of individuals aged 18-64 in relation to those aged 65 and above.[12] Within the realm of LTSS, three industries—home care, residential care, and nursing homes—play distinct roles, with nursing homes experiencing the slowest growth rate.[13] In fact, over 550 nursing homes out of 15,600 have closed since June 2015, attributed in part to the rise of for-profit corporate ownership and subsequent facility sales.[14]

This trend of for-profit expansion extends to home care services, paralleling the dynamics seen in nursing homes, with the for-profit segment reaching up to 76% in 2017.[15] While federal law mandates state Medicaid programs to cover institutional care, states possess the ability to opt out of Home and Community-Based Services (HCBS). And even those that don't opt out, have mechanisms to create plans of service, but limited workforce and/or available staff to allow for the credible implementation of these plans.

These challenges are reflected in the difficulties caregivers face in accessing affordable services within their locality. 27% of caregivers report encountering obstacles in this regard, marking an increase since 2015.[16] A decline in caregiver-reported health status compounds these concerns, underscoring the interplay between caregiver well-being and the ability to provide effective care and support.[17]

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[10] *See* wacaresfund.wa.gov (last visited August 7, 2024). A critical review of this program as currently implemented results in an objective determination that while providing a benefit, it is a small one when contrasted with what can often be catastrophic costs of long term care.

[11] 2022 National Strategy to Support Family Caregivers, *available at* https://acl.gov/CaregiverStrategy (last visited August 7, 2024); *see also* Voices of Paid and Family Caregivers for Medicaid Enrollees Receiving HCBS (2021), KFF, *available at* https://www.kff.org/medicaid/issue-brief/voices-of-paid-and-family-caregivers-for-medicaid-enrollees-receiving-hcbs/ (last visited August 7, 2024).

[12] *See* Voices *supra* n. 11.

[13] *See supra* n. 2.

[14] Seniors and staff caught in the middle of nursing homes' quest for profit (2020), The Guardian, *available at* https://www.theguardian.com/us-news/2020/jul/30/care-homes-seniors-nursing-homes-flipping-profit, (last visited August 7, 2024). In addition, from the author's experience staffing strains at the same time states are implementing safe staffing legislation are also impacting the operation of for profit and not for profit nursing homes alike, i.e. nursing homes that are not closing are choosing to shrink in size and "repurpose" their spaces to accommodate private pay residents in independent and assisted living units.

[15] *See supra* n. 2.

[16] *See supra* n. 7.

[17] *Id.*

As we navigate the complexities of this evolving landscape, it is evident that comprehensive strategies and policies are essential to ensure that seniors and individuals requiring long-term support receive quality care, while also addressing the well-being of their (often already overextended) caregivers.

III. Advising Families in the Current Environment

A. Objectives

The challenges many of our clients, and indeed many of us, are grappling with are deeply resonant and universal. Preparing for a future where parents can no longer provide the same level of care and support necessitates a profound reevaluation of roles and responsibilities within families. The shift places younger family members, often children, in the role of caregivers, a role they might not have initially foreseen due to the scarcity of available providers.

Indeed, the landscape of care alternatives is somewhat confined, centering around family members, friends, Medicaid-funded programs, and privately paid supports. Technological advancements hold potential solutions in certain areas, possibly fostering greater independence for individuals with disabilities. Nevertheless, a safety net remains essential, as complete self-reliance might not always be achievable.

Navigating this intricate landscape calls for a multifaceted approach rather than a one-size-fits-all solution. The objective is to facilitate a thorough understanding of the challenges at hand, enabling families to comprehensively assess available resources. Encouraging families to take proactive steps within their sphere of influence is paramount, particularly in bolstering private sources of funding to meet the evolving needs of aging individuals and those with disabilities. This might encompass self-planning and future-oriented financial arrangements, as well as seeking new methods to ensure a secure and supported journey as individuals transition through various stages of life.

Ultimately, the path forward is about fostering awareness, empowering families with knowledge, and guiding them to make informed decisions tailored to their unique circumstances. By promoting a holistic perspective and equipping families with the tools to navigate these challenges, we can contribute to creating a more resilient and supportive environment for individuals facing the complexities of aging and disability and their families.

B. Service Delivery: Then & Now

The shifting demographics of our population, coupled with the heightened demand for support services, coincide with a period of significant transformation within organizations that provide these vital services. Concurrently, the landscape of available funding for these services is also undergoing notable shifts. In the past, individuals seeking support and services could rely on larger, integrated organizations to provide comprehensive care.

However, the transition away from the traditional model was aimed at offering greater flexibility and choice to individuals with disabilities and their families. These programs, at least in name, became “person centered”. While this shift held the promise of empowerment, it has posed new challenges for many. The complexities of the new system have led some to find it more difficult to navigate and manage.

A striking 26% of caregivers reveal that they encounter difficulties when it comes to coordinating care across different providers, highlighting a pressing issue within the evolving landscape.[18]

This paradigm shift, though well-intentioned, underscores the importance of a delicate balance between flexibility and manageability. As the structure of support services adapts to accommodate changing needs, it becomes increasingly crucial to ensure that individuals and caregivers are equipped with the resources and tools necessary to effectively navigate these new person centered programs and the bureaucracy that comes along with them. By recognizing and addressing the challenges that can arise from these changes, we can work towards optimizing the delivery of support services and enhancing the quality of care for those who rely on them.

C. Families as Advocates, Natural Supports and Caregivers

Family support relationships encompass a diverse range of roles and dynamics that play a pivotal part in the well-being and care of individuals with disabilities and aging family members. The most common family support relationships are:

Parent Supporting a Child with a Disability: Parents often assume the roles of advocates, coordinating medical care, facilitating access to community-based services, and overseeing the overall well-being of their child. They work to ensure their child's integration into educational and social settings, as well as managing benefits and financial matters.

Child Supporting a Parent with a Disability: When roles shift, adult children may take on caregiving responsibilities for their parent. This may involve providing practical support, arranging medical care, and ensuring their parent's comfort and quality of life.

Spouse Supporting Husband/Wife: Spouses provide emotional and practical support, coordinate medical needs, and may take on caregiving duties as their partner's health declines.

Sibling Supporting Brother/Sister: Siblings often become advocates and natural supports, offering companionship, assistance with daily tasks, and ensuring their sibling's overall well-being.

Children Supporting Aging Parents: Adult children may transition into caregiver roles for their aging parents, assisting with daily activities, medical needs, and decision-making.

Within these roles, family members take on various functions:

Advocates: Advocates oversee community-based services, communicate with service providers, manage benefits, and ensure their loved one's rights and needs are met.

Natural Supports: These unpaid supports flow naturally from family and community relationships, ranging from assistance with daily tasks to emotional support. Natural supports are essential for everyone and are even more critical for individuals with disabilities and seniors as most Home and Community Based programs require some involvement from natural supports in the development of a plan of care.

Caregivers: Caregivers, whether family members or paid third parties, provide direct care to individuals with disabilities, children, or the elderly. This role can be intensive and time-consuming, contributing to declining family dynamics and often leading to significant relational challenges.

[18] *See supra* n. 7.

The importance of family caregivers is monumental, with over 53 million individuals providing support to older people and those with disabilities, enabling them to remain in their communities.[19] As DSPs leave the field due to low wages, family members are increasingly stepping into this role for a myriad of reasons, not the least of which are feelings of guilt and shame around the declining health of a family member.

Recognizing the complexities and significance of family support relationships is crucial for designing effective policies and support systems that acknowledge and address the challenges faced by these caregivers, ensuring the well-being of both caregivers and their loved ones.

D. Family Support Cycles

Family support cycles encompass intricate patterns of care and assistance that evolve over time, particularly in scenarios involving traditional families, children with disabilities, and aging parents or spouses. Each cycle is uniquely shaped by changing roles, evolving needs, and the interplay of available support options:

Traditional Family Cycle:

Parents initially provide support to their children, addressing their evolving needs. Over time, children grow and become more independent, necessitating a different and less intensive level of support from parents. As parents themselves age, children step in to offer increased support, often assuming caregiving responsibilities. Parents may eventually become caregivers to each other, further complicating their roles and relationships. When the children can no longer provide sufficient support, families may turn to formal support options like nursing homes or home care.

Child with a Disability Cycle:

Parents shoulder extensive support for their child with a disability throughout their lives. As parents age, maintaining the same level of support becomes increasingly challenging. Replacing parental support is intricate, often requiring a combination of Medicaid services, family and friend networks, private pay services, and technology. It's rare for a single individual to fully replace the multifaceted support parents provide (without cost), often necessitating a team approach. Changes in the support system can trigger far-reaching effects, creating a ripple across the family's dynamics.

Spouse and Children as Caregivers Cycle:

When an aging spouse or parent faces a disability, support needs tend to increase. However, maintaining current levels of support can become difficult due to various factors, including the aging of the spouse and geographical separation of children. Similar challenges may arise in sibling caregiver relationships, where the aging of a caregiving sibling necessitates a secondary transition in caregiving. The impact of an evolving and potentially strained service delivery system is evident in the increasing prevalence of caregivers taking on multiple caregiving roles simultaneously.[20]

As support systems falter, families often find themselves grappling with mounting responsibilities and complex care arrangements, many of them falling into the “sandwich” generation where care is needed both for an aging parent and a disabled child. This intricate interplay between family dynamics and external support systems underscores the critical need for comprehensive and sustainable care structures

[19] *See supra* n. 11.
[20] *See* AARP *supra* n. 7.

that can effectively address the evolving needs of individuals with disabilities and aging family members while recognizing the burden on caregivers.

E. Planning for Transition

Clients navigating the complexities of family support systems and natural supports must realistically assess the roles and capabilities of family members and others in their network. While the potential for assistance and support from these sources is valuable, it's crucial to temper expectations with a pragmatic understanding of each individual's capacity and willingness to contribute.

Commencing early planning for the transition of caregivers and advocates is essential, even if some families resist due to the strong identification with these roles. Exploring the extent of the "bench" available to the client involves evaluating the current and potential sources of support. As life expectancies of individuals with disabilities increase, planning becomes more critical than ever.[21] It's important to recognize that suitable Medicaid-funded supports may not be a guaranteed option, highlighting the need for proactive planning.

Key considerations include:

- Assessing the number of people available for support and assistance, as well as understanding their capabilities and commitments.
- Realistic expectations from family and natural supports, accounting for their limitations and strengths.
- Anticipating the level of support from community-based service providers, given the evolving landscape of human services and trends over the years.
- Confidence in the ability of Medicaid-funded services to bridge support gaps and whether they can provide the necessary advocacy and coordination.
- Evaluating the effectiveness of Medicaid-funded Care Managers or Service Coordinators and their potential to optimize services.
- Gauging the current state of services and housing options, and considering potential future changes or declines.
- Exploring the reliability of staffing and the likelihood of turnover in community-based support settings.

Overall, it's crucial to foster a comprehensive and realistic understanding of available resources, while also acknowledging potential challenges and uncertainties. By developing a plan that encompasses family, natural supports, community services, and proactive measures, clients can strive to create a well-rounded support structure that safeguards the well-being and quality of life for individuals with disabilities and aging family members.

F. Testing the Waters

Encouraging the client to proactively engage with community-based service providers can be a strategic approach to gauging their capabilities and establishing realistic expectations for future support

[21] *See supra* n. 2.

needs. By conducting a systematic test of the system, the client can better understand what can be reasonably anticipated from these providers. This approach involves the following steps:

Test the System: Collaborate with community-based service providers to assess their responsiveness, reliability, and effectiveness when additional support is required. This trial period will allow the client to gauge the provider's ability to meet the identified needs and offer insights into the quality of care and services.

Identify Transitionable Tasks: Work with the client to identify specific tasks or responsibilities that can be gradually transitioned to Medicaid-funded service providers. This could include routine activities or specific care tasks that the client currently manages. By gradually transitioning tasks, the client can actively support the process while still being available to intervene if necessary.

Monitor and Evaluate: During the transition phase, closely monitor the provider's performance and the client's comfort level with the arrangement. Regular evaluations will provide valuable insights into the provider's ability to meet expectations and the client's overall satisfaction.

Assess the Outcome: If the transition test yields positive results and the client is satisfied with the level of support provided by community-based service providers, it can provide a sense of comfort and assurance about future transitions. This success can serve as a foundation for expanding the role of these providers in the client's support network.

Learn from Challenges: If the transition does not proceed as smoothly as expected, the client gains valuable information about the limitations of the system and the need for additional family or privately funded supports. This insight informs future decision-making and helps identify areas where alternative solutions or supplementary resources may be necessary.

By adopting this approach, the client can make informed decisions about the future allocation of caregiving and support responsibilities. It provides a proactive way to explore the capacity and reliability of community-based service providers while safeguarding the client's ability to intervene and adjust plans as needed. Ultimately, this strategy empowers the client with a clearer understanding of available options and the ability to make well-informed decisions about the transition of support responsibilities and allocation of resources.

G. Educating the Successors

Educating potential successors and advocates is a necessary step in ensuring a smooth transition of care and support responsibilities. By providing intended successors with the necessary knowledge and insights, the client can help establish a robust support system for the future. Here are some recommended steps:

For Adult Siblings and Advocates:

1. Attend Life Plan/Care Planning Meetings: Encourage adult siblings and advocates to actively participate in Life Plan or care planning meetings. These gatherings provide a comprehensive understanding of the individual's needs, preferences, and goals, enabling successors to make informed decisions and contribute meaningfully.
2. Visit Residences and Meet Providers: Arrange visits to the individual's residence to meet staff and professional service providers. This firsthand experience fosters a personal connection and a deeper understanding of the individual's daily routines and support requirements.

3. Review Service and Care Plans: Provide copies of service and care plans for review. This documentation offers insights into the individual's specific needs, medical requirements, and support strategies.

4. Realistic Self-Assessment: Encourage adult siblings and advocates to realistically evaluate what they can contribute to the individual's care and support. This self-assessment helps set clear expectations and prevents overcommitment.

For Everyone:

1. Open and Honest Discussions: Foster open and honest conversations among family members about their willingness and capacity to provide support. Address any concerns or limitations upfront, ensuring that everyone's commitments align with their capabilities.

2. Realistic Expectations: It's essential to have realistic expectations about the level of support family members can provide. If a family member is unable to contribute minimally at present, it may not be practical to expect a substantial increase in their involvement in the future.

By educating successors and having transparent discussions, the client can lay the groundwork for a seamless transition of care. These proactive efforts help ensure that responsibilities are distributed effectively and that the individual's well-being remains a priority even as the client's direct involvement evolves over time.

H. Allied Professionals

Creating a comprehensive support team with specialized professionals is crucial to ensuring the well-being and financial security of individuals with disabilities and seniors. These professionals can provide specialized knowledge and guidance tailored to the unique needs of the client and their family. Here's how each member of the support team can contribute:

1. Special Needs Estate Planning/Elder Law Attorney: A specialized attorney who understands the nuances of Special Needs Estate Planning, Elder Law, and the Medicaid funded service delivery system can help create legally sound plans that safeguard the individual's financial future while ensuring continued eligibility for government benefits.

2. Geriatric Care Manager: A Geriatric Care Manager can play a vital role in coordinating care services, identifying suitable in-home caregivers, and exploring community-based residential options. They provide expertise in optimizing care arrangements for seniors or individuals with disabilities.

3. Government Benefits Consultant: This consultant can navigate the complex landscape of federal, state, and local benefits and programs, ensuring that the individual with a disability accesses all available resources to support their needs.

4. Accountant: An accountant well-versed in the intricacies of Special Needs Trusts (SNTs) can handle income tax returns for trustees of SNTs, parents, and individuals with disabilities. Their expertise ensures compliance and maximizes financial efficiency.

5. Investment Professional: An investment professional familiar with the specific disability-related considerations can tailor portfolio allocation and cash flow management for SNTs, aligning investments with the individual's needs and goals.

6. Life Insurance Professional: A life insurance expert who understands that disabilities need not preclude insurability can assist in securing coverage to provide for the individual's spouse and children, ensuring financial stability.

By assembling a support team comprised of these specialized professionals, the client can develop a comprehensive and sustainable plan that addresses all aspects of care, finances, and well-being for individuals with disabilities and seniors. This collaborative approach ensures that each component of the support structure is meticulously designed to meet the unique needs and circumstances of the individual and their family.

I. Empowering Agents & Advocates

Empowering agents and advocates with the necessary information and legal authority is pivotal to ensure a seamless transition and well-coordinated support system for the senior or person with a disability. The client can take several steps to facilitate this process:

1. **Guardianship/Conservatorship:** If appropriate and necessary, the client can establish guardianship or conservatorship for the individual with a disability. This legal arrangement grants the appointed guardian or conservator the authority to make decisions on behalf of the individual in various aspects of life, ensuring their well-being and financial security.

2. **Advance Health Care Directives:** Create Advance Health Care Directives, such as a Health Care Proxy or Living Will. These documents outline the individual's medical wishes and designate a trusted advocate to make healthcare decisions if the individual becomes incapacitated.

3. **Caregiver Succession Plan:** Establish a clear and documented caregiver succession plan that outlines roles, responsibilities, and steps for transition. This plan helps ensure that support responsibilities seamlessly transfer to designated caregivers or advocates.

4. **Supported Decision Making:** In states where Supported Decision Making is recognized, explore this alternative to guardianship. It allows individuals with disabilities to make decisions with the assistance of trusted supporters, ensuring their autonomy while maintaining a support network.

5. **Durable Power of Attorney.**

By addressing these legal and procedural elements, the client ensures that agents and advocates have the necessary authority and guidance to make informed decisions on behalf of the individual. An inclination to help, without legal authority to do so, leaves families with less options and ultimately more expense with resources being directed towards gaining that authority rather than being able to take action in a moment of crisis. This approach not only streamlines decision-making processes but also upholds the individual's rights and well-being while promoting a cohesive and supportive network of care.

J. Estate & Financial Planning to Address the Need for Private Funding

Establishing trust arrangements, such as Third-Party Supplemental (Special) Needs Trusts, can serve as effective tools for managing funds on behalf of a person with a disability while safeguarding their eligibility for Medicaid and other means-tested benefits. These trusts provide a structured way to ensure that private funds are available to enhance the individual's quality of life and support their needs, without jeopardizing access to essential government assistance.

By taking steps to secure private dollars through trust arrangements, the client can encourage family members and others to become more involved in providing support for the person with a disability.

These funds can cover necessities as well as enriching experiences, offering flexibility and enhancing the individual's overall well-being.

It's important to recognize that while siblings and other caregivers may have genuine intentions to contribute, they may not be able to provide the same level of time and attention as a parent. Having private funds available can bridge this gap and provide access to additional resources, including hiring private-pay aides and advocates who can navigate the complex service delivery system.

Revising expectations about the use of funds left in trust for family members with disabilities is a practical approach. This allows for a more comprehensive and balanced approach to supporting their needs, recognizing that private funds can play a vital role in augmenting government funding.

Additionally, considering financial support for disability service providers is crucial. Agencies struggle with inadequate reimbursement rates, which impact staffing and service quality. Directing some funds toward these providers can help improve their viability, ensuring that high-quality care is available for individuals with disabilities for years to come.

VI. Conclusion

The intricate landscape of care for seniors and individuals with disabilities necessitates a unified and forward-looking approach. As we navigate the challenges posed by an aging population, shifting demographics, and a strained support system, it is clear that a full-throated response is imperative. By fostering collaboration among families, caregivers, professionals, and policymakers, meaningful change can be achieved and a more resilient foundation for the of seniors and individuals with disabilities can be established.

Representing the Special Needs Family: What You and Your Clients Need to Know

Stetson
October 17, 2024

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Wilcenski & Pleat PLLC 2024

1

Demographics - Seniors

- 55 million Americans over age 65
  - 17% of the population
  - 25% of these people will live past 90
  - 10% will live past 95
- By 2050, over 65 population expected to increase to about 73 million
  - 10,000 a day
  - 22% of the population
  - Fastest growing segment is age 85 and older
- Over 6 million Americans diagnosed with Alzheimer's Disease
  - By 2050, this number will triple
  - 250,000 people under age 65

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2

Demographics – Individuals with Disabilities

- More than 60 million Americans are living with a disability
  - 18% of U.S. population
  - One in six children ages 3 to 17 have a developmental disability
  - As of 2023, one in 35 children are diagnosed with an autism spectrum disorder

Wilcenski & Pleat PLLC 2024

3

Demographics – Birth Rate/Work Force and Need for Caregivers

- US Birth Rate has fallen 20% since 2007
- Lower birth rate = smaller work force
- Smaller workforce + aging population will put fiscal pressure on social insurance programs like Social Security and Medicaid which are generally paid for through tax revenues.
- Watch for the need to have private dollars principally fund support and care for seniors and those with disabilities across all domains.

Wilcenski & Pleat PLLC 2024

4

What we are already seeing….

- National Staff Shortages in Service Delivery System
- Nursing Homes can't fill to capacity and are purposefully downsizing
- Agencies can't provide support to individuals with disabilities
- Families are responsible for oversight
- No long-term plan that lasts beyond an election cycle
- Families feeling guilt, shame and entitlement

Wilcenski & Pleat PLLC 2024

5

What we are already seeing….

- Wage compression and the need for private dollars needed to supplement service delivery
- Changing of philosophy about purpose of and use of publicly funded system
- Trust Administrators will be asked more and more to pay for caregivers, comm hab staff, case managers and advocates to navigate the system
- People will find themselves without choice if there is wholesale reliance on the Medicaid funded system
- What does this mean for families and Trustees

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Objectives for Special Needs & Long-Term Care Planning Professionals

- Many of our clients(and us) are wrestling with the same challenges: planning for the time when parents are no longer able to provide the same level of oversight and support.
- Alternatives are limited: other family members/friends, Medicaid funded supports, and privately-paid supports. Technology can provide solutions in some areas and individuals with disabilities may develop greater independence, but a safety net will always be necessary.
- There is no single solution or game plan.
- Objective is to identify and articulate the challenges, help families think through available resources, and encourage them to take steps in those areas that they can control, especially augmenting private sources of funding the needs of those with disabilities.

7

Estate and Financial Planning to Address the Need for Private Funding

- Maintain Private funds
  - Trust arrangements – usually Third Party Supplemental (Special) Needs Trusts – can be used to hold and manage funds for an individual with a disability without disrupting eligibility for and access to Medicaid and other public benefits
  - Reconsider Medicaid/Entitlement Planning for Seniors
  - Funds to provide both necessities and quality of life enhancements
  - Funds to hire aides and advocates to provide assessments and to help navigate a complicated service delivery system
  - Funds to hire aides and advocates to provide assessments and to help navigate a complicated service delivery system

8

Estate and Financial Planning to Address the Need for Private Funding

Revise expectations about how private funds and funds left in trust for family members with disabilities will be used:

-Trips to Disney World are fun, but my brother will need someone to help him get his car repaired

-Yankees tickets are great, but my sister needs someone to help interview and select new staff

-Hiring of Private advocates when no family members are willing and able to serve

-Normalize private payment for access to care and to buy choice

- Consider providing financial support to disability service providers. Agencies continue to struggle with inadequate reimbursement rates for staffing and other services. -- Special Needs Trust Improvement Act of 2022 (SECURE 2.0)
- The "funding formula" will be different for each family-help them think "outside the box."

Funds to hire aides and advocates to provide assessments and to help navigate a complicated service delivery system

9

THE OBJECTIVES OF "TRANSITION PLANNING 2.0"

- Empowering advocates
- Educating the successors
- Estate and financial planning so that there will be financial resources to supplement services and support the providers (understanding the public/private partnership)

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EMPOWERING AGENTS

- Legal authority to receive information and make decisions - more than just an inclination to help
- Considering guardianship and alternatives to guardianship:
  - Guardianship
  - Powers of Attorney and Health Care Proxies
  - Understanding what is (*and what is not*) expected when siblings and others assume these roles
- Supported Decision Making: valuable in aspiration, but insufficient in practice

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EDUCATING THE SUCCESSORS

- For the siblings and other advocates:
  - Attend ISP/care planning meetings (in person/by phone)
  - Visit a residence to meet staff and professional providers
  - Read copies of service and care plans
  - Think realistically about what you can offer
- For the parents and other caregivers:
  - Prepare a letter of intent/life care plan: *write it down*!
  - Hire a care manager to help create a record
  - Think realistically about what you should expect
- For everyone: honest and open discussion makes for smooth transitions

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ESTATE AND FINANCIAL PLANNING TO ADDRESS THE NEED FOR PRIVATE FUNDING

- Trust arrangements – usually Supplemental (Special) Needs Trusts – can be used to hold and manage funds for an individual with a disability without disrupting access to Medicaid and other public benefits
- Adequate Funding. New Paradigm.
- It is easier to ask family members and others to agree to assume some level of responsibility when you have taken steps to ensure that private dollars will be available to assist:

  -Funds to provide both necessities and quality of life enhancements

  -Funds to hire aides and advocates to provide assessments and to help negotiate a complicated service delivery system

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Service Delivery – Then & Now

- The changing population demographics, and the resulting increase in support needs, are occurring at a time of great organizational changes for providers of support services, and funding for those services.
- In the past, supports and services were available from larger, integrated organizations and direct support was provided by highly educated and trained staff; and they had smaller case loads.
- While these changes were designed in part to provide more flexibility and choice for individuals with disabilities and their families, many find the new system harder to manage.

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THE SERVICE DELIVERY SYSTEM: THEN AND NOW

- The dilemma presented by the aging of the caregiver population
- Past supports and services available from Disability Service Organizations
- Changes in funding and organizational makeup
- The impact of those changes on service providers, especially in the area of residential supports and staffing

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THE SERVICE DELIVERY SYSTEM: THEN AND NOW

- More flexible funding is designed to support more individuals living in their own home, including:
  - reimbursement for many household expenses
  - more generous hourly rates for staff
  - support for community-based activities
- But… more responsibility for oversight and administration by family members and other advocates

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PROVIDING FINANCIAL SUPPORT TO THE AGENCIES THAT SUPPORT OUR FAMILY MEMBERS - REMINDER

- Needs will not diminish with the passing of the caregiver. To the contrary, as individuals with disabilities age their needs will often increase
- Agencies continue to struggle with inadequate reimbursement rates for staffing and other services
- Without private financial support, agencies will be able to do less

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KEY POINTS TO HIT HOME

- Systemic Concerns in Service Delivery
- Legal Authority/Advocacy (Guardianship/Advance Directives/Supported Decision Making)
- Supplemental Needs Trusts for Asset Management and Support
- Behavioral Financial Decisions
- Expectation Setting for Families, Siblings, Next Gen

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Questions/Discussion?

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National Conference on Special Needs Planning and Special Needs Trusts

November 21, 2024

The Corporate Transparency Act: What Special Needs Planners May or May Not Need to Know

STETSON LAW

Center for Elder Justice

Access and Justice For All®

Financial Crimes Enforcement Network
U.S. Department of the Treasury
Washington, D.C. 20220

Beneficial Ownership Information Frequently Asked Questions

These Frequently Asked Questions are explanatory only and do not supplement or modify any obligations imposed by statute or regulation. Please refer to the Beneficial Ownership Information Reporting Rule and Beneficial Ownership Information Access and Safeguards Rule, available at www.fincen.gov/boi, for details on specific provisions. FinCEN expects to publish further guidance in the future. Questions on any of this content can be directed to https://www.fincen.gov/contact.

A. General Questions

A.1. What is beneficial ownership information?

Beneficial ownership information refers to identifying information about the individuals who directly or indirectly own or control a company.

[Issued March 24, 2023]

A.2. Why do companies have to report beneficial ownership information to the U.S. Department of the Treasury?

In 2021, Congress passed the Corporate Transparency Act on a bipartisan basis. This law creates a new beneficial ownership information reporting requirement as part of the U.S. government's efforts to make it harder for bad actors to hide or benefit from their ill-gotten gains through shell companies or other opaque ownership structures.

[Issued September 18, 2023]

A.3. Under the Corporate Transparency Act, who can access beneficial ownership information?

In accordance with the Corporate Transparency Act, FinCEN may permit access to beneficial ownership information to:

- Federal agencies engaged in national security, intelligence, or law enforcement activity;
- State, local, and Tribal law enforcement agencies with court authorization;
- Officials at the Department of the Treasury;
- Foreign law enforcement agencies, judges, prosecutors, and other authorities that submit a request through a U.S. Federal agency to obtain beneficial ownership information for authorized activities related to national security, intelligence, and law enforcement;

- Financial institutions with customer due diligence requirements under applicable law (in order to facilitate compliance with those requirements); and
- Federal functional regulators or other appropriate regulatory agencies that supervise or assess financial institutions with access to beneficial ownership information (in order to supervise such financial institutions' compliance with customer due diligence requirements).

FinCEN published the rule that will govern access to and protection of beneficial ownership information on December 22, 2023. Beneficial ownership information reported to FinCEN is stored in a secure, non-public database using rigorous information security methods and controls typically used in the Federal government to protect non-classified yet sensitive information systems at the highest security level. FinCEN will continue to work closely with those authorized to access beneficial ownership information to ensure that they understand their roles and responsibilities in using the reported information only for authorized purposes and handling in a way that protects its security and confidentiality.

[Updated October 3, 2024]

A.4. How will companies become aware of the BOI reporting requirements?

FinCEN is engaged in a robust outreach and education campaign to raise awareness of and help reporting companies understand the new reporting requirements. That campaign involves virtual and in-person outreach events and comprehensive guidance in a variety of formats and languages, including multimedia content and the Small Entity Compliance Guide, as well as new channels of communication, including social media platforms. FinCEN is also engaging with governmental offices at the federal and state levels, small business and trade associations, and interest groups.

FinCEN will continue to provide guidance, information, and updates related to the BOI reporting requirements on its BOI webpage, www.fincen.gov/boi. Subscribe here to receive updates via email from FinCEN about BOI reporting obligations.

[Issued December 12, 2023]

A.5. How is an Indian Tribe defined under the Corporate Transparency Act?

For purposes of reporting beneficial ownership information to FinCEN, "Indian Tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe. The Secretary of the Interior is required to publish annually a list of all recognized Indian Tribes in the Federal Register (https://www.federalregister.gov/documents/2024/01/08/2024-00109/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of).

[Issued June 10, 2024]

A.6. Is beneficial ownership information reported to FinCEN accessible under the Freedom of Information Act (FOIA)?

No. Beneficial ownership information reported to FinCEN is exempt from disclosure under the Freedom of Information Act (FOIA).

[Issued October 3, 2024]

B. Reporting Process

B.1. Should my company report beneficial ownership information now?

FinCEN launched the BOI E-Filing website for reporting beneficial ownership information (https://boiefiling.fincen.gov) on January 1, 2024.

- A reporting company created or registered to do business before January 1, 2024, will have until January 1, 2025, to file its initial BOI report.
- A reporting company created or registered in 2024 will have 90 calendar days to file after receiving actual or public notice that its creation or registration is effective.
- A reporting company created or registered on or after January 1, 2025, will have 30 calendar days to file after receiving actual or public notice that its creation or registration is effective.

[Updated January 4, 2024]

B.2. When do I need to report my company's beneficial ownership information to FinCEN?

A reporting company created or registered to do business before January 1, 2024, will have until January 1, 2025 to file its initial beneficial ownership information report.

A reporting company created or registered on or after January 1, 2024, and before January 1, 2025, will have 90 calendar days after receiving notice of the company's creation or registration to file its initial BOI report. This 90-calendar day deadline runs from the time the company receives actual notice that its creation or registration is effective, or after a secretary of state or similar office first provides public notice of its creation or registration, whichever is earlier.

Reporting companies created or registered on or after January 1, 2025, will have 30 calendar days from actual or public notice that the company's creation or registration is effective to file their initial BOI reports with FinCEN.

[Updated December 1, 2023]

B.3. When will FinCEN accept beneficial ownership information reports?

FinCEN will begin accepting beneficial ownership information reports on January 1, 2024. Beneficial ownership information reports will not be accepted before then.

[Issued March 24, 2023]

B.4. Will there be a fee for submitting a beneficial ownership information report to FinCEN?

No. There is no fee for submitting your beneficial ownership information report to FinCEN.

[Updated January 4, 2024]

B.5. How will I report my company's beneficial ownership information?

If you are required to report your company's beneficial ownership information to FinCEN, you will do so electronically through a secure filing system available via FinCEN's BOI E-Filing website (https://boiefiling.fincen.gov).

[Updated January 4, 2024]

B.6. Where can I find the form to report?

Access the form by going to FinCEN's BOI E-Filing website (https://boiefiling.fincen.gov) and select "File BOIR."

[Updated January 4, 2024]

B.7. Is a reporting company required to use an attorney, certified public accountant, enrolled agent, or other service provider to submit beneficial ownership information to FinCEN?

No. FinCEN expects that many, if not most, reporting companies will be able to submit their beneficial ownership information to FinCEN on their own using the guidance FinCEN has issued. Reporting companies that need help meeting their reporting obligations can consult with professional service providers, such as lawyers, accountants, or enrolled agents.

[Updated October 3, 2024]

B.8. Who can file a BOI report on behalf of a reporting company, and what information will be collected on filers?

Anyone a reporting company authorizes to act on its behalf—such as an employee, owner, or third-party service provider—may file a BOI report on the reporting company's behalf. When submitting the BOI report, individual filers should be prepared to provide basic contact information about themselves, including their name and email address. The person filing the BOI report, including a third-party service provider, must certify on behalf of the reporting company that the information is true, correct, and complete. (See Question C.15 regarding who can file a BOI report for a reporting company that ceases to exist before its initial BOI report is due to FinCEN.)

[Updated October 3, 2024]

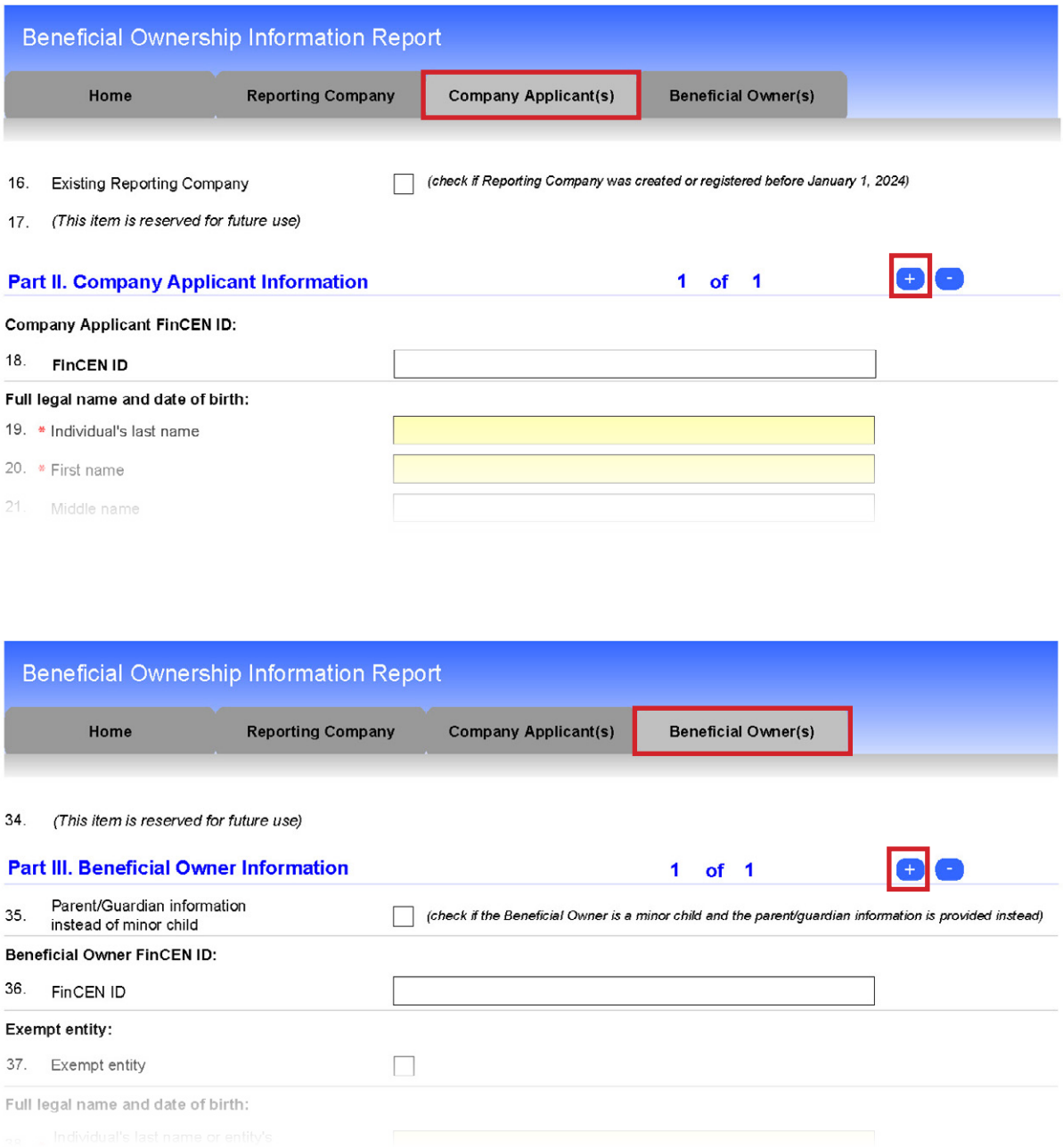
B.9. If a third-party service provider who is not an attorney submits a reporting company's beneficial ownership information to FinCEN, has that provider engaged in the unauthorized practice of law?

Nothing in the Corporate Transparency Act or FinCEN's regulations prevents a third-party service provider who is not an attorney from submitting a reporting company's beneficial ownership information (if authorized by the company to do so) or otherwise assisting a reporting company with preparing or submitting a BOI report. Whether an action qualifies as the unauthorized practice of law, however, is generally determined by State law, and thus may vary.

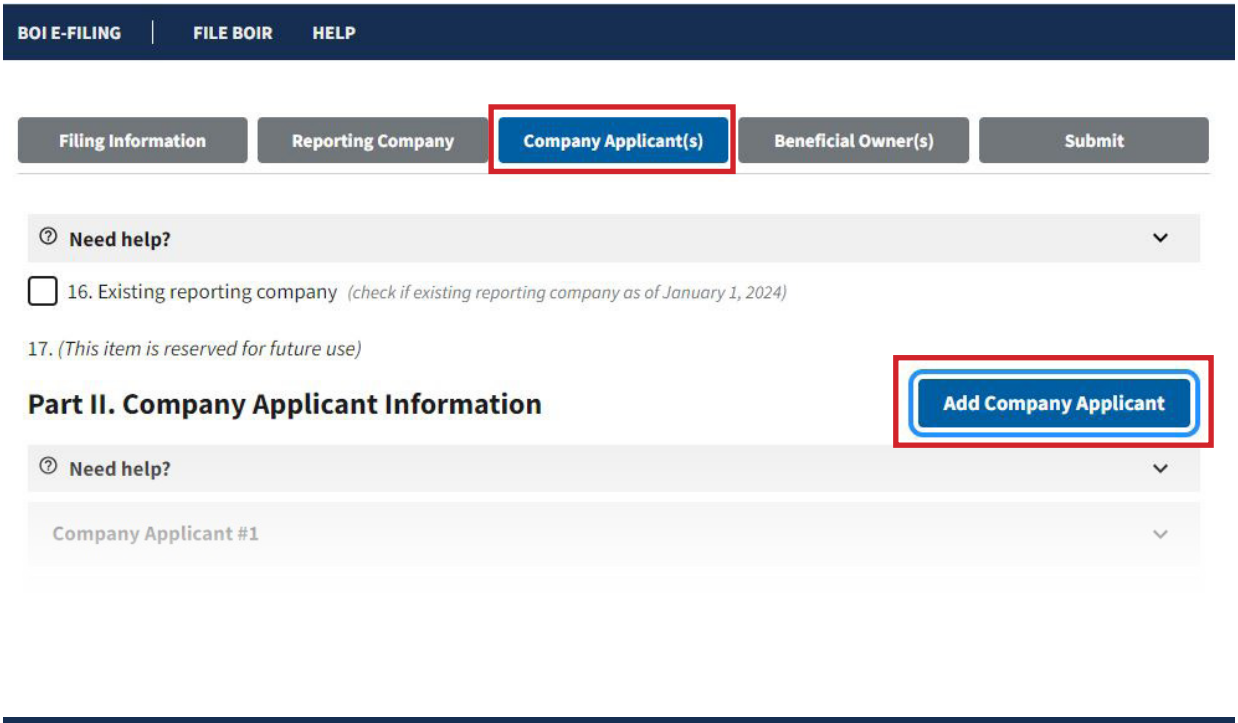
[Issued October 3, 2024]

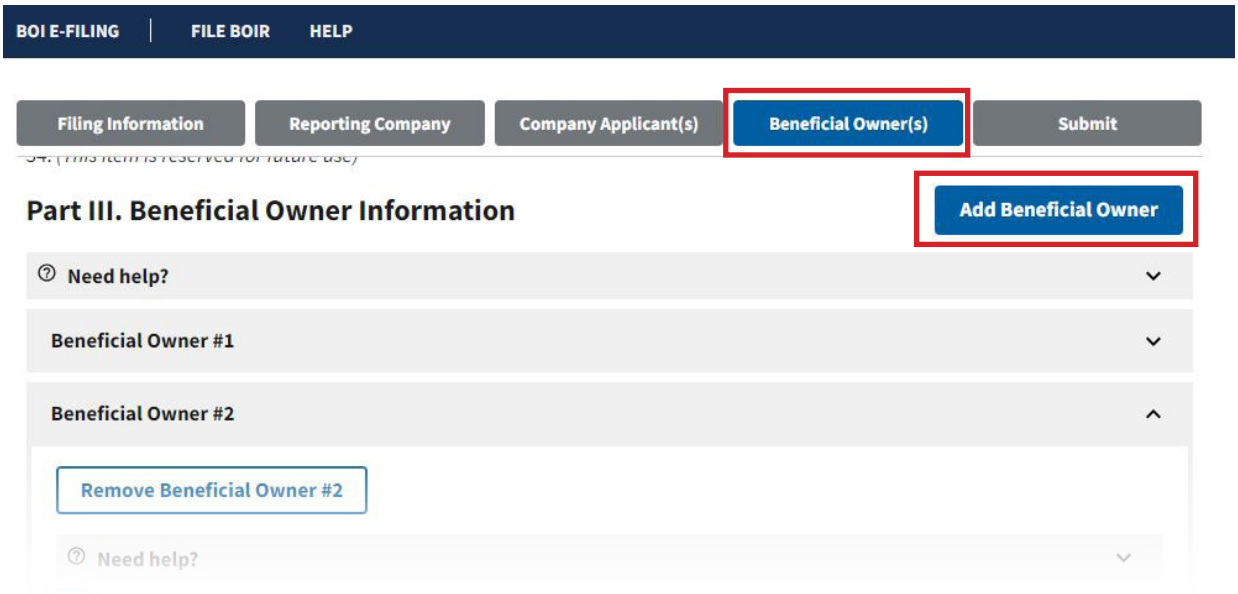
B.10. How do I report multiple beneficial owners or company applicants on one report?

When completing the beneficial ownership information (BOI) report in a PDF, you can add company applicants or beneficial owners by using the "+" button next to the relevant Section title:



When completing the BOI report online rather than as a PDF, you can add company applicants or beneficial owners by using the "Add Company Applicant" or "Add Beneficial Owner" button in the relevant Section title:





[Issued October 3, 2024]

C. Reporting Company

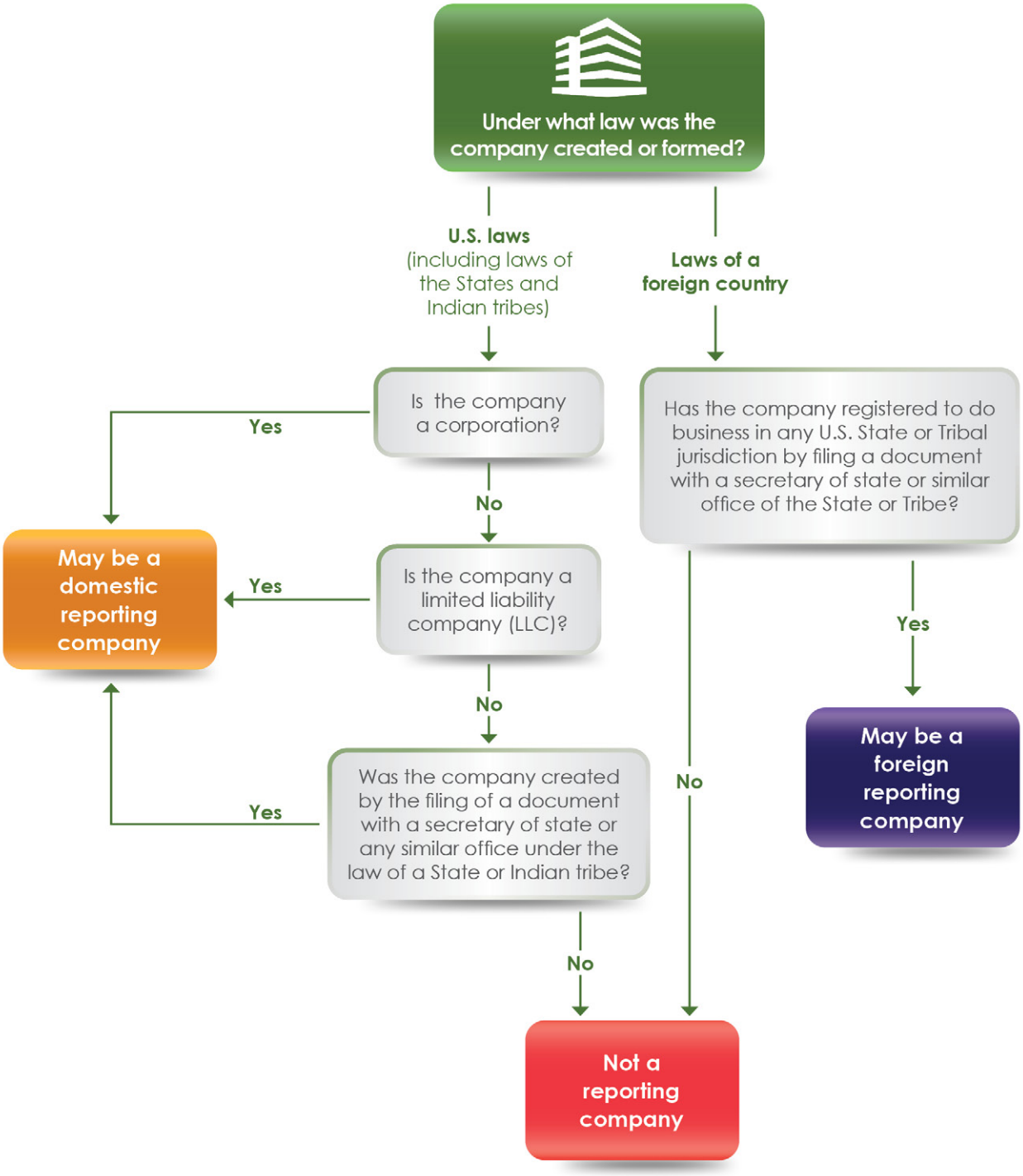
C.1. What companies will be required to report beneficial ownership information to FinCEN?

Companies required to report are called ***reporting companies***. There are two types of reporting companies:

- ***Domestic reporting companies*** are corporations, limited liability companies, and any other entities created by the filing of a document with a secretary of state or any similar office in the United States.
- ***Foreign reporting companies*** are entities (including corporations and limited liability companies) formed under the law of a foreign country that have registered to do business in the United States by the filing of a document with a secretary of state or any similar office.

There are 23 types of entities that are exempt from the reporting requirements (see Question C.2). Carefully review the qualifying criteria before concluding that your company is exempt.

FinCEN's Small Entity Compliance Guide for beneficial ownership information reporting includes the following flowchart to help identify if a company is a reporting company (see Chapter 1.1, "Is my company a "reporting company"?").



[Issued September 18, 2023]

C.2. Are some companies exempt from the reporting requirement?

Yes, 23 types of entities are exempt from the beneficial ownership information reporting requirements. These entities include publicly traded companies meeting specified requirements, many nonprofits, and certain large operating companies.

The following table summarizes the 23 exemptions:

Exemption No.	Exemption Short Title
1	Securities reporting issuer
2	Governmental authority
3	Bank
4	Credit union
5	Depository institution holding company
6	Money services business
7	Broker or dealer in securities
8	Securities exchange or clearing agency
9	Other Exchange Act registered entity
10	Investment company or investment adviser
11	Venture capital fund adviser
12	Insurance company
13	State-licensed insurance producer
14	Commodity Exchange Act registered entity
15	Accounting firm
16	Public utility
17	Financial market utility
18	Pooled investment vehicle
19	Tax-exempt entity
20	Entity assisting a tax-exempt entity
21	Large operating company
22	Subsidiary of certain exempt entities
23	Inactive entity

FinCEN's Small Entity Compliance Guide includes this table and checklists for each of the 23 exemptions that may help determine whether a company meets an exemption (see Chapter 1.2, "Is my company exempt from the reporting requirements?"). Companies should carefully review the qualifying criteria before concluding that they are exempt. Please see additional FAQs about reporting company exemptions in "L. Reporting Company Exemptions" below.

[Issued September 18, 2023]

C.3. Are certain corporate entities, such as statutory trusts, business trusts, or foundations, reporting companies?

It depends. A domestic entity such as a statutory trust, business trust, or foundation is a reporting company only if it was created by the filing of a document with a secretary of state or similar office. Likewise, a foreign entity is a reporting company only if it filed a document with a secretary of state or a similar office to register to do business in the United States.

State laws vary on whether certain entity types, such as trusts, require the filing of a document with the secretary of state or similar office to be created or registered.

- If a trust is created in a U.S. jurisdiction that requires such filing, then it is a reporting company, unless an exemption applies.

Similarly, not all states require foreign entities to register by filing a document with a secretary of state or a similar office to do business in the state.

- However, if a foreign entity has to file a document with a secretary of state or a similar office to register to do business in a state, and does so, it is a reporting company, unless an exemption applies.

Entities should also consider if any exemptions to the reporting requirements apply to them. For example, a foundation may not be required to report beneficial ownership information to FinCEN if the foundation qualifies for the tax-exempt entity exemption.

Chapter 1 of FinCEN's Small Entity Compliance Guide ("Does my company have to report its beneficial owners?") may assist companies in identifying whether they need to report.

[Issued November 16, 2023]

C.4. Is a trust considered a reporting company if it registers with a court of law for the purpose of establishing the court's jurisdiction over any disputes involving the trust?

No. The registration of a trust with a court of law merely to establish the court's jurisdiction over any disputes involving the trust does not make the trust a reporting company.

[Issued November 16, 2023]

C.5. Does the activity or revenue of a company determine whether it is a reporting company?

Sometimes. A reporting company is (1) any corporation, limited liability company, or other similar entity that was created in the United States by the filing of a document with a secretary of state or similar office (in which case it is a domestic reporting company), or any legal entity that has been registered to do business in the United States by the filing of a document with a secretary of state or similar office (in which case it is a foreign reporting company), that (2) does not qualify for any of the exemptions provided under the Corporate Transparency Act. An entity's activities and revenue, along with other factors in some cases, can qualify it for one of those exemptions. For example, there is an exemption for certain inactive entities, and another for any company that reported more than $5 million in gross receipts or sales in the previous year and satisfies other

exemption criteria. Neither engaging solely in passive activities like holding rental properties, for example, nor being unprofitable necessarily exempts an entity from the BOI reporting requirements.

FinCEN's Small Entity Compliance Guide provides additional information concerning exemptions in Chapter 1.2, "Is my company exempt from the reporting requirements?"

[Issued December 12, 2023]

C.6. Is a sole proprietorship a reporting company?

No, unless a sole proprietorship was created (or, if a foreign sole proprietorship, registered to do business) in the United States by filing a document with a secretary of state or similar office. An entity is a reporting company only if it was created (or, if a foreign company, registered to do business) in the United States by filing such a document. Filing a document with a government agency to obtain (1) an IRS employer identification number, (2) a fictitious business name, or (3) a professional or occupational license does not create a new entity, and therefore does not make a sole proprietorship filing such a document a reporting company.

[Issued December 12, 2023]

C.7. Can a company created or registered in a U.S. territory be considered a reporting company?

Yes. In addition to companies in the 50 states and the District of Columbia, a company that is created or registered to do business by the filing of a document with a U.S. territory's secretary of state or similar office, and that does not qualify for any exemptions to the reporting requirements, is required to report beneficial ownership information to FinCEN. U.S. territories are the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, and the U.S. Virgin Islands.

[Issued January 12, 2024]

C.8. Do the BOI reporting requirements apply to S-Corporations?

Yes. A corporation treated as a pass-through entity under Subchapter S of the Internal Revenue Code (an "S Corporation" or "S-Corp") that qualifies as a reporting company—i.e., that is created or registered to do business by the filing of a document with a secretary of state or similar office, and does not qualify for any of the exemptions to the reporting requirements—must comply with the reporting requirements. The S-Corp's pass-through structure for tax purposes does not affect its BOI reporting obligations. In particular, pass-through treatment under Subchapter S does not qualify an S-Corp as a "tax-exempt entity" under FinCEN BOI reporting regulations.

[Issued April 18, 2024]

C.9. If a domestic corporation or limited liability company is not created by the filing of a document with a secretary of state or similar office, is it a reporting company?

No. While FinCEN's BOI reporting regulations define a domestic reporting company as including a corporation or limited liability company, the inclusion of those entities is based on an understanding that domestic corporations and LLCs are

generally created by the filing of a document with a secretary of state or similar office. In an unusual circumstance where a domestic corporation or limited liability company is created, but not by the filing of a document with a secretary of state or similar office, such an entity is not a reporting company.

[Issued April 18, 2024]

C.10. Are homeowners associations reporting companies?

It depends. Homeowners associations (HOAs) can take different forms. As with any entity, if an HOA was not created by the filing of a document with a secretary of state or similar office, then it is not a domestic reporting company. An incorporated HOA or other HOA that was created by such a filing also may qualify for an exemption from the reporting requirements. For example, HOAs recognized by the IRS as section 501(c)(4) social welfare organizations (or that claim such status and meet the requirements) may qualify for the tax-exempt entity exemption. An incorporated HOA that is *not* a section 501(c)(4) organization, however, may fall within the reporting company definition and therefore be required to report BOI to FinCEN.

[Updated June 10, 2024]

C.11. Are entities formed under Tribal law required to report beneficial ownership information?

Yes, if the entity meets the reporting company definition and does not qualify for any exemptions to the reporting requirements. See Question C.1 for more information on what entities are reporting companies.

While Indian Tribes have varying legal entity formation practices, some allow individuals to form legal entities such as corporations or LLCs under Tribal law by the filing of a document (such as Articles of Incorporation) with a Tribal office or agency whose routine functions include creating such entities pursuant to such filings. Tribal offices or agencies that perform this function may be called something other than a "secretary of state," but they are performing a function similar to that of a typical secretary of state's office. As a result, a legal entity created by a filing with such Tribal office or agency is a reporting company and is required to file beneficial ownership information with FinCEN, unless it qualifies for an exemption.

Note that, under the Corporate Transparency Act, a legal entity is a reporting company only if it is created or registered to do business "under the laws of a State or Indian Tribe." Tribal corporations formed under federal law through the issuance of a charter of incorporation by the Secretary of the Interior—such as those created under section 3 of the Oklahoma Indian Welfare Act (25 U.S.C. 5203), or section 17 of the Indian Reorganization Act of 1934 (25 U.S.C. 5124)—are not created by the filing of a document with a secretary of state or similar office under the laws of an Indian tribe, and are therefore not reporting companies required to report beneficial ownership information to FinCEN.

Note also that "governmental authorities" are not required to report beneficial ownership information to FinCEN. For this purpose, a "governmental authority" is an entity that is (1) established under the laws of the United States, an Indian Tribe, a State, or a political subdivision of a State, or under an interstate compact between two

or more States, and that (2) exercises governmental authority on behalf of the United States or any such Indian Tribe, State, or political subdivision. Thus, a Tribal entity that is such a "governmental authority" is not required to report beneficial ownership information to FinCEN. This category includes tribally chartered corporations and state-chartered Tribal entities, if those corporations or entities exercise governmental authority on a Tribe's behalf.

Certain subsidiaries of governmental authorities are also exempt from the requirement to report beneficial ownership information to FinCEN. An entity qualifies for this exemption if its ownership interests are controlled (in their entirety) or wholly owned, directly or indirectly, by a governmental authority. Thus, for example, if a tribally chartered corporation (or state-chartered Tribal entity) exercises governmental authority on a Tribe's behalf, and that tribally chartered corporation (or state-chartered Tribal entity) controls or wholly owns the ownership interests of another entity, then both the tribally chartered corporation (or state-chartered Tribal entity) and that subsidiary entity are exempt from the requirement to report beneficial ownership information to FinCEN. See Questions L.3 and L.6 for more information on this "subsidiary exemption."

Other exemptions to the reporting requirements, such as the exemption for "tax-exempt entities," may also apply to certain entities formed under Tribal law.

FinCEN's Small Entity Compliance Guide includes a table and checklists for each of the 23 exemptions that may help determine whether a company meets an exemption (see Chapter 1.2, "Is my company exempt from the reporting requirements?"). Companies should carefully review the qualifying criteria before concluding that they are exempt. Please see additional FAQs about reporting company exemptions in "L. Reporting Company Exemptions" below.

[Issued June 10, 2024]

C.12. Do beneficial ownership information reporting requirements apply to companies created or registered before the Corporate Transparency Act was enacted (January 1, 2021)?

Yes. Beneficial ownership information reporting requirements apply to all companies that qualify as "reporting companies" (see Question C.1), regardless of when they were created or registered. Companies are not required to report beneficial ownership information to FinCEN if they are exempt (see Question C.2 and, generally, Section L) or ceased to exist as legal entities before January 1, 2024 (see Question C.13).

[Issued July 8, 2024]

C.13. Is a company required to report its beneficial ownership information to FinCEN if the company ceased to exist before reporting requirements went into effect on January 1, 2024?

A company is not required to report its beneficial ownership information to FinCEN if it ceased to exist as a legal entity before January 1, 2024, meaning that it entirely completed the process of formally and irrevocably dissolving. A company that ceased to exist as a legal entity before the beneficial ownership information reporting requirements became effective January 1, 2024, was never subject to the reporting requirements and thus is not required to report its beneficial ownership information to FinCEN.

Although state or Tribal law may vary, a company typically completes the process of formally and irrevocably dissolving by, for example, filing dissolution paperwork with its jurisdiction of creation or registration, receiving written confirmation of dissolution, paying related taxes or fees, ceasing to conduct any business, and winding up its affairs (e.g., fully liquidating itself and closing all bank accounts).

If a reporting company (see Question C.1) continued to exist as a legal entity for any period of time on or after January 1, 2024 (i.e., did not entirely complete the process of formally and irrevocably dissolving before January 1, 2024), then it is required to report its beneficial ownership information to FinCEN, even if the company had wound up its affairs and ceased conducting business before January 1, 2024.

Similarly, if a reporting company was created or registered on or after January 1, 2024, and subsequently ceased to exist, then it is required to report its beneficial ownership information to FinCEN—even if it ceased to exist before its initial beneficial ownership information report was due.

For specifics on how to determine when a company ceases to exist as a legal entity, consult the law of the jurisdiction in which the company was created or registered. A company that is administratively dissolved or suspended—because, for example, it failed to pay a filing fee or comply with certain jurisdictional requirements—generally does not cease to exist as a legal entity unless the dissolution or suspension becomes permanent.

[Issued July 8, 2024]

C.14. If a reporting company created or registered in 2024 or later winds up its affairs and ceases to exist before its initial BOI report is due to FinCEN, is the company still required to submit that initial report?

Yes. Reporting companies created or registered in 2024, no matter how quickly they cease to exist thereafter, must report their beneficial ownership information to FinCEN within 90 days of receiving actual or public notice of creation or registration. Reporting companies created or registered in 2025 or later, no matter how quickly they cease to exist thereafter, must report their beneficial ownership information to FinCEN within 30 days of receiving actual or public notice of creation or registration. These obligations remain applicable to reporting companies that cease to exist as legal entities—meaning wound up their affairs, ceased conducting business, and entirely completed the process of formally and irrevocably dissolving—before the expiration of the 30- or 90-day period reporting companies have to report their beneficial ownership information to FinCEN. If a reporting company files an initial beneficial ownership information report and then ceases to exist before the expiration of the 30- or 90-day period reporting companies have to report their beneficial ownership information to FinCEN, then there is no requirement for the reporting company to file an additional report with FinCEN noting that the company has ceased to exist.

[Updated September 10, 2024]

C.15. Who may file a BOI report on behalf of a reporting company created or registered in 2024 or later that ceases to exist before its initial BOI report is due to FinCEN?

Anyone whom a reporting company authorizes to act on its behalf—such as an employee, owner, or third-party service provider—may file a BOI report on the reporting company's behalf, even after the reporting company ceases to exist (see Question B.8). Thus, if a reporting company will cease to exist before the expiration of the 30- or 90-day period reporting companies have to report their beneficial ownership information to FinCEN, then it should make arrangements while it exists to have the report submitted on its behalf, even if the requisite filing does not occur until after the reporting company ceases to exist. Regardless, the BOI report must be filed by the time such report is due to FinCEN (see Question C.14).

[Issued September 10, 2024]

C.16. Is a foreign company required to report its beneficial ownership information to FinCEN if the company stopped doing business in the United States before reporting requirements went into effect on January 1, 2024?

A foreign company is not required to report its beneficial ownership information to FinCEN if it ceased to be registered to do business in the United States before January 1, 2024. For purposes of complying with beneficial ownership information reporting requirements under the CTA, a foreign reporting company ceases to be registered to do business in the United States when it entirely completes the process of formally and irrevocably withdrawing its registration(s) to do business in the United States. A foreign company that entirely withdrew any and all registrations to do business in the United States before the beneficial ownership information reporting requirements became effective January 1, 2024, was never subject to the reporting requirements and thus is not required to report its beneficial ownership information to FinCEN.

Although state or Tribal law may vary, a foreign company typically completes the process of formally and irrevocably withdrawing its registration to do business in a jurisdiction by, for example, filing withdrawal paperwork with its jurisdiction of registration, receiving written confirmation of withdrawal, paying related taxes or fees, ceasing to conduct any business in the jurisdiction, and winding up its affairs in that jurisdiction.

If a foreign reporting company (see Question C.1) was registered to do business in the United States on or after January 1, 2024, for any period of time (i.e., the company did not entirely complete the process of withdrawing its registration before January 1, 2024), then it is required to report its beneficial ownership information to FinCEN, even if the company had wound up its affairs and ceased conducting business before January 1, 2024.

Similarly, if a foreign reporting company was registered to do business in the United States on or after January 1, 2024, for any period of time, and subsequently withdrew that registration, then the company is required to report its beneficial ownership information to FinCEN—even if it withdrew the registration before the expiration of the 30- or 90-day period reporting companies have to report their beneficial ownership information to FinCEN.

For specifics on how to determine when a company withdraws its registration to do business, consult the law of the jurisdiction in which the company was registered. A company that is administratively suspended from conducting business—because, for example, it failed to pay a filing fee or comply with certain jurisdictional requirements—generally does not cease to be registered to conduct business unless the suspension becomes permanent.

[Issued September 10, 2024]

C.17. Reporting companies are created (or, if a foreign company, registered to do business) in the United States by filing a document with a secretary of state or "similar office." What government offices are "similar offices" to a secretary of state for this purpose?

A "similar office" is any office (including a department, agency, or bureau) of a governmental authority under the law of a State or Indian Tribe where or through which a domestic entity files a document to be created or a foreign entity files a document to be registered to do business in the United States. Federal agencies are not "similar offices."

Domestic entities that are created by State or Federal charter are not created by the filing of a document with a secretary of state or similar office.

[Issued October 3, 2024]

C.18. Does a conversion from one corporate type to another (e.g., LLC to corporation) create a new domestic reporting company that must file an initial beneficial ownership information report with FinCEN?

A domestic reporting company is an entity "created by" the filing of a document with a secretary of state or any similar office under the law of a State or Indian Tribe.

Depending on the law of the State or Indian Tribe, and the type of entity undergoing a conversion, a conversion filing may result in the creation of a "new" domestic reporting company. Where a conversion does result in the creation of a new domestic reporting company, the new domestic reporting company is required to file an initial beneficial ownership information (BOI) report.

Even if a conversion filing does not create a new domestic reporting company, a reporting company that undergoes such a conversion may nonetheless be required to submit an *updated* BOI report to FinCEN after the conversion. For example, if "Company, Inc." converted to an LLC, its name may have changed to "Company, LLC," and thus it may be required to file an updated BOI report because the name change is a change to required information previously submitted to FinCEN.

Reporting companies are also required to report their jurisdiction of formation. This is the jurisdiction where the reporting company was originally created. If a reporting company changes its jurisdiction of formation (for example, by ceasing to be a corporation incorporated under California law and becoming instead a corporation incorporated under Texas law), it must submit an updated BOI report to FinCEN.

[Issued October 3, 2024]

C.19. Does a reporting company need to file a beneficial ownership information report each time it registers to do business in a different state?

No. Reporting companies must file initial beneficial ownership information (BOI) reports within certain timeframes. For example, a reporting company created (if domestic) or registered to do business (if foreign) in the United States on or after January 1, 2024, must file an initial BOI report after it has received actual notice that its creation or registration has become effective or the date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the reporting company has been created or registered.

A reporting company does not need to file additional BOI reports in connection with subsequent filings with secretaries of state or similar offices that merely:

(1) authorize a domestic reporting company that already exists under the laws of one State or Tribe to do business under the laws of another State or Tribe; or

(2) authorize a foreign reporting company that is already registered under the laws of one State or Tribe to do business under the laws of another State or Tribe.

[Issued October 3, 2024]

D. Beneficial Owner

D.1. Who is a beneficial owner of a reporting company?

A beneficial owner is an individual who either directly or indirectly: (1) exercises substantial control (see Question D.2) over the reporting company, or (2) owns or controls at least 25% of the reporting company's ownership interests (see Question D.4). Because beneficial owners must be individuals (i.e., natural persons), trusts, corporations, or other legal entities are not considered to be beneficial owners. However, in specific circumstances, information about an entity may be reported in lieu of information about a beneficial owner (see Question D.12).

FinCEN's Small Entity Compliance Guide provides checklists and examples that may assist in identifying beneficial owners (see Chapter 2.3 "What steps can I take to identify my company's beneficial owners?").

[Updated April 18, 2024]

i. How many beneficial owners can a reporting company have?

An individual might be a beneficial owner through substantial control, ownership interests, or both. A reporting company can have multiple beneficial owners; there is no maximum number of beneficial owners who must be reported.

[Issued October 3, 2024]

ii. What if a reporting company does not have any individuals who own or control at least 25 percent?

FinCEN expects that every reporting company will be substantially controlled by one or more individuals, and therefore that every reporting company will be able to identify and report at least one beneficial owner to FinCEN.

[Issued October 3, 2024]

D.2. What is substantial control?

An individual can exercise substantial control over a reporting company in four different ways. If the individual falls into *any* of the categories below, the individual is exercising substantial control:

- The individual is a **senior officer** (the company's president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer who performs a similar function).
- The individual has **authority to appoint or remove** certain officers or a majority of directors (or similar body) of the reporting company.
- The individual is an **important decision-maker** for the reporting company. See Question D.3 for more information.
- The individual has **any other form of substantial control** over the reporting company as explained further in FinCEN's *Small Entity Compliance Guide* (*see Chapter 2.1, "What is substantial control?"*).

SENIOR OFFICER
any individual holding the position or exercising the authority of a:
1. President
2. Chief financial officer (CFO)
3. General counsel (GC)
4. Chief executive officer (CEO)
5. Chief operating officer (COO)

or any other officer, regardless of official title, who performs a similar function as these officers

APPOINTMENT OR REMOVAL AUTHORITY
any individual with the ability to appoint or remove any **SENIOR OFFICER** or a majority of the board of directors or similar body

IMPORTANT DECISION-MAKER
any individual who directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding the reporting company's:

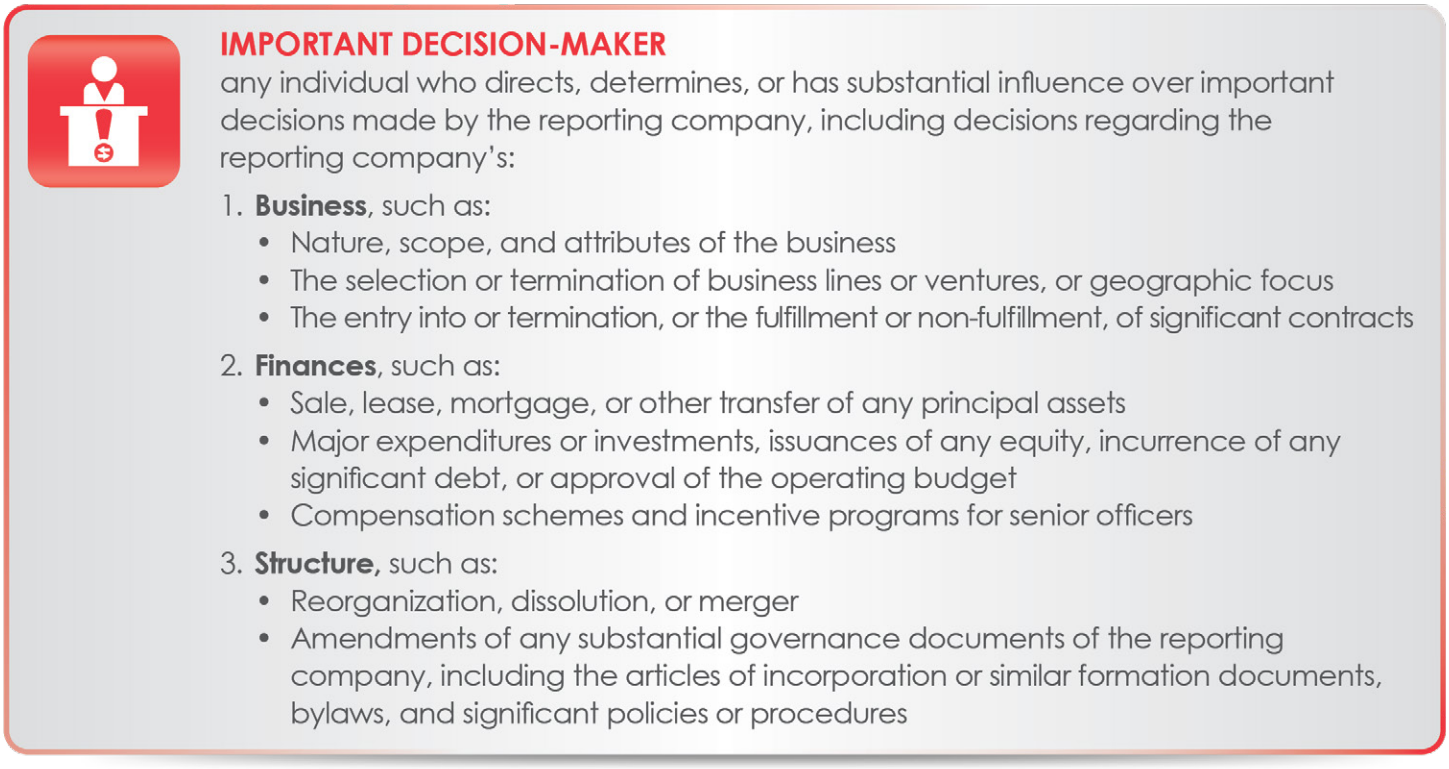
1. **Business**, such as:
   - Nature, scope, and attributes of the business
   - The selection or termination of business lines or ventures, or geographic focus
   - The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts
2. **Finances**, such as:
   - Sale, lease, mortgage, or other transfer of any principal assets
   - Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget
   - Compensation schemes and incentive programs for senior officers
3. **Structure**, such as:
   - Reorganization, dissolution, or merger
   - Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures

CATCH-ALL
any other form of substantial control over the reporting company. Control exercised in new and unique ways can still be substantial. For example, flexible corporate structures may have different indicators of control than the indicators included here

[Updated October 3, 2024]

D.3. One of the indicators of substantial control is that the individual is an important decision-maker. What are important decisions?

Important decisions include decisions about a reporting company's business, finances, and structure. An individual that directs, determines, or has substantial influence over these important decisions exercises substantial control over a reporting company. *Chapter 2.1, "What is substantial control?" of FinCEN's Small Entity Compliance Guide provides the following information:*



[Issued September 18, 2023]

D.4. What is an ownership interest?

An ownership interest is generally an arrangement that establishes ownership rights in the reporting company. Examples of ownership interests include shares of equity, stock, voting rights, or any other mechanism used to establish ownership.

Chapter 2.2, "What is ownership interest?" of FinCEN's Small Entity Compliance Guide discusses ownership interests and sets out steps to assist in determining the percentage of ownership interests held by an individual.

[Issued September 18, 2023]

D.5. Who qualifies for an exception from the beneficial owner definition?

There are five instances in which an individual who would otherwise be a beneficial owner of a reporting company qualifies for an exception. In those cases, the reporting company does not have to report that individual as a beneficial owner to FinCEN.

FinCEN's Small Entity Compliance Guide includes a checklist to help determine whether any exceptions apply to individuals who might otherwise qualify as beneficial owners (see Chapter 2.4. "Who qualifies for an exception from the beneficial owner definition?").

[Issued September 18, 2023]

D.6. Is my accountant or lawyer considered a beneficial owner?

Accountants and lawyers generally do not qualify as beneficial owners, but that may depend on the work being performed.

Accountants and lawyers who provide general accounting or legal services are not considered beneficial owners because ordinary, arms-length advisory or other third-party professional services to a reporting company are not considered to be "substantial control" (see Question D.2). In addition, a lawyer or accountant who is designated as an agent of the reporting company may qualify for the "nominee, intermediary, custodian, or agent" exception from the beneficial owner definition.

However, an individual who holds the position of general counsel in a reporting company is a "senior officer" of that company and is therefore a beneficial owner

FinCEN's Small Entity Compliance Guide includes a checklist to help determine whether an individual qualifies for an exception to the beneficial owner definition (see Chapter 2.4, "Who qualifies for an exception from the beneficial owner definition?").

[Updated November 16, 2023]

D.7. What information should a reporting company report about a beneficial owner who holds their ownership interests in the reporting company through multiple exempt entities?

If a beneficial owner owns or controls their ownership interests in a reporting company ***exclusively*** through ***multiple exempt*** entities, then the names of ***all*** of those exempt entities may be reported to FinCEN instead of the individual beneficial owner's information.

- Note that this special rule does not apply when an individual owns or controls ownership interests in a reporting company through ***both*** exempt and non-exempt entities. In that case, the reporting company must report the individual as a beneficial owner (if no exception applies), but the exempt companies do not need to be listed.

FinCEN's Small Entity Compliance Guide includes more information about this special reporting rule in Chapter 4.2, "What do I report if a special reporting rule applies to my company?"

[Issued September 29, 2023]

D.8. Is an unaffiliated company that provides a service to the reporting company by managing its day-to-day operations, but does not make decisions on important matters, a beneficial owner of the reporting company?

The unaffiliated company itself cannot be a beneficial owner of the reporting company because a beneficial owner must be an individual. Any individuals that exercise substantial control over the reporting company through the unaffiliated company must be reported as beneficial owners of the reporting company. However, individuals who do not direct, determine, or have substantial influence over important decisions made by the reporting company, and do not otherwise exercise substantial control, may not be beneficial owners of the reporting company.

Please see Chapter 2.1 of FinCEN's Small Entity Compliance Guide, "What is substantial control?" for additional information on how to determine whether an individual has substantial control over a reporting company.

[Issued September 29, 2023]

D.9. Is a member of a reporting company's board of directors always a beneficial owner of the reporting company?

No. A beneficial owner of a company is any individual who, directly or indirectly, exercises substantial control over a reporting company, or who owns or controls at least 25 percent of the ownership interests of a reporting company.

Whether a particular director meets any of these criteria, however, is a question that the reporting company must consider on a director-by-director basis.

FinCEN's Small Entity Compliance Guide includes additional information on how to determine if an individual qualifies as a beneficial owner in Chapter 2, "Who is a beneficial owner of my company?". This chapter includes separate sections with more information about substantial control and ownership interest: Chapter 2.1 "What is substantial control?" and Chapter 2.2 "What is ownership interest?".

[Issued September 29, 2023]

D.10. Is a reporting company's designated "partnership representative" or "tax matters partner" a beneficial owner?

It depends. A reporting company's "partnership representative," as defined in 26 U.S.C. 6223, or "tax matters partner," as the term was previously defined in now-repealed 26 U.S.C. 6231(a)(7), is not automatically a beneficial owner of the reporting company. However, such an individual may qualify as a beneficial owner of the reporting company if the individual exercises substantial control over the reporting company, or owns or controls at least 25 percent of the company's ownership interests.

Chapter 2 of FinCEN's Small Entity Compliance Guide ("Who is a beneficial owner of my company?") has additional information on how to determine if an individual qualifies as a beneficial owner of a reporting company.

Note that a "partnership representative" or "tax matters partner" serving in the role of a designated agent of the reporting company may qualify for the "nominee, intermediary, custodian, or agent" exception from the beneficial owner definition.

FinCEN's Small Entity Compliance Guide includes additional information on such exemptions in Chapter 2.4, "Who qualifies for an exception from the beneficial owner definition?"

[Issued November 16, 2023]

D.11. What should a reporting company report if its ownership is in dispute?

If ownership of a reporting company is the subject of active litigation and an initial BOI report has not been filed, a person authorized by the company to file its beneficial ownership information should comply with the requirements by reporting:

- all individuals who exercise substantial control over the company, and
- all individuals who own or control, or have a claim to ownership or control of, at least 25 percent ownership interests in the company.

If an initial BOI report has been filed, and if the resolution of the litigation leads to the reporting company having different beneficial owners from those reported (for example, because some individuals' claims to ownership or control have been rejected), the reporting company must file an updated BOI report within 30 calendar days of resolution of the litigation.

[Issued January 12, 2024]

D.12. Who does a reporting company report as a beneficial owner if a corporate entity owns or controls 25 percent or more of the ownership interests of the reporting company?

Ordinarily, such a reporting company reports the individuals who indirectly either (1) exercise substantial control over the reporting company or (2) own or control at least 25 percent of the ownership interests in the reporting company through the corporate entity. It should not report the corporate entity that acts as an intermediate for the individuals.

For an example of how to calculate the percentage of ownership interests an individual owns or controls in a reporting company if the individual's ownership interests are held through an intermediate entity, please review example 4 in Chapter 2.3, "What steps can I take to identify my company's beneficial owners?" of FinCEN's Small Entity Compliance Guide.

Two special rules create exceptions to this general rule in very specific circumstances:

1. A reporting company may report the name(s) of an exempt entity or entities in lieu of an individual beneficial owner who owns or controls ownership interests in the reporting company entirely through ownership interests in the exempt entity or entities; or
2. If the beneficial owners of the reporting company and the intermediate company are the same individuals, a reporting company may report the FinCEN identifier and full legal name of an intermediate company through which an individual is a beneficial owner of the reporting company.

FinCEN's Small Entity Compliance Guide includes additional information about these special reporting rules (see Chapter 4.2, "What do I report if a special reporting rule applies to my company?").

[Issued January 12, 2024]

D.13. Who is the beneficial owner of a homeowners association?

A homeowners association (HOA) that meets the reporting company definition and does not qualify for any exemptions must report its beneficial owner(s). A beneficial owner is any individual who, directly or indirectly, exercises substantial control over a reporting company, or owns or controls at least 25 percent of the ownership interests of a reporting company.

There may be instances in which no individuals own or control at least 25 percent of the ownership interests of an HOA that is a reporting company. However, FinCEN expects that at least one individual exercises substantial control over each reporting company. Individuals who meet one of the following criteria are considered to exercise substantial control over the HOA:

- the individual is a senior officer;
- the individual has authority to appoint or remove certain officers or a majority of directors of the HOA;
- the individual is an important decision-maker; or
- the individual has any other form of substantial control over the HOA.

[Issued April 18, 2024]

D.14. Can beneficial owners own or control reporting companies through trusts?

Yes, beneficial owners can own or control a reporting company through trusts. They can do so by either exercising substantial control over a reporting company through a trust arrangement or by owning or controlling the ownership interests of a reporting company that are held in a trust.

[Issued April 18, 2024]

D.15. Who are a reporting company's beneficial owners when individuals own or control the company through a trust?

A beneficial owner is any individual who either: (1) exercises substantial control over a reporting company, or (2) owns or controls at least 25 percent of a reporting company's ownership interests. Exercising substantial control or owning or controlling ownership interests may be direct or indirect, including through any contract, arrangement, understanding, relationship, or otherwise.

Trust arrangements vary. Particular facts and circumstances determine whether specific trustees, beneficiaries, grantors, settlors, and other individuals with roles in a particular trust are beneficial owners of a reporting company whose ownership interests are held through that trust.

For instance, the trustee of a trust may be a beneficial owner of a reporting company either by exercising substantial control over the reporting company, or by owning or controlling at least 25 percent of the ownership interests in that company through a trust or similar arrangement. Certain beneficiaries and grantors or settlors may also own or control ownership interests in a reporting company through a trust. The following conditions indicate that an individual owns or controls ownership interests in a reporting company through a trust:

- a trustee (or any other individual) has the authority to dispose of trust assets;

- a beneficiary is the sole permissible recipient of income and principal from the trust, or has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or
- a grantor or settlor has the right to revoke the trust or otherwise withdraw the assets of the trust.

This may not be an exhaustive list of the conditions under which an individual owns or controls ownership interests in a reporting company through a trust. Because facts and circumstances vary, there may be other arrangements under which individuals associated with a trust may be beneficial owners of any reporting company in which that trust holds interests.

[Issued April 18, 2024]

D.16. How does a reporting company report a corporate trustee as a beneficial owner?

For purposes of this question, "corporate trustee" means a legal entity rather than an individual exercising the powers of a trustee in a trust arrangement.

If a reporting company's ownership interests are owned or controlled through a trust arrangement with a corporate trustee, the reporting company should determine whether any of the corporate trustee's individual beneficial owners indirectly own or control at least 25 percent of the ownership interests of the reporting company through their ownership interests in the corporate trustee.

- For example, if an individual owns 60 percent of the corporate trustee of a trust, and that trust holds 50 percent of a reporting company's ownership interests, then the individual owns or controls 30 percent (60 percent × 50 percent = 30 percent) of the reporting company's ownership interests and is therefore a beneficial owner of the reporting company.
- By contrast, if the same trust only holds 30 percent of the reporting company's ownership interests, the same individual corporate trustee owner only owns or controls 18 percent (60 percent × 30 percent = 18 percent) of the reporting company, and thus is not a beneficial owner of the reporting company by virtue of ownership or control of ownership interests.

The reporting company may, but is not required to, report the name of the corporate trustee in lieu of information about an individual beneficial owner only if all of the following three conditions are met:

- the corporate trustee is an entity that is exempt from the reporting requirements;
- the individual beneficial owner owns or controls at least 25 percent of ownership interests in the reporting company ***only*** by virtue of ownership interests in the corporate trustee; and
- the individual beneficial owner does not exercise substantial control over the reporting company.

In addition to considering whether the beneficial owners of a corporate trustee own or control the ownership interests of a reporting company whose ownership interests are held in trust, it may be necessary to consider whether any owners of, or individuals employed or engaged by, the corporate trustee exercise substantial control over a reporting company. The factors for determining substantial control by an individual connected with a corporate trustee are the same as for any beneficial owner.

Please see Chapter 2.1 of FinCEN's Small Entity Compliance Guide, "What is substantial control?" for additional information on how to determine whether an individual has substantial control over a reporting company.

[Issued April 18, 2024]

D.17. Who should an entity fully or partially owned by an Indian Tribe report as its beneficial owner(s)?

The answer depends in part on the nature of the entity owned by the Indian Tribe. This informs the determination on whether the entity is a reporting company that must report beneficial ownership information.

In general, a reporting company must report as beneficial owners all individuals who, directly or indirectly, exercise substantial control over the reporting company (see Question D.2), and any individuals who directly or indirectly own or control at least 25 percent or more of the reporting company's ownership interests (see Question D.4).

An Indian Tribe is not an individual, and thus should not be reported as an entity's beneficial owner, even if it exercises substantial control over an entity or owns or controls 25 percent or more of the entity's ownership interests. However, entities in which Tribes have ownership interests may still have to report one or more individuals as beneficial owners in certain circumstances.

Entity Is a Tribal Governmental Authority. An entity is not a reporting company—and thus does not need to report beneficial ownership information at all—if it is a "governmental authority," meaning an entity that is (1) established under the laws of the United States, an Indian Tribe, a State, or a political subdivision of a State, or under an interstate compact between two or more States, and that (2) exercises governmental authority on behalf of the United States or any such Indian Tribe, State, or political subdivision. This category includes tribally chartered corporations and state-chartered Tribal entities if those corporations or entities exercise governmental authority on a Tribe's behalf.

Entity's Ownership Interests Are Controlled or Wholly Owned by a Tribal Governmental Authority. A subsidiary of a Tribal governmental authority is likewise exempt from BOI reporting requirements if its ownership interests are entirely controlled or wholly owned by the Tribal governmental authority. See Questions L.3 and L.6 for information on this "subsidiary exemption." See Question C.2 and Section L generally for more information about other exemptions.

Entity Is Partially Owned by a Tribe (and Is Not Exempt). A non-exempt entity partially owned by an Indian Tribe should report as beneficial owners all individuals exercising substantial control over it, including individuals who are exercising

substantial control on behalf of an Indian Tribe or its governmental authority. The entity should also report any individuals who directly or indirectly own or control at least 25 percent or more of ownership interests of the reporting company. (However, if any of these individuals owns or controls these ownership interests exclusively through an exempt entity or a combination of exempt entities, then the reporting company may report the name(s) of the exempt entity or entities in lieu of the individual beneficial owner. See Question D.12.)

FinCEN's Small Entity Compliance Guide includes additional information on how to determine if an individual qualifies as a beneficial owner in Chapter 2, "Who is a beneficial owner of my company?". This chapter includes separate sections with more information about substantial control and ownership interest: Chapter 2.1 "What is substantial control?" and Chapter 2.2 "What is ownership interest?"

[Updated July 8, 2024]

D.18. If one spouse has an ownership interest in a reporting company, is the other spouse also considered a beneficial owner if the reporting company is created or registered in a community property state?

Possibly. Whether State community property laws affect a beneficial ownership determination will depend upon the specific consequences of applying applicable State law. If, applying community property State law, both spouses own or control at least 25 percent of the ownership interests of a reporting company, then both spouses should be reported to FinCEN as beneficial owners unless an exception applies.

[Issued October 3, 2024]

E. Company Applicant

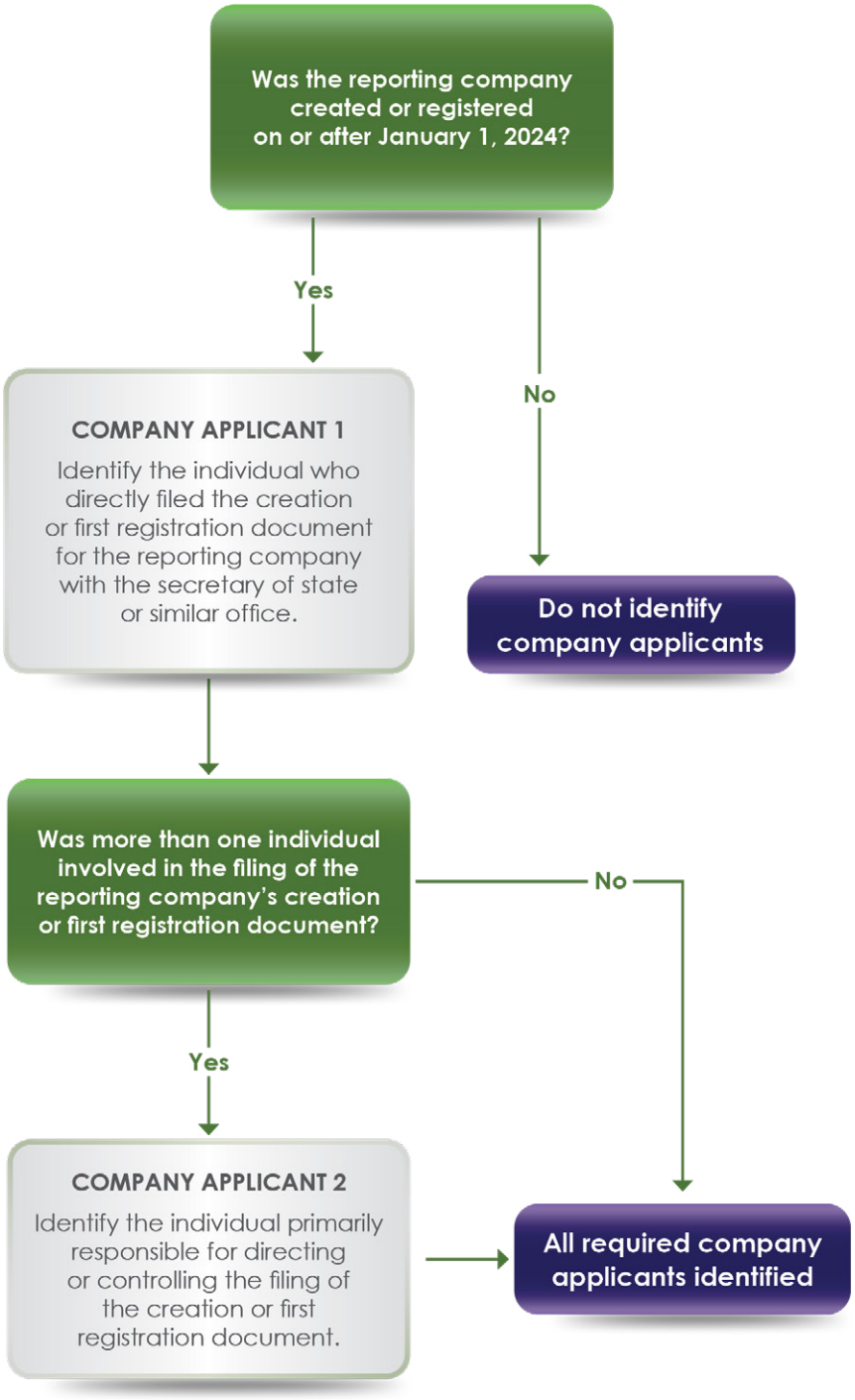
E.1. Who is a company applicant of a reporting company?

Only reporting companies created or registered *on or after* January 1, 2024, will need to report their company applicants.

A company that must report its company applicants will have only up to two individuals who could qualify as company applicants:

1. The individual who directly files the document that creates or registers the company; and
2. If more than one person is involved in the filing, the individual who is primarily responsible for directing or controlling the filing.

The following flowchart can help identify the company applicant.



In addition, Chapter 3.2, "Who is a company applicant of my company?" of FinCEN's Small Entity Compliance Guide includes additional information to help identify company applicants.

[Issued September 18, 2023]

E.2. Which reporting companies are required to report company applicants?

Not all reporting companies have to report their company applicants to FinCEN.

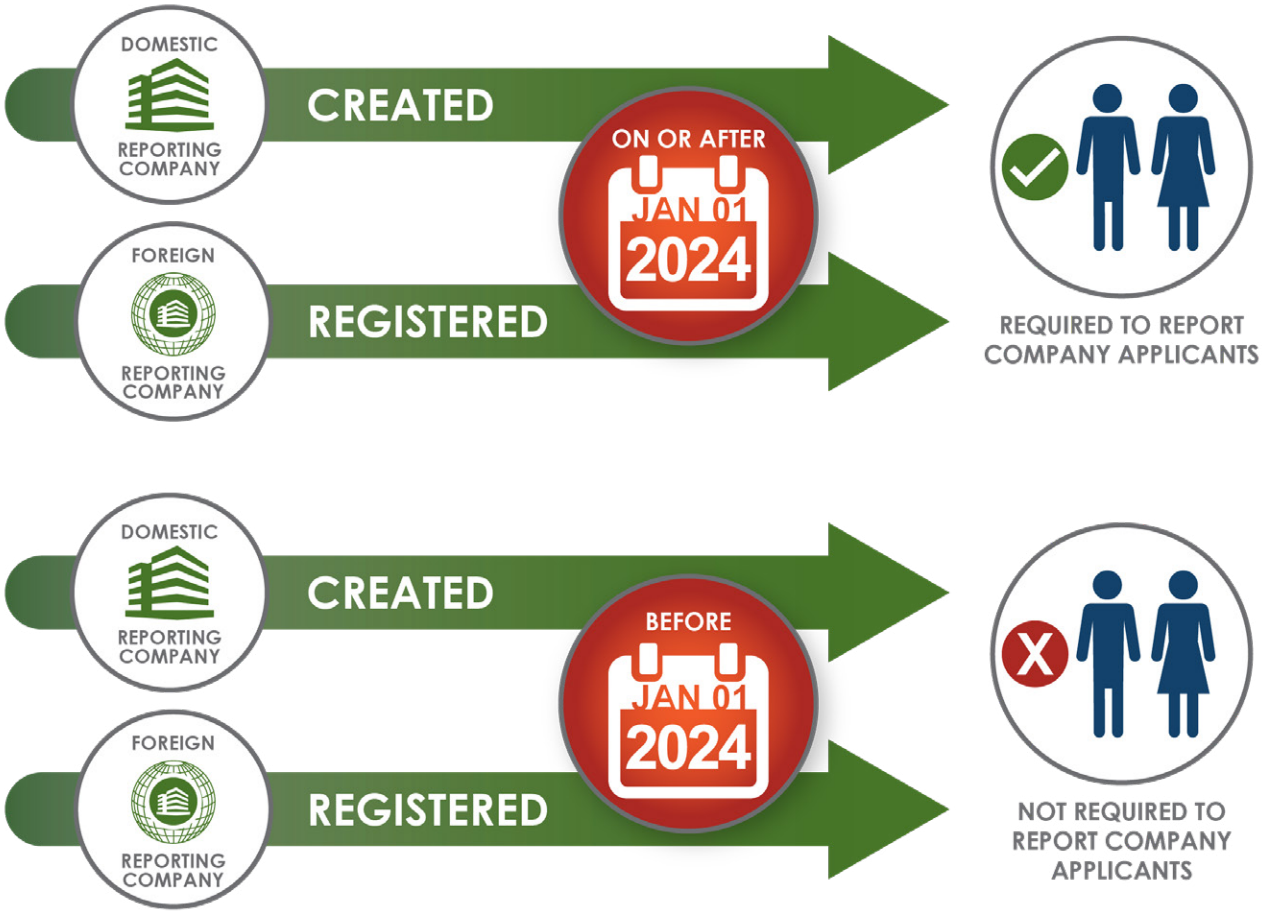
A reporting company **must report its company applicants** only if it is either a:

- Domestic reporting company created in the United States **on or after January 1, 2024**; or
- Foreign reporting company first registered to do business in the United States **on or after January 1, 2024.**

A reporting company **does not have to report its company applicants** if it is either a:

- Domestic reporting company created in the United States **before** January 1, 2024; or
- Foreign reporting company first registered to do business in the United States **before** January 1, 2024.

Below is summary of the company applicant reporting requirement. Chapter 3.1, "Is my company required to report its company applicants?" of FinCEN's Small Entity Compliance Guide includes additional information.



[Issued September 18, 2023]

E.3. Is my accountant or lawyer considered a company applicant?

An accountant or lawyer could be a company applicant, depending on their role in filing the document that creates or registers a reporting company. In many cases, company applicants may work for a business formation service or law firm.

An accountant or lawyer may be a company applicant if they directly filed the document that created or registered the reporting company. If more than one person is involved in the filing of the creation or registration document, an accountant or lawyer may be a company applicant if they are primarily responsible for directing or controlling the filing.

For example, an attorney at a law firm that offers business formation services may be primarily responsible for overseeing preparation and filing of a reporting company's incorporation documents. A paralegal at the law firm may directly file the incorporation documents at the attorney's request. Under those circumstances, the attorney and the paralegal are both company applicants for the reporting company.

[Issued September 18, 2023]

E.4. Can a company applicant be removed from a BOI report if the company applicant no longer has a relationship with the reporting company?

No. A company applicant may not be removed from a BOI report even if the company applicant no longer has a relationship with the reporting company. A reporting company created on or after January 1, 2024, is required to report company applicant information in its initial BOI report, but is not required to file an updated BOI report if information about a company applicant changes.

[Issued November 16, 2023]

E.5. The company applicants of a reporting company include the individual "primarily responsible for directing the filing of the creation or registration document." What makes an individual "primarily responsible" for directing such a filing?

At most, two individuals need to be reported as company applicants:

1. the person who directly files the document with a secretary of state or similar office, and
2. if more than one person is involved in the filing of the document, the person who is primarily responsible for directing or controlling the filing.

For the purposes of *determining* who is a company applicant, it is not relevant who signs the creation or registration document, for example, as an incorporator. To determine who is primarily responsible for directing or controlling the filing of the document, consider who is responsible for making the decisions about the filing of the document, such as how the filing is managed, what content the document includes, and when and where the filing occurs. The following three scenarios provide examples.

Scenario 1: Consider an attorney who completes a company creation document using information provided by a client, and then sends the document to a corporate service provider for filing with a secretary of state. In this example:

- The attorney is the company applicant who is primarily responsible for directing or controlling the filing because they prepared the creation document and directed the corporate service provider to file it.
- The individual at the corporate service provider is the company applicant who directly filed the document with the secretary of state.

Scenario 2: If the attorney instructs a paralegal to complete the preparation of the creation document, rather than doing so themself, before directing the corporate service provider to file the document, the outcome remains the same: the attorney and the individual at the corporate service provider who files the document are company applicants. The paralegal is not a company applicant because the attorney played a greater role than the paralegal in making substantive decisions about the filing of the document.

Scenario 3: If the client who initiated the company creation directly asks the corporate service provider to file the document to create the company, then the client is primarily responsible for directing or controlling the filing, and the client should be reported as a company applicant, along with the individual at the corporate service provider who files the document.

[Issued January 12, 2024]

E.6. Is a third-party courier or delivery service employee who only delivers documents that create or register a reporting company a company applicant?

No. A third-party courier or delivery service employee who only delivers documents to a secretary of state or similar office is not a company applicant provided they meet one condition: the third-party courier, the delivery service employee, and any delivery service that employs them does not play any other role in the creation or registration of the reporting company.

When a third-party courier or delivery service employee is used solely for delivery, the individual (e.g., at a business formation service or law firm) who requested the third-party courier or delivery service to deliver the document will typically be a company applicant.

Under FinCEN's regulations, an individual who "directly files the document" that creates or registers the reporting company is a company applicant. Third-party couriers or delivery service employees who deliver such documents facilitate the documents' filing, but FinCEN does not consider them to be the filers of the documents given their only connection to the creation or registration of the reporting company is couriering the documents.

Rather, when a third-party courier or delivery service is used by a firm, the company applicant who "directly files" the creation or registration document is the individual at the firm who requests that the third-party courier or delivery service deliver the documents.

- For example, an attorney at a law firm may be involved in the preparation of incorporation documents. The attorney directs a paralegal to file the documents. The paralegal may then request a third-party delivery service

to deliver the incorporation documents to the secretary of state's office. The paralegal is the company applicant who directly files the documents, even though the third-party delivery service delivered the documents on the paralegal's behalf. The attorney at the law firm who was involved in the preparation of the incorporation documents and who directed the paralegal to file the documents will also be a company applicant because the attorney was primarily responsible for directing or controlling the filing of the documents.

In contrast, if a courier is employed by a business formation service, law firm, or other entity that plays a role in the creation or registration of the reporting company, such as drafting the relevant documents or compiling information to be submitted as part of the documents delivered, the conclusion is different. FinCEN considers such a courier to have directly filed the documents—and thus to be a company applicant—given the courier's greater connection (via the courier's employer) to the creation or registration of the company.

- For example, a mailroom employee at a law firm may physically deliver the document that creates a reporting company at the direction of an attorney at the law firm who is primarily responsible for decisions related to the filing. Both individuals are company applicants.

[Issued January 12, 2024]

E.7. If an individual used an automated incorporation service, such as through a website or online platform, to file the creation or registration document for a reporting company, who is the company applicant?

If a business formation service only provides software, online tools, or generally applicable written guidance that are used to file a creation or registration document for a reporting company, and employees of the business service are not directly involved in the filing of the document, the employees of such services are not company applicants. For example, an individual may prepare and self-file documents to create the individual's own reporting company through an automated incorporation service. In this case, this reporting company reports only that individual as a company applicant.

[Issued January 12, 2024]

F. Reporting Requirements

F.1. Will a reporting company need to report any other information in addition to information about its beneficial owners?

Yes. The information that needs to be reported, however, depends on when the company was created or registered.

- If a reporting company is created or registered *on or after* January 1, 2024, the reporting company will need to report information about itself, its beneficial owners, **and** its company applicants.
- If a reporting company was created or registered *before* January 1, 2024, the reporting company only needs to provide information about itself and its beneficial owners. The reporting company does not need to provide information about its company applicants.

[Issued March 24, 2023]

F.2. What information will a reporting company have to report about itself?

A reporting company will have to report:

1. Its legal name;
2. Any trade names, "doing business as" (d/b/a), or "trading as" (t/a) names;
3. The current street address of its principal place of business if that address is in the United States (for example, a U.S. reporting company's headquarters), or, for reporting companies whose principal place of business is outside the United States, the current address from which the company conducts business in the United States (for example, a foreign reporting company's U.S. headquarters);
4. Its jurisdiction of formation or registration; and
5. Its Taxpayer Identification Number (or, if a foreign reporting company has not been issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of the jurisdiction).

A reporting company will also have to indicate whether it is filing an initial report, or a correction or an update of a prior report.

FinCEN's Small Entity Compliance Guide includes a checklist to help identify the information required to be reported (see Chapter 4.1, "What information should I collect about my company, its beneficial owners, and its company applicants?").

[Issued September 18, 2023]

F.3. What information will a reporting company have to report about its beneficial owners?

For each individual who is a beneficial owner, a reporting company will have to provide:

1. The individual's name;
2. Date of birth;
3. Residential address; and
4. An identifying number from an acceptable identification document such as a passport or U.S. driver's license, and the name of the issuing state or jurisdiction of identification document (for examples of acceptable identification, see Question F.5).

The reporting company will also have to report an image of the identification document used to obtain the identifying number in item 4.

FinCEN's Small Entity Compliance Guide includes a checklist to help identify the information required to be reported (see Chapter 4.1, "What information should I collect about my company, its beneficial owners, and its company applicants?").

[Issued September 18, 2023]

F.4. What information will a reporting company have to report about its company applicants?

For each individual who is a company applicant, a reporting company will have to provide:

1. The individual's name;
2. Date of birth;

3. Address; and
4. An identifying number from an acceptable identification document such as a passport or U.S. driver's license, and the name of the issuing state or jurisdiction of identification document (for examples of acceptable identification, see Question F.5).

The reporting company will also have to report an image of the identification document used to obtain the identifying number in item 4.

If the company applicant works in corporate formation—for example, as an attorney or corporate formation agent—then the reporting company must report the company applicant's business address. Otherwise, the reporting company must report the company applicant's residential address.

FinCEN's Small Entity Compliance Guide includes a checklist to help identify the information required to be reported (see Chapter 4.1, "What information should I collect about my company, its beneficial owners, and its company applicants?").

[Issued September 18, 2023]

F.5. What are acceptable forms of identification that will meet the reporting requirements?

The Corporate Transparency Act (CTA) requires a unique identification number found in one of the following acceptable forms of identification for individuals:

1. A non-expired U.S. driver's license (including any driver's license issued by a commonwealth, territory, or possession of the United States);
2. A non-expired identification document issued by a U.S. state or local government, or Indian Tribe;
3. A non-expired passport issued by the U.S. government; or
4. A non-expired passport issued by a foreign government (permitted only when an individual does not have one of the other three forms of identification listed above).

[Updated June 10, 2024]

i. What is an example of a "non-expired identification document issued by a U.S. state or local government, or Indian Tribe"?

A "non-expired identification document issued by a U.S. State or local government, or Indian Tribe" is a document issued by such authorities specifically for use as proof of the holder's identity. Such documents typically, but not always, include a photograph of the holder (see Question F.10). For example, a non-expired identification card issued by a State's Department of Corrections for the purpose of identifying a currently or previously incarcerated individual is an acceptable identification document. This is distinct from personal documents that serve functions other than use as proof of a holder's identity, such as recording a birth (a "birth certificate") or granting the holder access to particular government services (e.g., a "library card").

[Issued October 3, 2024]

ii. Is a U.S. passport card an acceptable form of identification?

Yes. With respect to Item 3 of the above list, a U.S. passport card is considered a type of passport issued by the U.S. government, and a non-expired U.S. passport card is therefore an acceptable form of identification.

[Issued October 3, 2024]

F.6. Is there a requirement to annually report beneficial ownership information?

No. There is no annual reporting requirement. Reporting companies must file an initial BOI report and updated or corrected BOI reports as needed.

FinCEN's Small Entity Compliance Guide includes more information about when to file initial BOI reports in Chapter 5.1, "When should my company file its initial BOI report?" and when to file updated and corrected BOI reports in Chapter 6, "What if there are changes to or inaccuracies in reported information?"

[Issued November 16, 2023]

F.7. Does a reporting company have to report information about its parent or subsidiary companies?

No, though if a special reporting rule applies, the reporting company may report a parent company's name instead of beneficial ownership information. A reporting company usually must report information about itself, its beneficial owners, and, for reporting companies created or registered on or after January 1, 2024, its company applicants. However, under a special reporting rule, a reporting company may report a parent company's name in lieu of information about its beneficial owners if its beneficial owners only hold their ownership interest in the reporting company through the parent company and the parent company is an exempt entity.

Chapter 4 of FinCEN's Small Entity Compliance Guide ("What specific information does my company need to report?") provides additional information on what must be reported to FinCEN. Chapter 4.2 ("What do I report if a special reporting rule applies to my company?") specifically provides details on what information must be reported pursuant to special reporting rules.

[Issued December 12, 2023]

F.8. Can a reporting company report a P.O. box as its current address?

No. The reporting company address must be a U.S. street address and cannot be a P.O. box.

FinCEN's Small Entity Compliance Guide includes additional information on what must be reported in Chapter 4, "What specific information does my company need to report?"

[Issued December 12, 2023]

F.9. Have I met FinCEN's BOI reporting obligation if I filed a form or report that provides beneficial ownership information to a state office, a financial institution, or the IRS?

No. Reporting companies must report beneficial ownership information directly to FinCEN. Congress enacted a law, the Corporate Transparency Act, that requires the reporting of beneficial ownership information directly to FinCEN. State or local

governments, financial institutions, and other federal agencies, such as the IRS, may separately require entities to report certain beneficial ownership information. However, by law, those requirements are not a substitute for reporting beneficial ownership information to FinCEN.

[Issued December 12, 2023]

F.10. If a beneficial owner or company applicant's acceptable identification document does not include a photograph for religious reasons, will FinCEN accept the identification document without the photograph?

Yes. If a beneficial owner or company applicant's identification document does not include a photograph for religious reasons, the reporting company may nonetheless submit an image of that identification document when submitting its report, as long as the identification document is one of the types of identification accepted by FinCEN, such as a non-expired State-issued identification document. Please see Question F.5 for a list of acceptable identification documents.

[Issued January 12, 2024]

F.11. What residential address should be reported if a reporting company is required to a report an individual's residential address, but that an individual does not have a permanent residential residence?

The residential address that is current at the time of filing should be reported to FinCEN. An updated report should be submitted within 30 calendar days if the address, or any other information previously reported, changes.

FinCEN's Small Entity Compliance Guide includes additional information on what information must be reported in Chapter 4, "What specific information does my company need to report?" and what to do when previously reported information needs to be updated in Chapter 6.1 "What should I do if previously reported information changes?"

[Issued January 12, 2024]

F.12. What address should a reporting company report if it lacks a principal place of business in the United States?

If a reporting company does not have a principal place of business in the United States, then the company must report to FinCEN as its address the primary location in the United States where it conducts business.

If a reporting company has no principal place of business in the United States and conducts business at more than one location within the United States, then the reporting company may report as its primary location the address of any of those locations where the reporting company receives important correspondence.

If a reporting company has no principal place of business in the United States and does not generally conduct business functions at any location in the United States, then its primary location is the address in the United States of the person that the reporting company, under State or other applicable law, has designated to accept service of legal process on its behalf. In some jurisdictions, this person is referred to as the reporting company's registered agent, or the address is referred to as the registered office. Such a reporting company should report this address to FinCEN as

its address. FinCEN will understand the use of such an address to mean that: (i) the registered agent or other person at the address designated to accept service of legal process has consented to the use of its address in this capacity, and (ii) the reporting company does not generally conduct business functions at any other location in the United States.

[Updated October 3, 2024]

F.13. What type of tax identification number should be reported by a reporting company that is disregarded for U.S. tax purposes?

An entity that is disregarded for U.S. tax purposes—a "disregarded entity"—is not treated as an entity separate from its owner for U.S. tax purposes. Instead of a disregarded entity being taxed separately, the entity's owner reports the entity's income and deductions as part of the owner's federal tax return.

A disregarded entity must report beneficial ownership information (BOI) to FinCEN if it is a reporting company (see Question C.1). Such a reporting company must provide one of the following types of taxpayer identification numbers (TINs) on its BOI report if it has been issued a TIN: an Employer Identification Number (EIN); a Social Security Number (SSN); or an Individual Taxpayer Identification Number (ITIN). If a foreign reporting company has not been issued a TIN, it must provide a tax identification number issued by a foreign jurisdiction and the name of that jurisdiction.

Consistent with rules of the Internal Revenue Service (IRS) regarding the use of TINs, different types of tax identification numbers may be reported for disregarded entities under different circumstances:

- If the disregarded entity has its own EIN, it may report that EIN as its TIN. If the disregarded entity does not have an EIN, it is not required to obtain one to meet its BOI reporting requirements so long as it can instead provide another type of TIN or, if a foreign reporting company not issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of that jurisdiction.
- If the disregarded entity is a single-member limited liability company (LLC) or otherwise has only one owner that is an individual with an SSN or ITIN, the disregarded entity may report that individual's SSN or ITIN as its TIN.
- If the disregarded entity is owned by a U.S. entity that has an EIN, the disregarded entity may report that other entity's EIN as its TIN.
- If the disregarded entity is owned by another disregarded entity or a chain of disregarded entities, the disregarded entity may report the TIN of the first owner up the chain of disregarded entities that has a TIN as its TIN.

As explained above, a disregarded entity that is a reporting company must report one of these tax identification numbers when reporting beneficial ownership information to FinCEN.

[Issued July 24, 2024]

F.14. Are reporting companies required to report the addresses of beneficial owners or company applicants that participate in an Address Confidentiality Program (ACP)?

FinCEN is mindful of the critical privacy interests protected by ACPs. Reporting companies that are required to report a beneficial owner or company applicant registered with a State's ACP should report to FinCEN the ACP address that the State provided to the individual. As a best practice, individuals registered with a State ACP may consider retaining documentation to demonstrate that they participate in an ACP.

[Issued October 3, 2024]

F.15. For each beneficial owner or company applicant a company is required to report, the company must provide an identifying number from an acceptable identification document as well as an image of the identification document used to obtain this identifying number. Does the name on an individual's acceptable identification document need to match the individual's current full legal name?

No. If the name on the identification document of a beneficial owner or company applicant does not match their current full legal name due to a recent legal name change, the individual's current full legal name should be reported to FinCEN. The individual may report an acceptable identifying document that does not include the updated full legal name. This also applies when an individual is requesting a FinCEN identifier.

If the requester obtains a new driver's license or other acceptable identifying document that includes a changed name, address, or identifying number, the requester should update the information already provided to FinCEN, either by filing an updated beneficial ownership information report or updating the previously filed FinCEN identifier information, including by submitting an image of the new identification document.

See Question F.5. "What are acceptable forms of identification that will meet the reporting requirement?" for a list of the acceptable forms of identification.

[Issued October 3, 2024]

G. Initial Report

G.1. When do I have to file an initial beneficial ownership information report with FinCEN?

If your company existed before January 1, 2024, it must file its initial beneficial ownership information report by January 1, 2025.

If your company was created or registered on or after January 1, 2024, and before January 1, 2025, then it must file its initial beneficial ownership information report within 90 calendar days after receiving actual or public notice that its creation or registration is effective. Specifically, this 90-calendar day deadline runs from the time the company receives actual notice that its creation or registration is effective, or after a secretary of state or similar office first provides public notice of its creation or registration, whichever is earlier.

If your company was created or registered on or after January 1, 2025, it must file its initial beneficial ownership information report within 30 calendar days after receiving actual or public notice that its creation or registration is effective. The following sets out the initial report timelines.

The reporting requirement is effective on January 1, 2024. FinCEN will begin accepting beneficial ownership information reports on that date.

INITIAL REPORTS

Required by all companies that meet the definition of **reporting company** and are not **exempt** from that definition.

Existing reporting companies

Created or registered to do business in the United States before January 1, 2024.

Reports due by **January 1, 2025**.

New reporting companies

Created or registered to do business in the United States on or after January 1, 2024.

Reporting companies created or registered **on or after January 1, 2024** and **before January 1, 2025**, have **90 calendar days** after receiving actual or public notice that their company's creation or registration is effective to file their initial BOI reports.

Reporting companies created or registered **on or after January 1, 2025**, will have **30 calendar days** from receipt of actual or public notice that their creation or registration is effective to file their initial BOI reports.

Chapter 5.1 "When should my company file its initial BOI report?" of FinCEN's Small Entity Compliance Guide has additional information about the reporting timelines.

[Updated December 1, 2023]

G.2. Can a parent company file a single BOI report on behalf of its group of companies?

No. Any company that meets the definition of a reporting company and is not exempt is required to file its own BOI report.

[Issued September 29, 2023]

G.3. How can I obtain a tax identification number for a new company quickly so that I can file an initial beneficial ownership information report on time?

A reporting company must provide one of the following types of taxpayer identification numbers (TINs) on its BOI report if it has been issued a TIN: an Employer Identification Number (EIN); a Social Security Number (SSN); or an Individual Taxpayer Identification Number (ITIN). If a foreign reporting company

has not been issued a TIN, it must provide a tax identification number issued by a foreign jurisdiction and the name of that jurisdiction.

The Internal Revenue Service (IRS) offers a free online application for an EIN, which is provided immediately upon submission of the application. For more information, see "Taxpayer Identification Numbers (TIN)" at IRS.gov (https://www.irs.gov/individuals/international-taxpayers/taxpayer-identification-numbers-tin).

For more information on Employer Identification Numbers specifically, and to access the EIN online application, see "Apply for an Employer Identification Number (EIN) Online" at IRS.gov (https://www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online).

Most reporting companies should be able to use the EIN online application to apply for their EIN. However, there may be situations where a reporting company needs to file a Form SS-4, Application for Employer Identification Number (https://www.irs.gov/pub/irs-pdf/fss4.pdf), in order to obtain an EIN. In particular, if the responsible party for the applicant is a foreign person that does not have an SSN or ITIN, they will not be able to use the online application portal. For information about completing and submitting the Form SS-4 by mail or fax, see the Instructions to Form SS-4 (https://www.irs.gov/instructions/iss4).

For Forms SS-4 submitted by fax, applicants should generally receive their EIN in four business days. For Forms SS-4 submitted by mail, applicants should receive their EIN in four to five weeks. However, in some circumstances, it may take six to eight weeks to receive an EIN. Thus, in some limited circumstances, a reporting company with no other tax identification number may not be able to obtain its EIN by its BOI report filing deadline.

A reporting company must report its tax identification number when reporting beneficial ownership information to FinCEN and, indeed, will be unable to submit its BOI report without including a tax identification number. In such circumstances, in addition to making all reasonable efforts to file its BOI report in a timely manner (including requesting all necessary information as early as practicable), the reporting company should file its report as soon as it receives its EIN. As a best practice, the reporting company may consider retaining documentation associated with its efforts to comply with the BOI reporting requirements in a timely manner.

[Updated July 24, 2024]

G.4. Should an initial BOI report include historical beneficial owners of a reporting company, or only beneficial owners as of the time of filing?

Except as noted below, an initial BOI report should only include the beneficial owners as of the time of the filing. Reporting companies should notify FinCEN of changes to beneficial owners and related BOI through updated reports.

If a reporting company created or registered in 2024 or later ceases to exist before the expiration of the 30- or 90-day period reporting companies have to report their beneficial ownership information to FinCEN, but no one submits the reporting company's initial beneficial ownership information report to FinCEN until after the reporting company ceases to exist, then that beneficial ownership information report should reflect the beneficial ownership information accurate as of the moment prior to the reporting company ceasing to exist.

FinCEN's Small Entity Compliance Guide includes more information about when to file updated or corrected BOI reports in Chapter 6, "What if there are changes to or inaccuracies in reported information?"

[Updated September 10, 2024]

G.5. How does a company created or registered after January 1, 2024, determine its date of creation or registration?

The date of creation or registration for a reporting company is the earlier of the date on which: (1) the reporting company receives actual notice that its creation (or registration) has become effective; or (2) a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the domestic reporting company has been created or the foreign reporting company has been registered.

FinCEN recognizes that there are varying state filing practices. In certain states, automated systems provide notice of creation or registration to newly created or registered companies. In other states, no actual notice of creation or registration is provided, and newly created companies receive notice through the public posting of state records. FinCEN believes that individuals who create or register reporting companies will likely stay apprised of creation or registration notices or publications, given those individuals' interest in establishing an operating business or engaging in the activity for which the reporting company is created.

[Issued December 12, 2023]

G.6. A company that was created or registered before January 1, 2024, and was exempt from the BOI reporting requirements loses its exempt status between January 1, 2024, and January 1, 2025. How long does the reporting company have to file its initial BOI report?

Normally, a company that loses its exempt status must file a BOI report with FinCEN within 30 calendar days after the date that it no longer meets the criteria for any exemption. A reporting company created or registered to do business before January 1, 2024, however, has until January 1, 2025, to file its initial BOI report.

FinCEN has determined that previously exempt entities that existed before 2024 and lose their exempt status in 2024 will receive the benefit of whichever of these two timeframes is longer: (1) the remaining days left in the one-year filing period for existing companies; or (2) the 30-calendar-day period for companies that lose their exempt status.

Thus, for example, if an existing reporting company ceases to be exempt on February 1, 2024, the company will have until January 1, 2025, to file its initial BOI report. If the company ceases to be exempt on December 15, 2024, the company will have until January 14, 2025, to file its initial BOI report.

[Issued April 18, 2024]

H. Updated Report

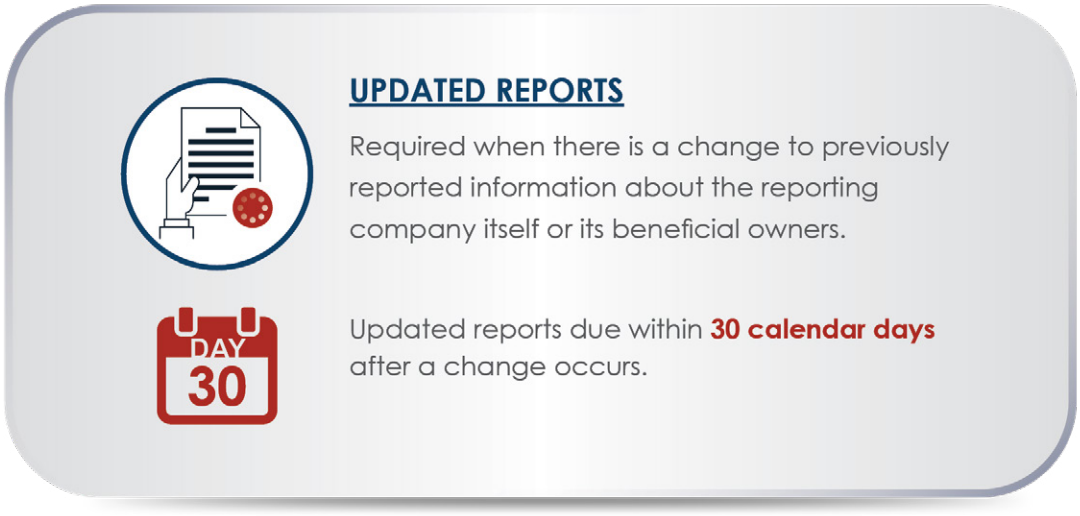
H.1. What should I do if previously reported information changes?

If there is ***any change*** to the required information about your company or its beneficial owners in a beneficial ownership information report that your company filed, your

company must file an updated report no later than 30 days after the date of the change.

A reporting company is not required to file an updated report for any changes to previously reported information about a company applicant.

The following infographic sets out **updated reports timelines**.



Chapter 6.1, "What should I do if previously reported information changes?" of FinCEN's Small Entity Compliance Guide provides additional information.

[Issued September 18, 2023]

H.2. What are some likely triggers for needing to update a beneficial ownership information report?

The following are some examples of the changes that would require an updated beneficial ownership information report:

- Any change to the information reported for the reporting company, such as registering a new business name.
- A change in beneficial owners, such as a new CEO, or a sale that changes who meets the ownership interest threshold of 25 percent (see Question D.4 for more information about ownership interests).
- Any change to a beneficial owner's name, address, or unique identifying number previously provided to FinCEN. If a beneficial owner obtained a new driver's license or other identifying document that includes a changed name, address, or identifying number, the reporting company also would have to file an updated beneficial ownership information report with FinCEN, including an image of the new identifying document.

FinCEN's Small Entity Compliance Guide provides additional guidance on triggers requiring an updated beneficial ownership information report (see Chapter 6.1 "What should I do if previously reported information changes?").

[Issued September 18, 2023]

H.3. Is an updated BOI report required when the type of ownership interest a beneficial owner has in a reporting company changes?

No. A change to the **type** of ownership interest a beneficial owner has in a reporting company—for example, a conversion of preferred shares to common stock—does not require the reporting company to file an updated BOI report because FinCEN does not require companies to report the type of interest. Updated BOI reports are required when information reported to FinCEN about the reporting company or its beneficial owners changes.

FinCEN's Small Entity Compliance Guide includes additional information on when and how reporting companies must update information in Chapter 6, "What if there are changes to or inaccuracies in reported information?"

[Issued December 12, 2023]

H.4. If a reporting company needs to update one piece of information on a BOI report, such as its legal name, does the reporting company have to fill out an entire new BOI report?

Updated BOI reports will require all fields to be submitted, including the updated pieces of information. For example, if a reporting company changes its legal name, the reporting company will need to file an updated BOI report to include the new legal name and the previously reported, unchanged information about the company, its beneficial owners, and, if required, its company applicants.

A reporting company that filed its prior BOI report using the fillable PDF version may update its saved copy and resubmit to FinCEN. If a reporting company used FinCEN's web-based application to submit the previous BOI report, it will need to submit a new report in its entirety by either accessing FinCEN's web-based application to complete and file the BOI report, or by using the PDF option to complete the BOI report and upload to the BOI e-Filing application.

[Issued December 12, 2023]

H.5. Can a filer submit a late updated BOI report?

An updated BOI report can be submitted to FinCEN at any time. However, the reporting company is responsible for ensuring that updates are filed within 30 days of a change occurring. If a reporting company has engaged a third-party service provider to file BOI reports and updates on its behalf, then it should communicate any changes to its beneficial ownership information to the third-party service provider with enough time to meet the 30-day deadline.

[Issued December 12, 2023]

H.6. If a reporting company last filed a "newly exempt entity" BOI report but subsequently loses its exempt status, what should it do?

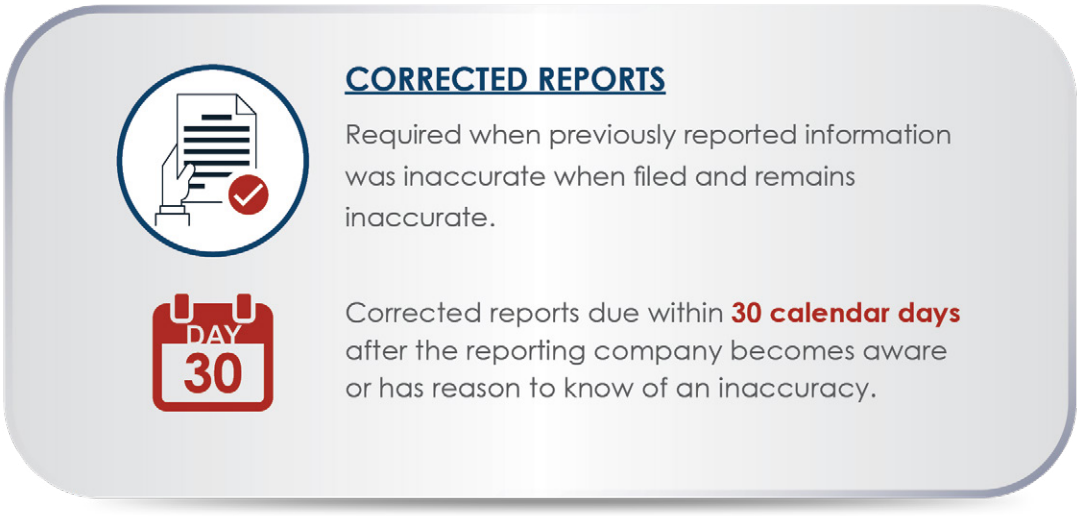
A reporting company should file an updated BOI report with FinCEN with the company's current beneficial ownership information when it determines it no longer qualifies for an exemption.

[Issued December 12, 2023]

I. Corrected Report

I.1. What should I do if I learn of an inaccuracy in a report?

If a beneficial ownership information report is inaccurate, your company must correct it no later than 30 days after the date your company became aware of the inaccuracy or had reason to know of it. This includes any inaccuracy in the required information provided about your company, its beneficial owners, or its company applicants. The following infographic sets out the **corrected report timelines**.



Chapter 6.2, "What should I do if I learn of an inaccuracy in a report?" of FinCEN's Small Entity Compliance Guide includes additional information about correcting inaccurate beneficial ownership information reports filed with FinCEN.

[Updated September 29, 2023]

J. Newly Exempt Entity Report

J.1. What should a reporting company do if it becomes exempt after already filing a report?

If a reporting company filed a beneficial ownership information report but then becomes exempt from filing the report, the company should file an updated report indicating that it is no longer a reporting company. An updated BOI report for a newly exempt entity will only require that: (1) the entity identify itself; and (2) check a box noting its newly exempt status.

Chapter 6.3, "What should my company do if it becomes exempt after already filing a report?" of FinCEN's Small Entity Compliance Guide includes more information.

[Issued September 18, 2023]

K. Compliance/Enforcement

K.1. What happens if a reporting company does not report beneficial ownership information to FinCEN or fails to update or correct the information within the required timeframe?

FinCEN is working hard to ensure that reporting companies are aware of their obligations to report, update, and correct beneficial ownership information. FinCEN

understands this is a new requirement. If you correct a mistake or omission within 90 days of the deadline for the original report, you may avoid being penalized. However, you could face civil and criminal penalties if you disregard your beneficial ownership information reporting obligations.

FinCEN's Small Entity Compliance Guide provides more information about enforcement of the requirement (see Chapter 1.3, "What happens if my company does not report BOI in the required timeframe?").

[Issued September 18, 2023]

K.2. What penalties do individuals face for violating BOI reporting requirements?

As specified in the Corporate Transparency Act, a person who willfully violates the BOI reporting requirements may be subject to civil penalties of up to $500 for each day that the violation continues. However, this civil penalty amount is adjusted annually for inflation. As of the time of publication of this FAQ, this amount is $591.

A person who willfully violates the BOI reporting requirements may also be subject to criminal penalties of up to two years imprisonment and a fine of up to $10,000. Potential violations include willfully failing to file a beneficial ownership information report, willfully filing false beneficial ownership information, or willfully failing to correct or update previously reported beneficial ownership information.

[Updated April 18, 2024]

K.3. Who can be held liable for violating BOI reporting requirements?

Both individuals and corporate entities can be held liable for willful violations. This can include not only an individual who actually files (or attempts to file) false information with FinCEN, but also anyone who willfully provides the filer with false information to report. Both individuals and corporate entities may also be liable for willfully failing to report complete or updated beneficial ownership information; in such circumstances, individuals can be held liable if they either cause the failure or are a senior officer at the company at the time of the failure.

i. Can an individual who files a report on behalf of a reporting company be held liable?

Yes. An individual who willfully files a false or fraudulent beneficial ownership information report on a company's behalf may be subject to the same civil and criminal penalties as the reporting company and its senior officers.

ii. Can a beneficial owner or company applicant be held liable for refusing to provide required information to a reporting company?

Yes. As described above, an enforcement action can be brought against an individual who willfully causes a reporting company's failure to submit complete or updated beneficial ownership information to FinCEN. This would include a beneficial owner or company applicant who willfully fails to provide required information to a reporting company.

[Issued December 12, 2023]

K.4. Is a reporting company responsible for ensuring the accuracy of the information that it reports to FinCEN, even if the reporting company obtains that information from another party?

Yes. It is the responsibility of the reporting company to identify its beneficial owners and company applicants, and to report those individuals to FinCEN. At the time the filing is made, each reporting company is required to certify that its report or application is true, correct, and complete. Accordingly, FinCEN expects that reporting companies will take care to verify the information they receive from their beneficial owners and company applicants before reporting it to FinCEN.

[Issued December 12, 2023]

K.5. What should a reporting company do if a beneficial owner or company applicant withholds information?

While FinCEN recognizes that much of the information required to be reported about beneficial owners and company applicants will be provided to reporting companies by those individuals, reporting companies are responsible for ensuring that they submit complete and accurate beneficial ownership information to FinCEN. Starting January 1, 2024, reporting companies will have a legal requirement to report beneficial ownership information to FinCEN.

Existing reporting companies should engage with their beneficial owners to advise them of this requirement, obtain required information, and revise or consider putting in place mechanisms to ensure that beneficial owners will keep reporting companies apprised of changes in reported information, if necessary. Beneficial owners and company applicants should also be aware that they may face penalties if they willfully cause a reporting company to fail to report complete or updated beneficial ownership information.

Persons considering creating or registering legal entities that will be reporting companies should take steps to ensure that they have access to the beneficial ownership information required to be reported to FinCEN, and that they have mechanisms in place to ensure that the reporting company is kept apprised of changes in that information.

[Issued December 12, 2023]

L. Reporting Company Exemptions

L.1. What are the criteria for the tax-exempt entity exemption from the beneficial ownership information reporting requirement?

An entity qualifies for the tax-exempt entity exemption if **any** of the following four criteria apply:

(1)	The entity is an organization that is described in section 501(c) of the Internal Revenue Code of 1986 (Code) (determined without regard to section 508(a) of the Code) and exempt from tax under section 501(a) of the Code.
(2)	The entity is an organization that is described in section 501(c) of the Code, and was exempt from tax under section 501(a) of the Code, but lost its tax-exempt status less than 180 days ago.
(3)	The entity is a political organization, as defined in section 527(e)(1) of the Code, that is exempt from tax under section 527(a) of the Code.
(4)	The entity is a trust described in paragraph (1) or (2) of section 4947(a) of the Code.

FinCEN's Small Entity Compliance Guide includes checklists for this exemption (see exemption #19) and for the additional exemptions to the reporting requirements (see Chapter 1.2, "Is my company exempt from the reporting requirements?").

[Issued September 18, 2023]

L.2. What are the criteria for the inactive entity exemption from the beneficial ownership information reporting requirement?

An entity qualifies for the inactive entity exemption if **all six** of the following criteria are met:

(1)	The entity was in existence on or before January 1, 2020.
(2)	The entity is not engaged in active business.
(3)	The entity is not owned by a foreign person, whether directly or indirectly, wholly or partially. "Foreign person" means a person who is not a United States person. A "United States person" is defined in section 7701(a)(30) of the Internal Revenue Code of 1986 as: a citizen or resident of the United States; domestic partnership; a domestic corporation; and certain estates and trusts.
(4)	The entity has not experienced any change in ownership in the preceding twelve-month period.
(5)	The entity has not sent or received any funds in an amount greater than $1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve-month period.
(6)	The entity does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity.

FinCEN's Small Entity Compliance Guide includes checklists for this exemption (see Exemption #23) and for the additional exemptions to the reporting requirements (see Chapter 1.2, "Is my company exempt from the reporting requirements?").

[Issued September 18, 2023]

L.3. What are the criteria for the subsidiary exemption from the beneficial ownership information reporting requirement?

Subsidiaries of certain types of entities that are exempt from the beneficial ownership information reporting requirements may also be exempt from the reporting requirement.

An entity qualifies for the subsidiary exemption if the following applies:

The entity's ownership interests are controlled or wholly owned, directly or indirectly, by **any** of these types of exempt entities:

- Securities reporting issuer;
- Governmental authority;
- Bank;
- Credit union;
- Depository institution holding company;
- Broker or dealer in securities;
- Securities exchange or clearing agency;
- Other Exchange Act registered entity;
- Investment company or investment adviser;
- Venture capital fund adviser;
- Insurance company;
- State-licensed insurance producer;
- Commodity Exchange Act registered entity;
- Accounting firm;
- Public utility;
- Financial market utility;
- Tax-exempt entity; or
- Large operating company.

FinCEN's Small Entity Compliance Guide includes definitions of the exempt entities listed above and a checklist for this exemption (see exemption #22). FinCEN's Guide also includes checklists for the additional exemptions to the reporting requirements (see Chapter 1.2, "Is my company exempt from the reporting requirements?").

[Issued September 18, 2023]

i. If a reporting company's ownership interests are controlled or wholly owned, directly or indirectly, by more than one exempt entity, do the entities need to be affiliated to qualify for the subsidiary exemption?

No. If a reporting company's ownership interests are controlled or wholly owned by more than one exempt entity, the reporting company may still qualify for the subsidiary exemption if the entities are unaffiliated; however,

every controlling or owning entity must itself be an exempt entity in order for the reporting company to qualify for the subsidiary exemption.

[Issued October 3, 2024]

L.4. If I own a group of related companies, can I consolidate employees across those companies to meet the criteria of a large operating company exemption from the reporting company definition?

No. The large operating company exemption requires that the entity itself employ more than 20 full-time employees in the United States and does not permit consolidation of this employee count across multiple entities.

FinCEN's Small Entity Compliance Guide includes a checklist for this exemption (see exemption #21).

[Issued November 16, 2023]

L.5. How does a company report to FinCEN that the company is exempt?

A company does not need to report to FinCEN that it is exempt from the BOI reporting requirements if it has always been exempt.

If a company filed a BOI report and later qualifies for an exemption, that company should file an updated BOI report to indicate that it is newly exempt from the reporting requirements. Updated BOI reports are filed electronically though the secure filing system. An updated BOI report for a newly exempt entity will only require that the entity: (1) identify itself; and (2) check a box noting its newly exempt status.

[Issued November 16, 2023]

L.6. Does a subsidiary whose ownership interests are partially controlled by an exempt entity and partially controlled by a non-exempt entity qualify for the subsidiary exemption?

No. If an exempt entity controls some but not all of the ownership interests of the subsidiary and any of remaining interests are controlled by a non-exempt entity or by an individual, the subsidiary does not qualify for the subsidiary exemption. To qualify, a subsidiary's ownership interests must be fully, 100 percent owned or controlled by one or more entities from the list of exempt entities identified in Question L.3. In cases involving more than one exempt parent entity, the subsidiary exemption applies even if the subsidiary's parent entities are exempt from the BOI reporting requirements for different reasons (e.g., one parent is an exempt large operating company and the other is an exempt public utility) so long as all of the subsidiary's ownership interests are owned or controlled by listed exempt entities.

In this context, control of ownership interests means that the exempt entity or entities entirely control all of the ownership interests in the reporting company, in the same way that an exempt entity or entities must wholly own all of a subsidiary's ownership interests for the exemption to apply.

[Updated October 3, 2024]

L.7. If the size of a reporting company fluctuates above and below one of the thresholds for the large operating company exemption, does the reporting company need to file a BOI report?

Yes. The company will need to file a BOI report if it otherwise meets the definition of a reporting company and does not meet the criteria for the large operating company exemption (or any other exemption). If the company files a BOI report and then becomes exempt as a large operating company, the company should file a "newly exempt entity" BOI report with FinCEN noting that the company is now exempt. If at a later date the company no longer meets the criteria for the large operating company exemption or any other exemption, the reporting company should file an updated BOI report with FinCEN. Updated reports should be submitted to FinCEN within 30 calendar days of the occurrence of the change.

To qualify for the large operating company exemption, an entity must have more than 20 full-time employees in the United States, must have filed a Federal income tax or information return in the United States in the previous year demonstrating more than $5,000,000 in gross receipts or sales, and must have an operating presence at a physical office in the United States.

[Issued April 18, 2024]

L.8. Are telecommunications services included in the public utility exemption to the reporting requirements?

FinCEN's regulations provide that an entity that is a regulated public utility as defined in 26 U.S.C. 7701(a)(33)(A) and that provides telecommunications services, electrical power, natural gas, or water and sewer services within the United States is not required to report its beneficial ownership information to FinCEN. Such exempt regulated public utilities include a corporation engaged in the furnishing or sale of telephone or telegraph services if the rates for such furnishing or sale meet the requirements of 26 U.S.C. 7701(a)(33)(A), as specified in 26 U.S.C. 7701(a)(33)(D).

[Issued June 10, 2024]

L.9. Does a company qualify for the large operating company exemption if it has not yet filed its Federal income tax or information return for the previous year?

The Corporate Transparency Act (CTA) specifies that a company may qualify for the large operating company exemption based on a Federal income tax or information return filed "in" the previous year, while FinCEN's regulations refer to tax or information returns filed "for" the previous year. To the extent a tax or information return *for* the previous year was not filed *in* the previous year (e.g., because a company has not filed its return for the previous year at the time beneficial ownership information is required to be reported, or because the return filed in the previous year was for a prior year), a company should use the return filed *in* the previous year for purposes of determining its qualification for the exemption. If a company relying on this exemption subsequently files a tax return demonstrating less than $5 million in gross sales or receipts, and it no longer qualifies for the large operating company exemption or any other exemption, it has 30 days from the date of the tax return to file an initial BOI report. The Federal income tax or information return must demonstrate more than $5,000,000 in gross receipts or sales, as reported as gross receipts or sales (net of returns and allowances) on the entity's

IRS Form 1120, consolidated IRS Form 1120, IRS Form 1120-S, IRS Form 1065, or other applicable IRS form, excluding gross receipts or sales from sources outside the United States, as determined under Federal income tax principles.

[Issued June 10, 2024]

L.10. Would a reporting company qualify for the pooled investment vehicle (PIV) exemption (Exemption # 18) if it is operated or advised by an exempt reporting adviser (ERA)?

The pooled investment vehicle (PIV) exemption from the beneficial ownership information reporting requirements only applies to PIVs operated or advised by certain types of entities.

One of these types of entities is an investment adviser registered with the Securities and Exchange Commission (SEC) under the Investment Company Act of 1940 or the Investment Advisers Act of 1940. Thus, an adviser, including an exempt reporting adviser (ERA), that is not registered with SEC would not qualify as this type of entity.

A PIV is also exempt, however, if it is operated or advised by a "venture capital fund adviser," i.e., an entity that is both described in section 203(l) of the Investment Advisers Act of 1940 (15 U.S.C. 80-3(l)) and has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV (or any successor thereto) with the SEC. PIVs operated by ERAs meeting these "venture capital fund adviser" criteria are exempt from the beneficial ownership information (BOI) reporting requirements. PIVs operated by ERAs that rely on another exemption from registration with the SEC under the Investment Advisers Act are not thereby exempt from the BOI reporting requirements.

[Issued October 3, 2024]

L.11. Does a reporting company qualify for the large operating company exemption if it is run from a personal residence?

It depends. To qualify for the large operating company exemption, an entity must have more than 20 full time employees in the United States, must have filed a Federal income tax or information return in the United States in the previous year demonstrating more than $5,000,000 in gross receipts or sales, and must have an operating presence at a physical office in the United States.

The term "operating presence at a physical office within the United States" means that an entity regularly conducts its business at a physical location in the United States that the entity owns or leases and that is physically distinct from the place of business of any other unaffiliated entity. The definition does not preclude residences from being such a physical office. However, the entity that qualifies for the relevant exemption must itself lease (or own) the physical location, regularly conduct business at that location, and the location must be physically distinct from the place of business of any other unaffiliated entity. Thus, if the company is run from a personal residence, the company must itself actually rent or own the space in the personal residence that it uses to qualify for the large operating company exemption.

[Issued October 3, 2024]

M. FinCEN Identifier

M.1. What is a FinCEN identifier?

A "FinCEN identifier" is a unique identifying number that FinCEN will issue to an individual or reporting company upon request after the individual or reporting company provides certain information to FinCEN. An individual or reporting company may only receive one FinCEN identifier.

FinCEN's Small Entity Compliance Guide includes additional information on FinCEN identifiers in Chapter 4.3, "What is a FinCEN identifier and how can I use it?"

[Issued September 29, 2023]

M.2. How can I use a FinCEN identifier?

When a beneficial owner or company applicant has obtained a FinCEN identifier, reporting companies may report the FinCEN identifier of that individual in the place of that individual's otherwise required personal information on a beneficial ownership information report. An individual who is both a beneficial owner and a company applicant will receive only one FinCEN identifier.

A reporting company may report another entity's FinCEN identifier and full legal name in place of information about its beneficial owners when three conditions are met: (1) the other entity obtains a FinCEN identifier and provides it to the reporting company; (2) the beneficial owners hold interests in the reporting company through ownership interests in the other entity; and (3) the beneficial owners of the reporting company and the other entity are the exact same individuals.

[Updated October 3, 2024]

M.3. How do I request a FinCEN identifier?

Individuals may request a FinCEN identifier starting January 1, 2024, by completing an electronic web form at https://fincenid.fincen.gov. Individuals will need to provide their full legal name, date of birth, address, unique identifying number and issuing jurisdiction from an acceptable identification document, and an image of the identification document. After an individual submits this information, they will immediately receive a unique FinCEN identifier.

Reporting companies may request a FinCEN identifier by checking a box on the beneficial ownership information report upon submission. After the reporting company submits the report, the company will immediately receive a unique FinCEN identifier. If a reporting company wishes to request a FinCEN identifier after submitting its initial beneficial ownership report, it may submit an updated beneficial ownership information report requesting a FinCEN identifier, even if the company does not otherwise need to update its information.

[Updated January 4, 2024]

M.4. Are FinCEN identifiers required?

No. An individual or reporting company is not required to obtain a FinCEN identifier.

[Issued September 29, 2023]

M.5. Do I need to update or correct the information I submitted to obtain a FinCEN identifier?

Yes. Individuals must update or correct information through the FinCEN identifier application that is also used to request a FinCEN identifier.

- Individuals must report any change to the information they submitted to obtain a FinCEN identifier no later than 30 days after the date on which the change occurred.
- If there is any inaccuracy in this information, an individual must correct the information no later than 30 days after the date the individual became aware of the inaccuracy or had reason to know of it.

Reporting companies with a FinCEN identifier must update or correct the company's information by filing an updated or corrected beneficial ownership information report, as appropriate.

[Issued September 29, 2023]

i. Does a reporting company need to update its BOI report if a beneficial owner or company applicant updates the information associated with their individual FinCEN identifier?

No. When information for a FinCEN identifier is updated, the BOI reports where that FinCEN identifier appears are automatically updated. When a reporting company provides an individual's FinCEN identifier for a company applicant or beneficial owner on its BOI report, the Beneficial Ownership IT system automatically links that BOI report to the information provided by the individual when they obtained the identifier, as well as any updates made by the individual to that information.

[Issued October 3, 2024]

M.6. Is there any way to deactivate an individual's FinCEN identifier that is no longer in use so that the individual no longer has to update the information associated with it?

FinCEN is actively assessing options to allow individuals to deactivate a FinCEN identifier so that they do not need to update the underlying personal information on an ongoing basis. FinCEN will provide additional guidance on this functionality upon completion of that process.

[Issued September 29, 2023]

M.7. Who can request a FinCEN identifier on behalf of an individual?

Anyone authorized to act on behalf of an individual may request a FinCEN identifier on the individual's behalf on or after January 1, 2024.

FinCEN identifiers for individuals are provided upon request after the requesting party has submitted the necessary information. Obtaining a FinCEN identifier for an individual requires the requesting party to create a Login.gov account, which is tied to the individual receiving the FinCEN identifier. Individuals who receive a FinCEN identifier should ensure their login credentials, including email address and related

multi-factor information associated with their Login.gov account, are saved for future reference.

FinCEN's Small Entity Compliance Guide includes additional information on the FinCEN identifier in Chapter 4.3 "What is a FinCEN identifier and how can I use it?"

[Issued December 12, 2023]

N. Third-Party Service Providers

N.1. Can a third-party service provider assist reporting companies by submitting required information to FinCEN on their behalf?

Yes. Reporting companies may use third-party service providers to submit beneficial ownership information reports. Third-party service providers will have the ability to submit the reports via FinCEN's BOI E-Filing website or an Application Programming Interface (API). To request the API technical specifications, use FinCEN's contact form (https://www.fincen.gov/contact). Please do the following when submitting your inquiry: (1) select the topic associated with Beneficial Ownership (BO) / Corporate Transparency Act (CTA); (2) select the subject associated with API requests; (3) in the message body, indicate the nature of your API-related inquiry (e.g., "I would like to review the API technical specifications," "I would like to request access to the API," etc.).

[Updated January 4, 2024]

N.2. What type of evidence will a reporting company receive as confirmation that its BOI report has been successfully filed by a third-party service provider?

The BOI E-Filing application, available beginning January 1, 2024, provides acknowledgement of submission success or failure, and the submitter will be able to download a transcript of the BOI report. The reporting company will need to obtain this confirmation from the third-party service provider.

[Issued December 12, 2023]

N.3. Will a third-party service provider be able to submit multiple BOI reports to FinCEN at the same time?

Yes. Third-party service providers will be able to submit multiple BOI reports through an Application Programming Interface (API).

[Issued December 12, 2023]

N.4. Are third-party service providers required to maintain records validating that they are authorized to file on behalf of a reporting company?

FinCEN does not require third-party service providers to maintain any specific record validating that they are authorized to file on behalf of a reporting company. A third-party filer who willfully files a false or fraudulent beneficial ownership information (BOI) report with FinCEN, however, may be subject to civil and criminal penalties. As a best practice, a third-party filer thus may want to consider maintaining documentary records relevant to BOI reports filed on behalf of reporting companies.

[Issued October 3, 2024]

O. Access to Beneficial Ownership Information

O.1. When will authorized recipients have access to beneficial ownership information?

FinCEN will take a phased approach to providing access to beneficial ownership information.

- The first phase, expected to begin in the spring of 2024, will be a pilot program for a handful of Federal agency users.
- The second phase, expected in the summer of 2024, will extend access to Treasury offices and other Federal agencies engaged in law enforcement and national security activities that already have memoranda of understanding for access to Bank Secrecy Act information.
- The third phase, expected in the fall of 2024, will extend access to additional Federal agencies engaged in law enforcement, national security, and intelligence activities, as well as to State, local, and Tribal law enforcement partners.
- The fourth phase, expected in the winter of 2024, will extend access to intermediary Federal agencies in connection with foreign government requests.
- The fifth phase, expected in the spring of 2025, will extend access to financial institutions subject to customer due diligence requirements under applicable law and their supervisors.

FinCEN is not currently accepting requests for access to beneficial ownership information. FinCEN will provide further guidance on how to request access in the future.

[Issued April 18, 2024]

O.2. I work at a Federal agency. How can I request beneficial ownership information from FinCEN?

FinCEN is authorized to disclose beneficial ownership information to Federal agencies engaged in national security, intelligence, or law enforcement activities as well as Federal regulatory agencies that supervise financial institutions for compliance with customer due diligence requirements. To request beneficial ownership information from FinCEN, such Federal agencies will first need to enter into a memorandum of understanding with FinCEN describing how the agency will protect the security and confidentiality of the information. Additional information about entering into such a memorandum will be available when your agency becomes eligible to obtain access to beneficial ownership information under the phased implementation timeline (see Question O.1).

In the meantime, we encourage agencies interested in access to beneficial ownership information to review the Beneficial Ownership Information Access and Safeguards Rule and become familiar with this rule's requirements for agencies accessing beneficial ownership information. Please see Question O.5 for more information.

[Issued April 18, 2024]

O.3. Which state agencies can request beneficial ownership information from FinCEN?

State, local, and Tribal law enforcement agencies—i.e., government agencies authorized by law to engage in the investigation or enforcement of civil or criminal violations of law—will be able to request beneficial ownership information from FinCEN in certain circumstances. A State, local, or Tribal law enforcement agency, however, can only request beneficial ownership information from FinCEN if authorized by a "court of competent jurisdiction" to seek the information in a criminal or civil investigation. The state, local, or Tribal law enforcement agency also must meet certain other access requirements, including entering into a memorandum of understanding with FinCEN that describes how the agency will protect the security and confidentiality of the information.

Additionally, state regulatory agencies that supervise financial institutions for compliance with customer due diligence requirements may also request beneficial ownership information from FinCEN to conduct such supervision. Like other domestic government agencies, to receive beneficial ownership information from FinCEN, state regulatory agencies must also enter into a memorandum of understanding with FinCEN that describes how the agency will protect the security and confidentiality of the information.

[Issued April 18, 2024]

O.4. Can foreign governments access beneficial ownership information?

Foreign governments cannot directly access the beneficial ownership IT system—the secure system that FinCEN uses to receive and store BOI—but will be able to request beneficial ownership information through intermediary Federal agencies. Foreign governments may request beneficial ownership information for a law enforcement investigation or prosecution, or for a national security or intelligence activity, that is authorized under the laws of the foreign country. There are two different request channels available to foreign governments:

1. requests made under an international treaty, agreement, or convention; or
2. requests made, when no such treaty, agreement, or convention is available, by a law enforcement, judicial, or prosecutorial authority of a foreign country determined by FinCEN, with the concurrence of the Secretary of State and in consultation with the Attorney General or other agencies as necessary and appropriate, to be a trusted foreign country.

Foreign requests for beneficial ownership information are not yet being processed.

[Issued April 18, 2024]

O.5. How should authorized recipients prepare to receive, store, and use beneficial ownership information?

The preparations necessary to receive, store, and use beneficial ownership information will vary depending on the type of authorized recipient. Those interested in accessing beneficial ownership information should first review the Beneficial Ownership Information Access and Safeguards Rule (and the relevant regulations at 31 CFR 1010.955). Depending on the type of authorized recipient, the requirements may include, but are not limited to, the agency:

- establishing standards and procedures to protect the security and confidentiality of beneficial ownership information received, including procedures for training agency personnel on the appropriate handling and safeguarding of such information;
- providing to FinCEN initially, and annually thereafter, a report that describes the standards and procedures that the agency uses to ensure the security and confidentiality of any beneficial ownership information received;
- providing to FinCEN initially, and thereafter semi-annually, a certification by the head of the agency, on a non-delegable basis, that the agency has standards and procedures that appropriately implement the security and confidentiality requirements;
- establishing or designating, to the satisfaction of FinCEN, a secure system for BOI storage;
- establishing and maintaining a permanent, auditable system of standardized records of the agency's requests for beneficial ownership information including, for each request, the date of the request, name of individual who makes the request, the reason for the request, any disclosure of such information made by or to the requesting agency, and other information or references necessary to reconstruct reasons for the request;
- conducting an annual internal audit to verify that information obtained from FinCEN has been accessed and used appropriately and in accordance with the established standards and procedures, providing the results of that audit to FinCEN upon request; and
- cooperating with FinCEN's annual audit of the adherence of agencies to the security and confidentiality requirements to ensure that agencies are requesting and using the information appropriately, including by promptly providing any information FinCEN requests in support of its annual audit.

[Issued April 18, 2024]

O.6. Although financial institutions subject to customer due diligence requirements are not currently required to access the beneficial ownership IT (BO IT) system, what are the current supervisory expectations if they choose to access beneficial ownership information from the BO IT system, when access becomes available to them?

FinCEN anticipates extending access to the BO IT system to financial institutions subject to customer due diligence requirements under applicable law, along with their supervisors, in the spring of 2025. FinCEN intends to provide additional guidance regarding any specific supervisory expectations for financial institutions that choose to access the BO IT system prior to those institutions receiving access to the system.

For more information, see the Interagency Statement for Banks on the Issuance of the Beneficial Ownership Information Access Rule and the Statement for Non-Bank Financial Institutions on the Issuance of the Beneficial Ownership Information Access Rule.

[Issued April 18, 2024]

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DISCLAIMER

This presentation does not constitute legal, accounting, or other professional advice. Only through a personal, confidential consultation with qualified legal counsel can anyone properly evaluate their own unique estate planning challenges and determine what, if any, appropriate legal strategies and tactics should be implemented to meet those challenges.

2

IRS CIRCULAR 230 DISCLAIMER

Nothing in this presentation is intended or written to be used, and cannot be used, by any person for the purpose of avoiding tax penalties regarding any transactions or matters addressed herein.

You should always seek advice from independent tax advisors regarding the same.

3

THE CORPORATE TRANSPARENCY ACT (CTA)

4

Introduction

Corporate Transparency Act (CTA)

- Effective January 1, 2024, the CTA is intended to aid law enforcement in combatting illicit activity conducted through anonymous shell companies.
- Requires certain privately held entities to report beneficial ownership information (BOI) to the US Treasury Department's Financial Crimes Enforcement Network (FinCEN)

5

Introduction

Corporate Transparency Act (CTA)

- The Reporting Requirements are intended to apply broadly and impact small companies, many of whom have never made federal filings other than those with the Internal Revenue Service.
- Many larger or otherwise highly regulated entities are exempt from the CTA.

6

Overview

What We Will Cover (Perhaps Not in this Oder!)

- Entities that are reporting companies under the CTA and must submit a BOI report to FinCEN
- Exemptions from the CTA's reporting requirements
- The information that a reporting company must report to FinCEN
- When initial reports and changes to reports must be filed
- The penalties for failing to comply with the reporting requirements
- Who is expected to report under the CTA
- Steps to take to comply with the CTA
- Current constitutionality of the CTA

7

ENTITIES THAT ARE REPORTING COMPANIES UNDER THE CTA AND MUST SUBMIT A BOI REPORT TO FINCEN

8

Reporting Companies Under the CTA

- Both domestic and foreign entities can be reporting companies under the CTA
- Domestic reporting companies are corporations, limited liability companies (LLCs), or other entities created by filing a document with a secretary of state (SOS) or any similar office under the law of either:
  - A state of the US, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the US Virgin Islands, or any other commonwealth, territory, or possession of the US.
  - An Indian tribe

31 C.F.R. § 1010.380(c)(1)(i)

9

Reporting Companies Under the CTA

- **Foreign reporting companies** are non-US entities that are:
  - Corporations, LLCs, or other entities.
  - Formed under the law of a foreign country.
  - Registered to do business in any state or tribal jurisdiction by the filing of a document with a SOS or any similar office under the law of a state or Indian tribe.

31 C.F.R. § 1010.380(c)(1)(ii)

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EXEMPTIONS FROM THE CTA'S REPORTING

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Exemptions from the CTA's Reporting

The CTA excludes from the reporting company definition **23 categories** of entities. Some of these entities are exempt because they are already highly regulated. Others are exempt for different reasons which will soon be clear.

31 C.F.R. § 1010.380(c)(2)

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Exempt Entities

Banks, bank holding companies, and savings and loan holding companies	Any bank, as defined in (A) Section 3 of the Federal Deposit Insurance Act, (B) Section 2(a) of the Investment Company Act of 1940, or (C) Section 202(a) of the Investment Advisers Act of 1940.
Credit unions	Any Federal credit union or state credit union, as those terms are defined in Section 101 of the Federal Credit Union Act (12 U.S.C. 1752)
Money transmitting businesses and money services businesses and their subsidiaries	Any money transmitting business registered with FinCEN under 31 U.S.C. 5330, and any money services business registered with FinCEN under 31 CFR 1022.380.
Securities Reporting Issuers	An issuer of securities that is (a) an issuer of a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l); or (b) is required to file supplementary or periodic information under Section 15(d) of the Securities Exchange Act of 1934.
Securities brokers or dealers	Any broker or dealer (as defined in Section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c) that is registered under Section 15 of the 1934 Act (15 U.S.C. 78o)
Securities exchange or clearing agencies	Any exchange or clearing agency (as defined in Section 3 of the Securities Exchange Act of 1934) that is registered under Sections 6 or 17A of the 1934 Act.
Other Securities Exchange Act of 1934 Entities	Any other entity not described in the securities reporting issuer, broker/dealer in securities, or securities exchange or clearing agency exemptions that is registered with the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).
Regulated public utilities	Any entity that is a regulated public utility as defined in 26 U.S.C. 7701(a)(33)(A) that provides telecommunications services, electrical power, natural gas, or water and sewer services within the United States.
Financial market utilities	Entities designated by the Financial Stability Oversight Council ("FSOC") under Section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010 (12 U.S.C. 5463).

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Exempt Entities Continued

Tax-exempt entities and entities assisting tax-exempt entities and their subsidiaries	Any 501(c) organization exempt from tax under 501(a); political organizations defined in IRC 527(e)(1) exempt from tax under 527(a); or Charitable trust or Charitable Split Interest Trust described in IRC 4947(a)(1) or (2). Assisting entities: (1) operate to provide financial assistance/governance rights over an Exemption 19 entity, (2) are a U.S. person under IRC 7701(a)(30), (3) are beneficially owned or controlled exclusively by U.S. individual persons, and (4) derive at least most of its funding/revenue from one or more U.S. individual persons.
Governmental entities	Legal entities that are established under U.S. law (federal, state, Indian tribe, political subdivision of a state, or interstate compact between two or more states) and exercises governmental authority on behalf of the United States, an Indian tribe, a state, or political subdivision.
Inactive entities and their subsidiaries	Entities that: (i) predate January 1, 2020, (ii) do not have an active business, (iii) have no foreign ownership, (iv) no recent change of ownership (last 12 months), (v) has not sent or received any funds greater than $1,000 through any financial account (including affiliates) in last 12 months, and (vi) does not hold any assets (including ownership interest in entities).
Large operating company	Entities with: an operating presence physically inside the U.S., not sharing space with other entities; at least 20 full time U.S. employees; at least $5 million in gross receipts or sales on its consolidated tax return from sources inside the U.S.
Insurance companies and producers	Any insurance company as defined in section 2 of the Investment Company Act of 1940 (15 U.S.C. 80a-2). Also, any entity that (a) is an insurance producer authorized by a state and subject to supervision by the insurance commissioner or a similar official or agency of a state; and (b) has an operating presence at a physical office within the United States.
Public accounting firms	Any public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7212).
Venture capital fund advisers	Any investment adviser that (a) is described in Section 203(l) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(l)); and (b) has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the Securities and Exchange Commission.
Certain pooled investment vehicles	Any pooled investment vehicle operated or advised by a person described in certain exemptions. For CTA purposes, a pooled investment vehicle is an entity that is either (1) an investment company (as defined in Section 3(a) of the 1940 Act); or (2) would be an investment company but for the exclusions provided by paragraphs (1) or (7) of 3(c) of the 1940 Act and is identified (or will be identified) by its legal name by the applicable investment adviser in its Form ADV (or successor form) filed with the SEC.

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The Subsidiary Exemption

- Applies to entities whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more qualifying exempt entities.
- Control – Control for purposes of the Subsidiary Exemption is not defined in the CTA. Based on the preamble, FinCEN believes that the word control in this context is the equivalent of "wholly controlled"
- Control Over "Ownership Interests" – The Subsidiary Exemption looks for control over the ownership interest of the company and not control over the activities or decisions of the company

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The Subsidiary Exemption

- Does the Subsidiary Exemption apply to a company that is 100% owned by a bank or trust company in its capacity as trustee of a family trust (a "fiduciary subsidiary")?
  - It is unclear whether the subsidiary exemption can apply to a fiduciary subsidiary.
  - Some relevant questions:
    - Is it a revocable trust?
    - Is it a directed trust?
    - Does the grantor have a substitution power?

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The Subsidiary Exemption

- Does the Subsidiary Exemption apply to a company that is 100% owned by a pooled investment company?
  - No, because the Subsidiary Exemption is not available to the subsidiaries of a pooled investment company.
  - FinCEN explicitly refused to extend the Subsidiary Exemption to pooled investment companies.
  - It may be possible to extend the exemption of another exempt entity in the structure with 100% **control** over the disposition of the pooled investments company's assets.

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INFORMATION A REPORTING COMPANY MUST REPORT TO FINCEN

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Information a Reporting Company Must Report to FinCEN

A reporting company must disclose information about itself and:

- Its **individual beneficial owners** and, for entities created or registered on or after the Effective Date, its **company applicants**. A company applicant is an **individual** who either:
  - Directly files the document that creates a domestic reporting company or first registers a foreign reporting company to do business in the US.
  - Is primarily responsible for directing or controlling the filing of the relevant document by another, if more than one individual is involved in the filing.

31 C.F.R. § 1010.380(e)

19

Information a Reporting Company Must Report to FinCEN

As to **each individual beneficial owner and company applicant**, a reporting company **must disclose**:

- Their full legal name.
- Their date of birth.
- Their complete current address.
- A unique identifying number.
- An image of the document with the unique identifying number.

31 C.F.R. § 1010.380(b)(1)(ii)

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Information a Reporting Company Must Report to FinCEN

The **unique identifying number** must come from one of the following **nonexpired documents** issued to the individual:

- A US passport issued by the US government.
- A state, local government, or Indian tribal identification document issued to identify the individual.
- A state-issued driver's license.
- If an individual does not have one of the above, a passport issued to them by a foreign government.

31 C.F.R. § 1010.380(b)(1)(ii)(D)

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Information a Reporting Company Must Report to FinCEN

- Instead of the specific information about each beneficial owner, a reporting company can report an individual's FinCEN identifier (**FinCEN ID**).
- As of the Effective Date, an individual may obtain a FinCEN ID by giving to FinCEN the same information a reporting company must provide regarding its beneficial owners.
- A reporting company may also obtain a FinCEN ID by checking a box on its BOI report when it submits the report.

31 C.F.R. § 1010.380(b)(4)(i)

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Information a Reporting Company Must Report to FinCEN

A reporting company **must report** the following **about itself**:

- Full legal name, any trade names, and any doing business as (d/b/a) or trading as (t/a) names under which it conducts business, whether or not formally registered.
- Complete current address of the company's principal place of business.
- Its state, tribal, or foreign jurisdiction of formation and, for a foreign reporting company, the state or tribal jurisdiction where it first registered in the US.
- Its IRS taxpayer identification number, including an employer identification number.

31 C.F.R. § 1010.380(b)(1)(i)

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WHEN A REPORTING COMPANY MUST FILE ITS INITIAL REPORT

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When a Reporting Company Must File Its Initial Report

A reporting company that is created or becomes a foreign reporting company

- **Before the Effective Date** has until **January 1, 2025**, to file its initial BOI report.
- **On or after the Effective Date** must file its initial BOI report within **90 days**, if created or registered **in 2024**, and within **30 days** if created or registered **on or after January 1, 2025**, of the earlier of the date on which:
  - It receives actual notice that its creation or registration is effective.
  - A SOS or similar office first provides public notice that the company has been created or registered to do business.

31 C.F.R. § 1010.380(a)(1)

25

When a Reporting Company Must File Changes to Reports

A reporting company has **30 days** to:

- **Report any changes** to information in its BOI report regarding itself or its beneficial owners. For example:
  - The reporting company changes its name or address or becomes exempt.
  - A beneficial owner transfers their interest or there is a change to their address or unique identifying number.
- **Correct any inaccuracies** in its BOI report if it becomes aware or has reason to know of the inaccuracy.

31 C.F.R. § 1010.380(a)(2) and (3)

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PENALTIES

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Penalties

- There are both **civil** and **criminal** penalties for violating the CTA, including a **fine up to $10,000**, **imprisonment for up to two years**, or **both**, for any person **willfully**:
  - Providing or attempting to provide false or fraudulent BOI.
  - Failing to report complete or updated BOI to FinCEN.
- Penalties may also apply to reporting companies and individuals who:
  - Cause a reporting company not to report.
  - Are **senior officers** of a reporting company at the time of its failure to fulfill its obligation to accurately report or update BOI.
  - Disclose or use the BOI reported to FinCEN in an unauthorized manner.

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Safe Harbor from Penalties

A **safe harbor** exists if a reporting company with reason to believe its BOI report contains inaccurate information files a corrected report **within 30 days** of becoming aware or having reason to know of the inaccuracy, provided that the inaccuracy:

- Is corrected **within 90 days** of filing the inaccurate BOI report.
- Was not made to evade reporting requirements.
- Was not known to the person filing the report at the time it was submitted.

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WHO REPORTS UNDER THE CTA

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Beneficial Owners

- For each individual who is a beneficial owner, a reporting company will have to provide:
  - the individual's name;
  - date of birth;
  - address; and
  - an identifying number from an acceptable identification document such as a passport or US driver's license, and the name of the issuing state or jurisdiction of identification document

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Beneficial Owners

A **beneficial owner** is any **individual** who, directly or indirectly, **either**:

- Exercises **substantial control** over the reporting company.
- **Owns or controls 25% or more** of the **ownership interests** of the reporting company.

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Beneficial Owners

- Neither Substantial Control nor Ownership or Control is defined in the CTA
- They are defined under the Regulation.
- **Owns or controls 25% or more** of the **ownership interests** of the reporting company.

31 C.F.R. § 1010.380(d)

33

Substantial Control

An individual **exercises substantial control** over a reporting company if the individual does any of the following:

- Serves as a **senior officer** of the reporting company.
- Has **authority to appoint or remove** either:
  - Any senior officer.
  - A majority of the reporting company's board of directors or similar body.
  - Directs, determines, or has **substantial influence over important decisions** made by the reporting company.
- Has **any other form of substantial control** over the reporting company.

Note: D**oes not** include powers held as employee (not Senior Officer) mere creditor, professional advisors acting solely in that capacity.

31 C.F.R. § 1010.380(d)(1)(i)

34

Senior Officers

Senior officers are:

- The president.
- The chief financial officer.
- The general counsel.
- The chief executive officer.
- The chief operating officer.
- Any other officer, **regardless of title, performing a similar function**.

31 C.F.R. § 1010.380(f)(8)

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Substantial Influence Over Important Decisions

Important decisions a reporting company makes include:

- Those concerning the nature and scope of the reporting company's business.
- Selling or leasing principal assets.
- Making major expenditures or investments.
- Issuing any equity.
- Incurring significant debt.
- Selecting or terminating business lines or ventures, or geographic focus, of the reporting company.

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Substantial Influence Over Important Decisions

Important decisions a reporting company makes also include:

- Approving its operating budget.
- Compensation schemes and incentive programs for senior officers.
- Entering into or terminating significant contracts.
- Amending any of the reporting company's substantial governance documents or significant policies or procedures.

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Examples of Substantial Control

Exercising substantial control may include:

- Board representation (but being a director by itself is **not** determinative).
- Owning or controlling a majority of the voting power or voting rights of the reporting company.
- Rights associated with any financing arrangement or interest in the reporting company.

31 C.F.R. § 1010.380(d)(1)(ii)

38

Examples of Substantial Control

Exercising substantial control may also include:

- Control over one or more intermediary entities that separately or collectively exercise substantial control over the reporting company.
- Arrangements or financial or business relationships, formal or informal, with other individuals or entities acting as nominees.
- **Any other contract, arrangement, understanding, relationship, or otherwise.**

31 C.F.R. § 1010.380(d)(1)(ii)

39

Ownership Interests

The Final Reporting Rule defines ownership interests **broadly** to include the following regardless of whether the interest is transferable, classified as stock or similar, or confers voting power or rights:

- Any equity, stock, or similar instrument.
- Any preorganization certificate or subscription.
- Any transferable share of, or voting trust certificate or certificate of deposit for, an equity security.
- An interest in a joint venture.
- A certificate of interest in a business trust.

31 C.F.R. § 1010.380(d)(2)(i)(A)

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Ownership Interests

Ownership interests also include:

- Any **capital** or **profits interest** in an entity.
- Any **instrument convertible**, with or without consideration, into any share or instrument described above or any future on any such instrument, whether or not characterized as debt.
- Any **warrant** or **right to purchase, sell, or subscribe** to a share or other interest described above.
- Any **put**, **call**, **straddle**, or **other option or privilege** of buying or selling any of the above interests without being bound to do so, except to the extent that the option or privilege is held by a third party and not known to the reporting company.
- **Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership**.

31 C.F.R. § 1010.380(d)(2)(i)

41

Ownership Interests

An individual may **directly or indirectly** own or control an ownership interest through:

- Any contract, arrangement, understanding, relationship, or otherwise, including joint ownership with one or more other persons.
- A nominee, intermediary, custodian, or agent.
- Ownership or control of one or more intermediary entities.

31 C.F.R. § 1010.380(d)(2)(ii)

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Ownership Interests

If an ownership interest in a reporting company is held **through a trust**, these **individuals** are deemed to have an **ownership interest** in the reporting company:

- A **trustee** of the trust or any other individual having authority to dispose of trust assets.
- A **beneficiary** who either:
  - Is the sole permissible recipient of the trust's income and principal.
  - Has the right to demand a distribution of or withdraw substantially all of the trust's assets.
- A **grantor or settlor** having the right to revoke the trust or otherwise withdraw trust assets.

31 C.F.R. § 1010.380(d)(2)(ii)(C)

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Calculating Total Ownership Interests

There are **standards to calculate if an individual meets the 25% ownership or control threshold** for a reporting company:

- An individual's total ownership interests that they own or control, directly or indirectly, are to be calculated:
  - As a percentage of the total outstanding ownership interests of the reporting company.
  - At the present time, with any options or similar interests being treated as exercised.
- If capital or profits interests are issued (including in entities taxed as partnerships), the individual's ownership interests are their capital and profits interests as a percentage of the total outstanding capital and profits interests.

31 C.F.R. § 1010.380(d)(2)(iii)

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Calculating Total Ownership Interests

- For **corporations**, **entities treated as corporations for tax purposes**, and other **reporting companies that issue shares of stock**, the applicable percentage is **the greater of the total combined**:
  - Voting power of all classes of ownership interests of the individual as a percentage of the total outstanding voting power of all classes of ownership interests entitled to vote.
  - Value of the individual's ownership interests as a percentage of the total outstanding value of all classes of ownership interests.
- If the calculations **cannot** be made with **reasonable certainty**, an individual owning or controlling 25% or more of any class or type of ownership interest of a reporting company is **deemed to have exceeded the 25% ownership or control threshold**.

31 C.F.R. § 1010.380(d)(2)(iii)

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Individuals Exempt as Beneficial Owners

Five categories of individuals are exempt from the beneficial owner definition:

- Minor children.
- Individuals acting as a nominee, intermediary, custodian, or agent on another's behalf.
- Certain employees who are not senior officers.
- Heirs.
- Certain creditors of a reporting company.

31 C.F.R. § 1010.380(d)(3)

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Company Applicants

- Company Applicants are required to be reported as of January 1, 2024.
- Up to two individuals could qualify as company applicants: but are capped at two.
  - The individual who directly files the document that creates or registers the company; and
  - If more than one person is involved in the filing, the individual who is primarily responsible for directing or controlling the filing.
- None of the Company Applicants need to be reported for companies formed prior to January 1, 2024.

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Company Applicants

- For each individual who is a company applicant, a reporting company will have to provide:
  - the individual's name;
  - date of birth;
  - address; and
  - an identifying number from an acceptable identification document such as a passport or US driver's license, and the name of the issuing state or jurisdiction of identification document
- If the company applicant works in corporate formation, then the reporting company must report the company applicant's business address. Otherwise, the reporting company must report the company applicant's residential address.

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Company Applicants

- Accountant and Lawyers may both be company applicants, depending on their role in filing the document that creates or registers a reporting company. In many cases, company applicants may work for a business formation service or law firm.
- If an accountant or lawyer filed the document that created or registered the reporting company, then they are a company applicant. IF more than one person was involved in the filing, an accountant or lawyer may be a company applicant if they are primarily responsible for directing or controlling the filing.

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COMPLYING WITH THE CTA

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Complying with the CTA

To comply with the CTA, a reporting company must be able to:

- **Determine** the individuals who are its **beneficial owners**.
- **Timely obtain** the **required personal information** of its beneficial owners so the company can meet the CTA reporting deadlines.
- Be **promptly notified** of any **change** in its beneficial owners' required personal information so the company can timely report the change to FinCEN.

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Determining Beneficial Owners

- An individual may **indirectly** own or control an ownership interest in a reporting company through ownership or control of one or more intermediary entities.
- A reporting company with **one or more entities** as owners or in management (like a limited partnership with an LLC acting as its general partner) may need those entities to provide the required personal information of all the individuals who are their direct and indirect owners.

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Obtaining Beneficial Ownership Information and Being Notified of Changes

- To meet the CTA's filing deadlines, a reporting company needs to be able to **promptly**:
  - Obtain its beneficial owners' required personal information.
  - Receive notification of any changes to that personal information.
- A reporting company must decide how and when it will acquire this information from the appropriate individuals and implement appropriate policies and procedures if necessary.

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Obtaining Beneficial Ownership Information and Being Notified of Changes (cont'd)

- Owners, management, and other persons that may need to give a reporting company personal information should be required to provide the information and updates to the information with enough time for the company to timely review and report the information.
- These **obligations** may be contained in **agreements** such as:
  - The reporting company's governing documents (an LLC or LP agreement or a stockholders' agreement, for example).
  - A company policy.
  - An investment, warrant, employment, equity incentive, or other agreement.

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Remedies for Failure to Provide Beneficial Ownership Information

- If obligations are set out in an agreement, entity owners can also be required to provide their governing documents and the personal information of those individuals who may be beneficial owners of the company
- To enforce these obligations, parties should consider including in any agreement remedies for failing to provide the required information. Depending on a reporting company's entity type and ownership structure, company-specific factors, and the applicable law in the reporting company's state of formation, remedies to consider may include:
  - Requiring the defaulting party to **indemnify** the reporting company and other specified parties
  - **Specific performance**
  - A **call right** to repurchase the defaulting owner's ownership interests (presumably at a discount), or, if the reporting company is an LLC or LP, **forfeiture** of LLC or partnership interests or any bonus or incentive equity
  - The **involuntary disassociation or expulsion** of a member or partner

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CONSITUTIONALITY

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CTA Constitutionality Case Update

National Small Business Association ("NSBA") Case

- On March 1, 2024, the U.S. District Court for the Northern District of Alabama ruled that the CTA is unconstitutional because it exceeds the Constitution's limits on Congress' power and lacks a sufficient nexus to any enumerated power to be a necessary or proper means of achieving Congress' policy goals.
- Final judgment declaring the act unconstitutional only enjoins the government from enforcing it against the plaintiffs.
- In response, on March 4, 2024, FinCEN issued a release announcing that it will comply with the court's order for as long as it remains in effect, but (again) only with respect to the plaintiffs in that action which only includes members of the NSBA as of March 1, 2024. It is FinCEN's position that anyone joining the NSBA after March 1, 2024 will not be exempt from CTA reporting.
- The case already has been appealed, but enforcement is not stayed while the government appeals. Everyone else still must comply with the CTA.

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Other Cases and Challenges

- **Robert J. Gargasz Co. v. Yellen**, No. 1:23-cv-02468 (N.D. Ohio Dec. 29, 2023)
  - Similar lawsuit and claims as the *NSBA* case but seeks nationwide injunctive relief against enforcement of the CTA.
- **William Boyle v. Janet Yellen et al.**, No. 2:24-CV-00081 (D.C. Maine Mar. 15, 2024)
  - challenges the constitutionality of the Corporate Transparency Act (CTA), asserting that the law infringes on states' regulatory authority and violates the 9th and 10th amendments.
- **Small Business Ass'n of Michigan, et al. v. Janet Yellen et al.**, No. 1:24-cv-00314 (Michigan Mar. 26, 2024)
  - Challenges the constitutionality of the CTA using similar arguments as in the NSBA case and citing the holding in NSBA.
  - Also argues that the CTA violates Fourth Amendment rights of beneficial owners whose personal identification information will go into the BOSS database and then shared among law enforcement agencies.
- **Black Economic Council of Massachusetts, Inc. v. Yellen**, No. 1:24-cv-11411 (D. Mass. May 29, 2024)
  - Challenges based on Fourth Amendment rights of beneficial owners and company applicants, outside of Congress' enumerated powers, and First Amendment right to associate, and asserts Fifth and Ninth Amendment claims.
  - Seeks nationwide injunctive relief against enforcement of the CTA.

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FREQUENTLY ASKED QUESTIONS

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Sample FAQs

- Under the Corporate Transparency Act, who can access beneficial ownership information?
  - FinCEN will permit Federal, State, local, and Tribal officials, as well as foreign officials who submit a request through a U.S. Federal government agency, to obtain beneficial ownership information for authorized activities related to national security, intelligence, and law enforcement.
  - Financial institutions will also have access to beneficial ownership information in certain circumstances, with the consent of the reporting company. Those financial institutions' regulators will also have access to beneficial ownership information when they supervise the financial institutions.

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Sample FAQs

- How do I report my company's beneficial ownership information?

  If you are required to report your company's beneficial ownership information to FinCEN, you will do so electronically through a secure filing system available via FinCEN's website. This system is currently being developed and will be available before your report must be filed.

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Sample FAQs

- Where can I find the form to report?

  Answer: The form to report beneficial ownership information can be found online. It can either be filled out online and submitted through the FinCEN portal, or it can be submitted as a PDF.

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Sample FAQs

- What if one of the people I have to report won't give me their information? What then? What can I tell them to motivate them to give me what I need so I don't get in trouble?

  Answer: FinCEN clarified that reporting companies and individuals (e.g., the BOIR filer, Senior Officer of a company, individual) can be liable for willful CTA violations. They also specifically call out that a beneficial owner or company applicant can be held liable for refusing to provide required information to a reporting company and that an enforcement action can be brought against an individual who willfully causes a reporting company's failure to submit complete or updated beneficial ownership information to FinCEN. This would include a beneficial owner or company applicant who willfully fails to provide required information to a reporting company.

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Sample FAQs

- Is a trust considered a reporting company if it registers with a court of law for the purpose of establishing the court's jurisdiction over any disputes involving the trust?
  - No, the registration of a trust with a court of law merely to establish the court's jurisdiction over any disputes involving the trust does not make the trust a reporting company.

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Sample FAQs

- Can a parent company file a single BOI report on behalf of its group of companies?
  - No, any company that meets the definition of a reporting company and is not exempt is required to file its own BOI report.

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Model Engagement Letter Language

Unless we other otherwise expressly agree, all federal or state tax returns — and any other type of federal or state information reporting, including, but not limited to, beneficial ownership reporting required under 31 U.S.C. § 5336 — necessitated by any entity we create or any other work we perform during this engagement will be completed and filed by some other party. You must notify that other party of the possible need to complete and file such tax returns or other reporting and will, if necessary, provide that other party with copies of documents that we prepare during this engagement. You must retain that other party's tax return and information reporting services on your own, and fees that other party may charge for those services will be in addition to any fees or expenses we charge you. We do not have any compliance procedures to remind you of the need to complete and file such tax returns or any other information reporting.

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National Conference on Special Needs Planning and Special Needs Trusts

November 21, 2024

Top 10 Mistakes Made in Special Needs Trust Drafting

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Top Ten (Maybe even Fifteen!) Mistakes Made in Drafting & Administering Special Needs Trusts

a presentation for the

2024 National Conference on Special Needs Planning and Special Needs Trusts

by

Stuart D. Zimring

Date October 17, 2024

Law Offices Of
STUART D. ZIMRING
Attorneys & Counselors At Law

Top Ten (Maybe Fifteen!) Mistakes Made In Drafting & Administering Special Needs Trusts

1. Introduction[1]

Consider the following all-too-real hypothetical:

It's 4p.m. on a Friday afternoon. You are just beginning to close your briefcase and head out for the weekend when your phone rings. It's Marvin the Med-Mal Maven, an attorney whose advertisements you've seen and heard but have never met. He informs you that he has just settled the biggest case of his career. It's a multimillion dollar settlement of a personal injury case involving a 19 year old young woman, Giselle, a ballet prodigy who was hit by a car rendering her a paraplegic. She has decision making capacity and is firmly convinced she will dance again and wants the settlement funds directed towards making that happen.

Marvin, the defendants, the structured settlement brokers, life care planners and the young girl's mother, had all agreed on the terms when the mother informed Marvin that her best friend had asked why the monies weren't going into a Special Needs Trust? Marvin consults with the structured settlement brokers and the life care planner who all agree that's not a bad idea (especially given the kind of long-term therapy and surgeries Giselle may need if it appears she can dance again), and why didn't they think of it first. Giselle's Uncle Freddie has agreed to serve as Trustee because he used to be a bookkeeper and worked for an investment firm. Giselle's mother suggests that Marvin

[1] My thanks to my "cohorts in crime," Bridget O'Brien Swartz, Howard Krooks and A. Frank Johns for their contributions to the this paper. That said, it should be noted that none of them have ever made any of these mistakes.

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contact you to send him one of those "special needs trust thingies" so he can take it to the Judge on Monday (when they've all been ordered to appear to put the settlement on the record.)

You explain to Marvin that it's not quite that simple and suggest that he get the matter continued so that you can meet with Giselle, her mother, Uncle Freddie and the other players involved so that you can do your job as well as Marvin has done his. With some grumbling Marvin agrees and a meeting is set for the following week.

Everyone is present at the meeting. Marvin tells you the story and what, in his opinion, the terms of the trust need to be, while Giselle and her mother sit there and nod. Whenever you try to talk to Giselle, her mother, or Uncle Freddie, Marvin interrupts, giving you what he believes is the correct answer. Everyone urges you to ***please*** prepare the Trust since they have to be back in Court in two days. You, feeling pressured but are sure your “standard” SNT will work just fine, promise to have it to them tomorrow. Having observed Giselle, you believe you have enough information to move forward without reviewing the life care plans, her medical records or having any further conversations with her mother or her. You ask your paralegal to printout “our form SNT”, glance at it to make sure everyone’s names are spelled correctly and send it off the Marvin.

What could possibly go wrong....?

2. **Failing to Identify who the Client Is**

In ***any*** representation, job one is to identify who you are representing. Failing to do that at the earliest possible moment can often/usually be the first cascading domino in

a veritable collapsing house of cards (mixed metaphor intentional) of misunderstandings, frustration for you and all of the people involved (some or all of whom believe they are your client (or think they ought to be). In the hypothetical it is conceivable that:

a. Marvin thinks he's your client because he called you and/or because he believes he's going to be calling the shots;

b. Giselle thinks she's your client because she's the reason everyone is sitting around the table and it's her life and future we're all talking about;

c. Giselle's mother thinks she's your client because she's Mom; and

d. Uncle Freddie thinks he's the client because he's going to be the Trustee (whatever that means – he's not sure).

It is for this reason that NAELA Aspirational Standard B.1 states:

> "The elder law and special needs law attorney identifies the client and the individuals who will assist the client at the earliest stage of the representation, obtains the client's agreement on these identifications, and communicates this information to the persons involved."[2]

You could represent Marvin whose firm is retaining you, on their behalf, to draft the SNT for their client. You could represent Giselle. You could represent Mom.

Whatever choice you make it should be in the context of AS A.1 which states:

> "In applying a holistic approach to legal problems [the attorney] works to

[2] NAELA Aspirational Standards for the Practice of Elder and Special Needs Law (hereafter "AS"), 2nd Ed. 2017, NAELA Journal Special Edition 2018

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consider the larger context, both other legal consequences as well as the extra-legal context to which the problems exist and must be solved."[3]

And once you've done that, you meet with the prospective client privately at the earliest practicable time to assess capacity, the client's wishes and the possibility of the presence of undue influence.[4]

3. **Failing to Communicate who the client is to the family and what that means**

Assume you've decided that your client is Giselle. She may be young, but she's smart and has a very clear understanding of what she wants and what her future looks like. As suggested in A.S. B.3 you now invite everyone in the room to leave so you can meet with Giselle privately. Giselle tells you that (a) she trusts Marvin and welcomes his advice moving forward and because this is all that "legal stuff," wants him to be kept in the loop; and (b) she also values her mother's advice, but wants it to be made clear that the final decisions are hers, not her mother's. You explain to Giselle that you can do this - that she will sign a retainer agreement with you; that she will authorize you in writing to continue to communicate with Marvin and her mother to whatever extent Giselle wants after you review in detail the impact such authority may have on the attorney-client privilege and

confidentiality..

[3] AS A.1
[4] A.S. B.3

You're now going to bring everyone back in and explain how things are going to proceed from this point, setting out as clearly as you can the boundaries of attorney confidentiality and attorney-client privilege as they are going to apply in this matter moving forward.

4. **Drafting a Third Party Trust with "payback" provision** Rule 1.1 of the ABA's Model Rules of Professional Conduct states:

> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[5]

MRPC Rule 1.0(h) defines "reasonably" as follows:

> "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."[6]

Mistakes happen. In this case, the mistake (whether by oversight or ignorance) of creating a third party SNT with estate recovery language that is only applicable to first party trusts under 42 USCA §1396p(d)(4)(A) and the corresponding Regulations & POMS, has the result of exposing assets that would otherwise not be subject to a claim for reimbursement by the state Medicaid Agency to an enforceable claim by the Agency. Attorneys who have made this mistake have found themselves subject to malpractice

[5] ABA Model Rules of Professional Responsibility (MRPC) 1.1

[6] MRPC 1.1(h).

claims and disciplinary proceedings. In a number of cases, efforts by the attorney to modify the trust retroactively have failed. "I pulled up the wrong template on my computer" is not a defense.

5. **Drafting a First Party Trust without a "Payback" provision**

This is the flip side of the previous mistake. However in this case, the ramifications are potentially much worse since not including the appropriate "payback" provisions in a first party special needs trust will cause the Beneficiary to lose their eligibility. And even if a court agrees to modify the trust retroactively, the Social Security Administration may not honor the Order retroactively, but only prospectively.

6. **Adding Third Party Funds to a First Party Trust or *vice versa***

New hypothetical: Your client tells you that she was just told her late brother left $10,000.00 to her daughter's special needs trust. Unfortunately, the special needs trust to which she is referring is the first party special needs trust you created for the daughter some years ago after the daughter was injured in an automobile accident. It is unlikely that the transaction can be reversed, especially if the brother's trust or will specifically names his niece's trust as the recipient. Perhaps the brother's drafting attorney should have contacted your client (or you) to make sure the gift was being worded properly. Did the brother's attorney commit malpractice?

On the flip side, grandfather creates purely discretionary trusts for each of his grandchildren providing that the Trustee can make distributions of income and/or principal to each of the grandchildren on essentially an HEMS (health, education, maintenance and

support) basis. One of the grandchildren is receiving public benefits and doesn't want to lose them if the Trustee of the grandfather's trust were to make distributions to her. She goes to an attorney who prepares a third party special needs trust and sends her on her way. She takes the trust to the Trustee of the grandfather's trust and says "I now have a special needs trust. Please make distributions to my new trust." The Trustee, on the advice of counsel declines to do so. Why? Because the grandfather's trust only authorizes the Trustee to make distributions solely to the Beneficiary and to no one else. The Trustee's attorney tells the granddaughter that if the Trustee makes distributions to her, she will be disqualified from receiving public benefits because it's her money (first party) and she cannot contribute it to a third party trust. It seems clear under these facts that the granddaughter's attorney failed to carefully read the grandfather's trust. He should have prepared a first party trust and advised the granddaughter to immediately transfer funds she receives from the grandfather's trust into her first party trust. On the other hand, if the grandfather's attorney had given the Trustee authority to make distributions "to or for the benefit of" the granddaughter, the necessity of having two trusts might have been avoided.

7. **Failing to clearly understand the nature of the Beneficiary's disability**

As someone once said, "trust, but verify." Once you accept an engagement to create a SNT one of the first questions you'll ask is "what is the nature of the Beneficiary's disability?" From there you (hopefully) will seek more details about (a) severity; (b) long term prognosis for either improvement or not, or worse; (c) are there treatments or

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procedures such as corrective surgeries indicated as the Beneficiary matures; and (d) any other information you deem relevant. Depending on the situation, it may behoove you to get multiple answers to these questions.

For example, MedMal Marvin will certainly provide you with a copy of the life care plan he obtained to bolster his case. It probably takes a very pessimistic view of his client's long-term prognosis. Viewing the defendant's plan might give some perspective and might be worthwhile reviewing. But what about the Beneficiary herself? Her opinion certainly counts as does that of her parents. The more information you can glean, the better document you're going to be able to produce.

For example, in the real-world version of this hypothetical, it was extremely useful to research exactly what kinds of experimental treatments and surgeries the Beneficiary and her family were contemplating. Doing so enabled me to craft specific protections for the Trustee regarding exposure to liability in authorizing experimental treatments, pharmaceuticals, therapies etc.

8. **Making distributions from a Third Party Trust prior to making distributions from a companion First Party Trust**

In those situations where you have both a third party trust and a first party trust, good planning and drafting should include provisions in both trusts (if possible) directing the Trustees as to which trust should be the first to make distributions in any given circumstance. If there is no such specific language in the trusts, the Trustees should agree between themselves as to the sequencing and commit that to writing.

9. **Not advising a non-professional (or even a professional) fiduciary on the "do's & don'ts" of appropriate distributions, and why administering a SNT is SOOOO different than other Trusts.**

In situations where you are not representing the Trustee, you may not have an obligation to instruct her/him as to the intricacies of SNT management, but I think at the very least, especially if you have doubts about the Trustee's ability to do the job (*i.e.* Uncle Freddie), you owe your client, whether it be the Settlor or the Beneficiary, an obligation to give them a "head's up" as to the difficulty of the task ahead and the potential for harm to the Beneficiary if the administration is not handled properly.

10. **Drafting SNTs without regard to various POMS provisions directly on point or using improper language that contradicts a POMS provision directly on point**.

We love to be creative. Many of us relish the challenge of drafting documents that present unique factual issues and there is certainly a place for that in drafting a SNT. **HOWEVER**, as Meredith Willson observes in the very opening of "The Music Man" - "ya gotta know the territory." In this case, the "territory" is the POMS. Your creativity will be of no use (and may create serious problems) if you haven't established a foundation that is compliant with the relevant POMS. And the POMS, and the interpretation of the POMS is anything but static. The simplest example is that on September 30th of this year, "food" will no longer be a disqualifying distribution from an SNT. And (unfortunately) the interpretation of the POMS can vary widely. So it is incumbent on us to stay on top of not

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only what the POMS say but also what our local Regions and even local offices *think* they say.

In addition to the POMS, we of course need to pay attention to our respective State's Medicaid Regulations and policies which may require state-specific language. For example, in Arizona, a first party SNT must refer to the state statute and corresponding policy, particularly as it relates to "allowable disbursements" and the payback.

11. **Not adequately discussing the appropriate use of a Bond**

When the Trustee is going to be someone other than an institutional Trustee, there should be a discussion as to whether it is appropriate for the Trustee to obtain a fiduciary Bond. Where Uncle Freddie is going to be the Trustee, this can create a ticklish situation both for the family and for Uncle Freddie. When the immediate answer to my question "do you want Uncle Freddie to post a Bond in order to protect the Beneficiary?" the knee jerk reaction is usually,"Of course not, Uncle Freddie is very trustworthy." How you respond is up to you, but I believe pushback is appropriate. Strong pushback. Of course at the end of the day, we do what our clients tell us to do, but also at the end of the day, when Uncle Freddie is on a beach in South America with the trust's corpus as his retirement fund, we also know that the clients will be pointing a finger at us and saying "you should have insisted!."

12. **Funding a third party SNT with funds held in the Beneficiary's UTMA Account**

Most parents or Custodians of UTMA Accounts don't give much thought to the reality that the funds in the account belong to the minor from the moment of funding. In fact, many parents go to great lengths to make sure their children don't know the money is theirs for the asking after they reach majority. As a result the parents may ask you if they can take the funds out of the UTMA Account and put it into the third party SNT that you are creating for them. The answer is "no." Generally speaking the TIN for the UTMA account will be the child's social security number which makes it easy to point out that it is the child's money. However, even in those situations where an independent EIN is obtained for the account, the funds, as a matter of law belong to the minor, *ergo* a first party SNT is the proper vehicle. It goes beyond the scope of this discussion as to what authority the parents (or other Custodian) may have to transfer the UTMA Account into a first party SNT without the consent of the child.

13. **Failing to properly advise clients regarding the use of structured settlements**.

Structured settlements and annuities certainly have their place. However, frequently we, as the drafting attorneys, are the only ones who can objectively see the whole picture and give advice (assuming we have the experience and expertise to do so) on whether or not a structured settlement or annuity is appropriate in this particular matter.

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14. **Failing to properly analyze the advantages/disadvantages to using Trust Advisors or Trust Advisory Committees**

Everything I said above regarding structured settlements and annuities applies to the use of Trust Advisors and Trust Advisory Committees as well. They have their place.

15. **Poorly and/or inconsistently drafted definitions of "disability" or "special needs, especially in the context of qualifying the SNT under SECURE Act 2.0."**

We need to keep in mind that the words “disabled” and “disability” have different meanings under different statues (SECURE ACT 2.0 being the most recent). As a result it is important to try to make our terminology as consistent and “statute friendly” as possible.

As an example, a colleague is currently involved in the administration of a trust that leaves IRAs to multiple beneficiaries, one of whom thankfully qualifies as "disabled" under the new Final Regs of the SECURE Act 2.0, but does not meet the definition of "special needs" under the terms of the trust allowing for retention of the interest in a third party SNT. Although, this likely can be decanted or reformed by court order. The definition of "special needs" in this trust requires the Beneficiary to be receiving Social Security disability or SSI benefits.

Top Ten (Maybe even 15!) Mistakes Made in Drafting & Administering Special Needs Trusts

1

Our Hypothetical

- It's 4p.m. on a Friday afternoon. You are heading out for the weekend when your phone rings. It's Marvin the Med-Mal Maven, an attorney whose advertisements you've seen and heard but have never met. He informs you that he has just settled the biggest case of his career. It's a multimillion dollar settlement of a personal injury case involving a 19 year old young woman, Giselle, a ballet prodigy who was hit by a car rendering her a paraplegic. She has decision-making capacity and is firmly convinced she will dance again and wants the settlement funds directed towards making that happen.

2

- Marvin, the defendants, the structured settlement brokers, life care planners and the young girl's mother, had all agreed on the terms when the mother informed Marvin that her best friend had asked why the monies weren't going into a Special Needs Trust? Marvin consults with the structured settlement brokers and the life care planner who all agree that's not a bad idea (especially given the kind of long-term therapy and surgeries Giselle may need if it appears she can dance again), and why didn't they think of it first. Giselle's Uncle Freddie has agreed to serve as Trustee because he used to be a bookkeeper and worked for an investment firm. Giselle's mother suggests that Marvin contact you to send him one of those "special needs trust thingies" so he can take it to the Judge on Monday (when they've all been ordered to appear to put the settlement on the record.)

3

- You explain to Marvin that it's not quite that simple and suggest that he get the matter continued so that you can meet with Giselle, her mother, Uncle Freddie and the other players involved so that you can do your job as well as Marvin has done his. With some grumbling Marvin agrees and a meeting is set for the following week.

4

- Everyone is present at the meeting. Marvin tells you the story and what, in his opinion, the terms of the trust need to be, while Giselle and her mother sit there and nod. Whenever you try to talk to Giselle, her mother, or Uncle Freddie, Marvin interrupts, giving you what he believes is the correct answer. Everyone urges you to ***please*** prepare the Trust since they have to be back in Court in two days. You, feeling pressured but are sure your "standard" SNT will work just fine, promise to have it to them tomorrow. Having observed Giselle, you believe you have enough information to move forward without reviewing the life care plans, her medical records or having any further conversations with her mother or her. You ask your paralegal to printout "our form SNT", glance at it to make sure everyone's names are spelled correctly and send it off with Marvin.

5

- What could possibly go wrong....?

6

#1

- Failing to identify who the Client is

7

#2

- Failing to communicate who the Client is to the family and what that means

8

#3

- Drafting a Third Party Trust with a “Payback” provision

9

#4

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#5

- Adding Third Party funds to a First Party Trust or *vice versa*

11

#6

- Failing to clearly understand the nature of the Beneficiary's disabiity

12

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- Making distributions from a Third Party Trust prior to making distributions from a companion First Party Trust

13

#8

- Not advising a non-professional (or even a professional) Fiduciary on the "do's and don'ts" of appropriate distributions, and why administering a SNT is SOOOOOO different than other Trusts.

14

#9

- Drafting SNTs without regard to various POMS provisions directly in point or using improper language that contradicts a POMS provision directly on point

15

#10

- Not adequately discussing the appropriate use of a Bond

16

#11

- Funding a Third Party SNT with funds held in the Beneficiary's UTMA Account

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#12

- Failing to properly advise clients regarding the use of Structured Settlements

18

#13

- Failing to properly analyze the advantages/disadvantages of using Trust Advisors or Trust Advisory Committees

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#14

- Poorly or inconsistently drafted definitions of “disability” or “special needs”, especially in the context of qualifying the SNT under SECURE 2.0

20

#15

- Your pick for “worst mistake” (not by you, of course…) that you’ve ever seen

21


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Breakout Session 4

Presented on October 17, 2024

4:25-5:15 p.m.

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Excerpts from New York Elder Law and Special Needs Practice (West 2024 Edition)

By: Vincent J. Russo and Marvin Rachlin, *New York Elder Law and Special Needs Practice (West 2024 Edition)*

a. 2:8. Special Needs Planning Issues
b. 9:9. Article 17A Guardianships – Special Needs Trusts
c. 21:15. Medicaid: OBRA 1993 Exempt Trusts – Special Needs Trusts – Overview
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N.Y. Elder Law Practice § 2:8 (2024 ed.)

New York Elder Law and Special Needs Practice | May 2024 Update
Vincent J. Russo, Marvin Rachlin

Chapter 2. Practice of Special Needs

§ 2:8. Special needs planning issues

The attorney may be approached by the parents of a child with special needs with various concerns.

The parents may be concerned that they may not be able to leave a bequest to the child for fear of endangering eligibility for some governmental program. On this issue, it will be necessary to determine what benefits the child receives. It could be Social Security Disability Insurance (SSDI), Supplemental Security Income (SSI), Medicare or Medicaid or a combination of them.

It will also be necessary to know the age of the child, where the child lives, and what their special needs are. With a complete understanding of the facts and circumstances, the attorney can start to formulate a plan that will meet the parents' objective of leaving assets to a child without endangering eligibility for means tested governmental programs which are currently providing payments or services and also those that may be applied for in the future.

The attorney may also be retained by a parent whose child is a legal minor (under age eighteen (18)).[1] It is also best if the attorney meets with the parents when the child reaches age 14 due to the SSI transfer penalty and three (3) year look-back rules.[2] Another option that is now available for an over-resourced SSI applicant is to take advantage of an Able Account.[3]

Decision Making. Sometimes, a parent will seek the attorney's counsel when a child is approaching age 18 because the parent will lose the legal authority to act on behalf of their child when the child attains age 18. If the parent informs the attorney that the child lacks the capacity to make financial and medical decisions, and hence, cannot execute a health care proxy, living will or a power of attorney, then the special needs planning attorney will be able to explain the parent's predicament and offer a plan to enable the parent to continue making financial and medical decisions for the child.[4]

In some instances, a parent may be unaware that the parent's authority to make medical decisions for a child who is 18 or older in spite of the fact that there was no greater capacity at age 18 than there was before. The Family Health Care Decisions Act of 2010[5] expanded decision-making authority for patients in a facility-based setting but *excluded* persons with developmental disabilities. There are other laws that govern persons whose treatment is governed by the state Office of Mental Health (OMH) or NYS Office for People with Developmental Disabilities, namely SCPA § 1750(b). The Surrogate's Court Procedure Act identifies "qualified" family members (including parents) to make health care decisions but still limits it to the withholding or withdrawing of life sustaining treatment for end of life decisions and not general medical treatment. A parent would not possess the authority to dictate the place of residence of the child or simple day to day decisions. A special needs planning attorney must be familiar with advance directives and guardianship proceedings in order to be able to properly advise the parents.

Advance Directives. For those individuals with special needs who have requisite mental capacity to understand the meaning and purpose of advanced directives, the attorney would be well advised to recommend that a health care proxy,[6] HIPAA release, living will,[7] and comprehensive durable power of attorney[8] be executed.

Capacity Issues. The special needs planning attorney should meet with the individual with special needs and not rely on the description of others regarding the individual's abilities and capacity. For the individual with some mental capacity, it is important for the individual to be present at the meeting, if possible. Beyond having the opportunity to assess capacity, it is just as important to make the individual a party to the planning that is being explored for their benefit. Not all individuals will have enough mental capacity to participate in planning and to execute legal documents. You may be called upon to represent a legal guardian or an individual who is seeking guardianship in order to plan for someone who has never had the capacity to execute a health care proxy, or any other legal document.

Guardianship. Article 17A guardianships are a valuable tool for special needs planning attorneys. This planning tool can be combined with other tools such as irrevocable trusts, including payback trusts which can be authorized by the Surrogate. When a child reaches age 18 and does not have the ability to make sound decisions, an Article 17A guardianship proceeding should be commenced in the surrogate court in the county where the child resides.[9] Once appointed guardian with-health care decision making authority, the parent can make medical decisions for a child over the age of 18.[10] Powers under an Article 17A guardianship may include authority to make end of life decisions for the child, subject to the statutory requirements.[11]

In addition to health care decisions, the guardian can also make decisions regarding the personal needs of the adult child such as:

i. whether they should travel;

ii. determining who shall provide personal care or assistance;

iii. whether they should have a license to drive;

iv. decisions regarding education;

v. access to or release of confidential records;

vi. choosing their place of abode; and

vii. applying for government or private benefits.

Standby and Alternate Guardians. Parents are faced with the realization that not only is the child with special needs getting older, but so are they. The special needs planning attorney should discuss with the parents who will be the caregiver when the parent or parents are no longer able to provide care either because of illness, disability, or death. The special needs planning attorney should explain that as part of the Article 17A guardianship proceeding, standby or alternate guardians can be appointed, ready to step in whenever the parent/guardian is no longer able to act.[12]

Supported Decision Making. On July 26, 2022, Governor Kathy Hochul signed Supported Decision Making into Article 82 of the Mental Hygiene Law.[13] It provides a formal manner for individuals with intellectual and developmental disabilities to appoint a person to assist them in making decisions. The parties enter into an agreement which identifies the disabled person's supporters and the scope of the agreement. There is a presumption of capacity for all adults unless a legal guardian has been appointed.[14] This law was enacted to encourage support for disabled persons while maintaining their control in decision making. Supported Decision Making can be used in addition to signing advance directives such as a Durable Power of Attorney and Health Care Proxy which appoint an agent to substitute the disabled person's decision making.[15] It is also a less restrictive means to an Article 81 guardianship proceeding.[16]

Health Care Decision-Making. In 1991 the Health Care Proxy became part of New York Law.[17] Once properly executed, the health care proxy allows the principal to designate an agent to make all medical decisions, including end of life decisions for the principal, when the principal does not have the capacity to make their own decisions.

In 1993, the legislature addressed the issue of substituted judgment for individuals who never had the capacity or lost the capacity to execute a health care proxy by passing the Health Care Decisions Act for Persons with Mental Retardation.[18] Guardians appointed pursuant to Article 17A of the Surrogates Court procedure act were given authority to make major health care decisions, including end of life decisions but only for wards that were mentally retarded. It wasn't until the end of 2007 that the same authority was extended to 17A guardians for wards who are developmentally disabled.[19]

It is important to note that health care decision-making under the Family Health Care Decisions Act does not apply to individuals who never had the capacity to make health care decisions for themself.

Testamentary Bequests to a Special Needs Child. The special needs planning attorney should also discuss with the parents how they can leave assets for their child with special needs without affecting eligibility for governmental benefits such as SSI and Medicaid. The attorney will also need to clarify with them that Social Security Disability Insurance and Medicare are not financially means tested. There should be a discussion with them as to the benefits of a lifetime or a testamentary supplemental needs trust for the benefit of their child. Such a trust, when properly drafted, can allow the trust assets to enhance and improve the life and care of the individual with special needs without reducing or eliminating any governmental benefits.[20]

Malpractice and Personal Injury Settlements. Tort attorneys are valuable contacts for special needs planning attorneys. The special needs planner may be contacted by a medical malpractice or negligence attorney who is close to settling a case on behalf of a client in receipt of Supplemental Security Income (SSI) or Medicaid or both. Often, the call will come after the case has been settled and time is of the essence. The tort attorney will be seeking the special needs planning attorney's expertise to protect the eligibility for SSI and/or Medicaid of the client who will soon receive a substantial sum of money. There also may be Medicare and/or Medicaid lien issues that the tort attorney will ask the special needs attorney to help resolve. Further, the settlement may be subject to the Medicare Secondary Payer Act.[21]

There is also a group of special needs attorneys who have focused on settlement planning as its own specific practice area. Settlement planning is a process that integrates immediate and periodic payments by planning for the timely use of funds by using annuities, trusts, taxable investments, and other vehicles. It strives to preserve assets through coordination with other benefits such as Medicaid and Medicare and by prudent estate planning.[22]

First Party Special Needs Trusts. In some cases, the appropriate plan may be to create and fund a First Party Special Needs Trust which can either be a Special Needs Trust (sometimes referred to as a payback trust, or a d(4)(a) trust)[23] or a Pooled Trust (sometimes referred to as a d(4)(c) trust).[24] If a special needs trust is being used, it is important that the trust be prepared and either in place prior to settlement or made a part of the court proceeding, so that the recovery will be paid directly into the trust by court order. This will prevent any break in coverage for a means tested program such as Medicaid or SSI. The special needs planning attorney should also be aware of the 10-day reporting rule for SSI. You have 10 days after the month in which the change occurred to report a change.[25] It is recommended that the notice is sent using a mail tracking mechanism such as overnight courier, registered or certified mail.

As a special needs planning attorney, you may develop a different plan if the client receives community Medicaid in New York, Social Security Disability Insurance and/or Medicare. The attorney will be called on to decide whether a Special Needs Trust is the most appropriate plan. The decision will be based on the client's age, the level of care and the probability of requiring institutional care within the next five years. After analyzing the relevant factors, the special needs attorney may consider presenting two alternatives to the client: one, to create and fund a Special Needs Trust or two, create and fund a Medicaid Asset Protection Trust. To

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look ahead five years presents probabilities, but no certainty. Once there has been a full explanation and discussion the client will be able to make an educated choice between a Special Needs Trust and a Medicaid Asset Protection Trust which will not affect community Medicaid but will protect assets after the five-year look back for Medicaid nursing home care and avoid a Medicaid payback. The attorney's case notes should reflect the alternatives that were explained as well as the choice that was made. The same information should be contained in a letter to the client to avoid any question in the future regarding the choice that was made.

Inter-Vivos Third Party Supplemental Needs Trust.[26] There will be times that you are approached by a parent, other relative or friend to create and fund an inter-vivos irrevocable third party supplemental needs trust (Supplemental Needs Trust) for an individual with special needs. Because this is a third party trust, a special needs trust which has a payback provision to the state is not required (unlike a First Party Special Needs Trust). The attorney should explain that after the initial funding, the client (typically the parents) will be able to add additional assets to the existing trust. Testamentary bequests can also be made to the existing trust. If there are other people who may be inclined to make gifts or bequests to the individual with special needs, the client should be advised to inform them that such gifts or bequests can be made to the existing trust, now or in the future without effecting eligibility for programs such as Medicaid or SSI for the child with special needs.

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Footnotes

1 For more information go to: http://www.vjrussolaw.com/resources/free-planning-guides/.

2 *See infra* § 10:49.

3 *See infra* § 10:40 Supplemental Security Income—Resources.

4 *See infra* § 9:17.

5 PHL section 29-C.

6 *See infra* § 7:40.

7 *See infra* § 7:30.

8 *See infra* Powers of Attorney Ch 6.

9 *See* § 9:1.

10 It is important to note that health care decision-making under the Family Health Care Decisions Act

does not apply to individuals who never had the capacity to make health care decisions for themself; *see* § 7:27, The Family Health Care Decisions Act, for more details.

11 *See* § 9:6; SCPA §§ 1750, 1759(b).

12 *See* § 9:8.

13 MHL § 82.01.

14 MHL § 82.03.

15 *See infra* §§ 6:1 and 7:1.

16 *See infra* § 9:3; MHL § 82.01.

17 Pub. Health Law § 2977.

18 *See infra* § 7:27.

19 *See infra* § 9:17.

20 *See* §§ 22:7, 22:8.

21 42 U.S.C.A. § 1395y(b).

22 *See* Society of Settlement Planners at http://societyofsettlementplanners.com/.

23 *See infra* §§ 21:16 and 21:17.

24 *See infra* §§ 21:15, 21:19.

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[25] *See* https://secure.ssa.gov/poms.nsf/lnx/0502301005.

[26] *See infra* § 21:22.

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N.Y. Elder Law Practice § 9:9 (2024 ed.)

New York Elder Law and Special Needs Practice | May 2024 Update
Vincent J. Russo, Marvin Rachlin

Chapter 9. Guardianships—Article 17A

§ 9:9. Article 17A Guardianships—Special Needs Trusts

Special Needs Planning is not only limited to Article 81 guardianship proceedings. Under Article 17A, the opportunity to preserve the assets of an individual who has intellectual disabilities and/or developmental disabilities exists through the use of Special Needs Trusts.

An application to establish and fund a Special Needs Trust can be brought after a Guardian of the Property has been appointed in the initial Article 17A proceeding. It is good practice to obtain the procedural guidelines from your local Surrogate's Court. The petition to establish the Special Needs Trust should be made at the earliest possible moment, especially where Medicaid benefits are at stake. The timing of the petition can make the difference between assets being deemed available or unavailable for Medicaid eligibility purposes. While local Medicaid agencies have taken the position that a pending Article 17A petition for the appointment of a guardian and the establishment of a Special Needs Trust where the assets have not yet been distributed to the person with a disability deem the assets unavailable, the Social Security Administration may take the position that the assets are available until the Special Needs Trust has been established and funded with said assets.

During this proceeding, as in an 81 proceeding, the assets of the individual are deemed unavailable by the local Medicaid agency because of the inability of the person with a disability to manage their assets. However, the assets would be deemed available upon the appointment of the guardian.[1]

In cases where a guardian is appointed and no application for the Special Needs Trust was made, the disabled person will not be eligible for Medicaid benefits if their assets exceed the resource allowance for Medicaid eligibility.

In many situations, the local Medicaid agency provides a health care safety net for individuals with a disability.

The continuation of Medicaid benefits is in the best interest of the disabled person, and this point should be made clear in the petition as a means of preemptively easing any judicial reluctance to entertain both issues in the initial application.

In the event the disabled person is also receiving SSI benefits and intends to maintain SSI eligibility, it is critical that the attorney advise the client that SSI may take the position that the assets are available until the Special Needs Trust is established and funded with those excess assets, and if the assets exceed the allowable limit, then the individual's SSI benefits may be terminated. In addition, the terms of the Special Needs Trust must mandate the Medicaid be paid back on death to the State before the payment of funeral expenses. For an SSI recipient, the inclusion of an order to prepay a burial before funding the Special Needs Trust is paramount. In cases where an individual's Medicaid eligibility is directly tied to the individual's SSI eligibility and the SSI has been terminated; it is likely that the individual's Medicaid benefits will be terminated as well. In instances where an individual's Medicaid eligibility was determined prior to applying for SSI benefits, it is likely that the individual's Medicaid eligibility will remain unchanged for the duration of the proceeding.

It is very important to pay close attention to provisions of the Article 17A proposed order establishing and funding the Special Needs Trust to make sure that the implementation of the order will achieve the objective of the disabled person which is to protect assets while maintaining government benefits.

In re Larson. The timing of the application is paramount, but in at least one case where nearly everything went wrong, the court found a way to provide the needed relief. In *In re Larson*[2] the court considered the case of a developmentally disabled SSI and Medicaid recipient residing in a New York State operated residential alternative. In 1987, the individual inherited $25,000. The 17A petition was first filed in 1995 seeking authority to establish a supplemental needs trust for the inherited $25,000. Though authorized by the court, the trust was never established or funded. In 2002, the petitioners, joined by the director of the Hudson Valley Developmental Disabilities Service Office, asked the court for permission to transfer the inheritance to New York State to be deposited and administered in a manner similar to a supplemental needs trust.

The Nassau County Surrogate ruled that Mental Hygiene Law § 13.29 authorized the commissioner on behalf of the estate to accept and hold in trust, gifts devises, and so forth, for the maintenance, support, and benefit of one or more patients of a facility.[3] The court ruled that such trust would meet the requirements of federal and state law as an exempt trust. The court noted that 42 U.S.C.A. § 1396p(6) includes any legal instrument similar to a trust. The court therefore approved the transfer to the state for the creation of a trust pursuant to Mental Hygiene Law § 13.29.

Often, the disabled person has assets due to a personal injury or medical malpractice settlement. Again, it is important to carefully review the language of the proposed order or settlement of any third-party action. The proposed order or settlement of a third-party action should provide for a direction to first establish a prepaid funeral account and thereafter fund the Special Needs Trust.

Ahlborn. In the *Ahlborn* case, Heidi Ahlborn was a 19-year-old college student with dreams of becoming a teacher when she became the victim of a car accident. The accident left Heidi with permanent and severe injuries including brain damage. The injuries arising from the accident necessitated care which she was unable to finance. Heidi was determined to be eligible for Medicaid benefits. An action was later commenced against the parties who caused Heidi's injuries. The action sought damages for past medical costs and for permanent injury, future medical costs, past and future pain, suffering and mental anguish as well as past loss of earnings and permanent impairment of future earnings.

Once a settlement was reached, the state imposed a lien against the proceeds for all of its expenditures and not only the amount allocated to past medical payments but from the full settlement. The U.S. Supreme Court determined that any assignment of rights in a third party action could not require an assignment of the right to recover the portion of the settlement that was not allocated to payments for past medical expenses.

The court also agreed with the assertion that the federal anti-lien provisions preclude the attachment or

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encumbrance of any part of the settlement not allowed to past medical expense.

For attorneys settling personal injury actions and even medical malpractice actions, the *Ahlborn* decision provided an advocacy opportunity to fund all proceeds but the damages allocable to medical costs into a Special Needs Trust.

Previously, in light of the Supreme Court decision in the *Ahlborn* case,[4] the proposed order or settlement should have contained a specific allocation of damages for past medicals. However, Section 202(b) of the Bipartisan Budget Act of 2013, effectively reversed *Arkansas Dept. of Health & Human Srvs. v. Ahlborn*. The Act, which was signed by President Obama on December 26, 2013, modified portions of the federal Medicaid Act to permit recovery not just for health care items but for "any payments by such third party." Under the Act, the local Medicaid agency was able to assert its lien against the entirety of the award instead of the portion of the award that represented payment for medical expenses. The practical concern with this law was that it would likely make negotiating liens with the local Medicaid agency much more difficult and would limit the amount of funds that would otherwise be available for Special Needs Trusts which could allow an individual to be eligible for Medicaid while permitting the individual to benefit from the trust.

Congress delayed the provision in the budget bill that gives states the ability to recover Medicaid costs from a beneficiary's full personal injury settlement or award by two years. The law ultimately was delayed until October 1, 2017. This meant that Medicaid would continue to only be able to recover from the portion of a personal injury settlement or award that was allocated to past medical expenses.

On February 9, 2018, President Trump signed a budget deal, which included among other issues, a new law, fully repealing Medicaid's expanded rights regarding third party settlements that had become effective October 1, 2017 as part of the Bipartisan Budget Act of 2013. Section 53102[5] of the 2018 Budget Act repeals Medicaid's expanded recovery rights granted in Section 202 of the Bipartisan Budget Act of 2013. This new law conforms to the Supreme Court's prior rulings in Arkansas Dept. of Health and Human Services v. Ahlborn, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006) and Wos v. E.M.A. ex rel. Johnson, 568 U.S. 627, 133 S. Ct. 1391, 185 L. Ed. 2d 471 (2013) limiting Medicaid's recovery in third-party liability settlements based on the allocation of funds under the settlement.

While this may be widely accepted, it is still left to the States to decide to follow such ruling, as was exemplified by *Andrews ex rel. Andrews v. Haygood whereby the Court of Appeals of NC*, even considering *Ahlborn* still decided not to follow the ruling.[6] In its reasoning, the Court in *Andrews* stated the Court *in Ahlborn* was interpreting Arkansas Statute and not its own, quoting earlier cases saying "… it is well settled that "'the construction of the statues of a state by its highest courts is to be regarded as determining their meaning[.]" "[7]

While the use of Special Needs Trusts should always be considered, they should not be used in a mechanical fashion. There are situations where Special Needs Trusts are the perfect fit and where they simply make no sense at all.

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Footnotes

1 N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

2 In re Larson, 190 Misc. 2d 482, 738 N.Y.S.2d 827 (Sur. Ct. 2002).

3 In re Larson, 190 Misc. 2d 482, 738 N.Y.S.2d 827 (Sur. Ct. 2002).

[4] Arkansas Dept. of Health and Human Services v. Ahlborn, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006). Reversed by the Bipartisan Budget Act of 2013.

[5] PL 115-123, § 53102, February 9, 2018, 132 Stat 299.

[6] Andrews ex rel. Andrews v. Haygood, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443 (2008), aff'd, 362 N.C. 599, 669 S.E.2d 310 (2008) (abrogated by, Wos v. E.M.A. ex rel. Johnson, 568 U.S. 627, 133 S. Ct. 1391, 185 L. Ed. 2d 471 (2013)).

[7] Champion Fibre Co. v. Cozad, 183 N.C. 600, 607, 112 S.E. 810, 813 (1922) (quoting Supervisors v. U.S., 85 U.S. 71, 21 L. Ed. 771, 1873 WL 15960 (1873)).

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N.Y. Elder Law Practice § 21:15 (2024 ed.)

New York Elder Law and Special Needs Practice | May 2024 Update
Vincent J. Russo, Marvin Rachlin

Chapter 21. Living Trusts

§ 21:15. Medicaid: OBRA 1993 Exempt Trusts—Special Needs Trusts—Overview

The Special Needs Trust, also referred to as a "(d)(4)(A) Trust," a "Disability Trust," a "First Party Special Needs Trust" or a "Payback Trust,"[1] is available only to individuals who are disabled and under the age of 65 years. The trust must be funded with the assets of the individual who is disabled and must be created for their benefit by themself,[2] a parent, a grandparent, or a legal guardian of the individual or a court. The trust must be for the sole benefit of the individual who is disabled. Lastly, the trust must contain a payback provision to the state for Medicaid paid on the disabled individual's behalf.

It is important to note that prior to December 13, 2016, the Special Needs Trust could not be established by the disabled beneficiary of the Trust. On December 13, 2016, the *Cures Act*,[3] containing the *Special Needs Trust Fairness Act*, was signed by President Obama and passed into law. This marks an enormous milestone for

individuals with disabilities. The passage of this legislation establishes liberties for persons with disabilities which had been previously denied to them. Prior to passing the Act, only a parent, grandparent, legal guardian of the disabled individual, or a court could establish a Special Needs Trust on behalf of the disabled individual. Under the new Act, individuals with disabilities who are under the age of 65 and have capacity can create their own Special Needs Trust. It is the author's belief, that the Passage of the *Special Needs Trust Fairness Act* ends the false and degrading presumption that all individuals with disabilities lack the mental capacity to handle their own affairs.

The author is proud of the National Academy of Elder Law Attorneys (NAELA) for spearheading the efforts to get these provisions passed![4] The author is also honored to be a Founding Member and Past President of an organization that continues to pave the way for the betterment of the lives of the elderly and those with special needs.

New York State has implemented the Special Needs Trust Fairness Act effective May 22, 2017.[5]

The Special Needs Trust authorized by OBRA 1993 is exempt for Medicaid eligibility purposes and the funding will not affect the Medicaid eligibility of the individual.

There is a statutory requirement that the disabled beneficiary be under the age of sixty-five (65) upon the creation of the trust. If a Special Needs Trust is created for an individual who is under the age of 65, that trust will remain exempt if the individual lives beyond the age of 65. However, any assets added to the trust after the individual reaches age 65 will be subject to the Medicaid transfer penalty rules.

The Special Needs Trust must contain a payback provision. Upon the death of the individual, any balance left in the trust must be paid back to the Department of Health in an amount not to exceed the Medicaid benefits paid on behalf of the individual during their life.

The language of the federal statute regarding the payback provides that the "… state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total Medicaid assistance paid on behalf of the individual under a state plan under this subchapter."[6] This language raises an issue: whether Medicaid is entitled to recover any assistance paid on behalf of the individual prior to the creation of the trust. Since, upon the death of the disabled individual the balance of the trust funds will not be part of that individual's probate estate, it would not be subject to a Medicaid estate claim.[7] Thus, if the individual received Medicaid assistance prior to the creation of the trust, and if the trust was left with considerable assets after the individual's death, the issue of whether Medicaid benefits granted prior to the creation of the trust are recoverable is an important one.

There is no longer any question in New York State as to whether the payback provision requires payback of all Medicaid previously paid, including payments prior to the creation of the trust. The New York Court of Appeals, reversing an Appellate Division decision, ruled that all Medicaid payments including pre-trust payments are subject to the payback provision.[8]

If the Special Needs Trust is funded with the proceeds of a negligence or medical malpractice suit brought on behalf of the beneficiary of the Special Needs Trust, it is possible that there would be a Medicaid lien against the proceeds for the repayment of Medicaid benefits paid to treat the injury or condition caused by the negligence or medical malpractice.[9] It has been determined that such liens must be satisfied prior to the funding of a Special Needs Trust.[10]

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Footnotes

[1] For purposes of this book, the authors will refer to this type of Trust as a "Special Needs Trust" and a Trust set up and funded by an individual for the supplemental needs of a third party as a "Third Party

Supplemental Needs Trust."

[2] 21st Century Cures Act (H.R. 34, 114th Cong. (2015 to 2016)). Section 5007 of the Act, titled "Fairness in Medicaid Supplemental Needs Trusts."

[3] 21st Century Cures Act (H.R.34, 114th Congress (2015 to 2016)). Section 5007 of the Act, titled "Fairness in Medicaid Supplemental Needs Trusts."

[4] *See* https://www.naela.org/Web/Home_Page/Announcements/SNTFMIA.aspx?WebsiteKey=ef1fbf77-8f85-4dfa-8c27-01f22ae4f5c8.

[5] See GIS 17 MA/08 (5/22/17).

[6] 42 U.S.C.A. § 1396p(d)(4)(B)(ii).

[7] *See supra* § 17:3.

[8] In re Abraham XX., 11 N.Y.3d 429, 871 N.Y.S.2d 599, 900 N.E.2d 136 (2008).

[9] *See infra* § 21:17.

[10] See *supra* § 17:19 and *infra* § 21:17.

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N.Y. Elder Law Practice § 21:16 (2024 ed.)

Vincent J. Russo, Marvin Rachlin

§ 21:16. Medicaid: OBRA 1993 Exempt Trusts—Special Needs Trust—Administration

Purpose. Special Needs Trusts are intended to supplement rather than duplicate or replace Medicaid benefits. To accomplish this and achieve the benefits of a Special Needs Trust, the trustee's authority must be carefully defined and limited. There has to be a specific limitation to prohibit paying for any expense that would otherwise be paid for by Medicaid or any other means tested entitlement program.[1] Statutory guidance for the language of a Special Needs Trust or Supplemental Needs Trust (trusts established and funded by a person other than the beneficiary) can be found in New York law.[2] It is recommended that the statute be cited in the Trust and that the statutory language be used where appropriate.

Distributions. The elder law/special needs planning attorney drafting a trust pursuant to the statutory exemption of OBRA 1993[3] must use great care to assure that the payments from the trust to the individual do not affect such individual's Medicaid eligibility. Payments from the trust to the individual receive no statutory protection, and must, therefore, be designed so as not to duplicate or replace any Medicaid funding. Any duplication or replacement of Medicaid funding would result in the trust having to pay for expenses that would otherwise be covered by Medicaid.[4] Thus, if a Special Needs Trust authorized the trustee to pay the beneficiary's medical expenses with no qualifying language, trust funds would have to be exhausted before Medicaid would pay any medical expenses.

Care must also be taken to prevent direct payments to the individual, because direct unrestricted payments are income to the individual which would affect their Medicaid eligibility.[5] Provision can be made for the trustee to spend Trust funds on specific items that would not be covered by Medicaid. For example, the trustee could be authorized to purchase a television for the individual. Since a television is not a medical item provided by Medicaid, such authorization or purchase would not affect the individual's Medicaid eligibility. The type and number of items and services that can be authorized by a Special Needs Trust are limited only by the experience of the elder law attorney cognizant of the need to avoid any replacement or duplication of items or services available from Medicaid and of the needs of the beneficiary.

In *Matter of La Barbera (Donovan)*,[6] the court did not authorize a Special Needs Trust because the record did not establish that the current expenses exceeded the income of the individual.

In *Matter of Sutton*, the court ordered the establishment of a Special Needs Trust for an infant Medicaid recipient as requested by the guardian appointed under S.C.P.A. Article 17A. In this case, the infant, who suffered from multiple physical disabilities but had no mental impairments, was entitled to an inheritance from his mother's estate.[7]

Planning for SSI. Special Needs Trusts are a valuable planning tool for Supplemental Security Income (SSI). In New York State, SSI eligibility creates automatic Medicaid eligibility; the special needs trust for an SSI individual must protect not only SSI eligibility, but Medicaid eligibility as well.

Since SSI is a cash maintenance program for living expenses, and Medicaid pays various medical expenses, trust language must not allow duplication of living expenses as well as medical expenses. To properly draft a trust, the elder law attorney must be familiar with the benefits covered and provided by both SSI and Medicaid. Thus, if the trust fully protected assets regarding medical expenses but allowed the trustee to pay for or provide housing or pay utility bills, such powers would affect the beneficiary's SSI eligibility.

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A trustee can be authorized to provide many items that would enhance the life of the person with special needs while protecting SSI and Medicaid eligibility. The trust can provide recreational opportunities, trips to see family and friends, and even the purchase of a specially equipped van to permit travel. Entertainment devices, including, but not necessarily limited to, televisions, radios, and computers can be purchased by the trustee for the beneficiary. The trust can be tailored to meet the specific needs of the beneficiary without interfering with SSI or Medicaid eligibility. Certain expenditures by the Trust for the benefit of the beneficiary may reduce or eliminate SSI.[8]

A Special Needs Trust should be designed to meet the special needs of the beneficiary. Doing so will result in a document that enhances the life of the beneficiary while protecting SSI and Medicaid eligibility. Knowing your special needs client will enable you to design a document that will truly benefit the client.

Payback Provisions. Disposition of trust assets upon the death of the disabled beneficiary is also an issue for SSI. Trust provisions that provide for the payment of funeral expenses prior to the payback to Medicaid will not be approved by the Social Security Administration as to SSI. For SSI purposes, the trust may provide for certain allowable expenses such as taxes due from the trust to the State(s) and reasonable fees for the administration of the trust estate before the Medicaid payback to the State(s), and then provide for funeral and other expenses from the remaining balance, if any.[9]

The Social Security Administration has also changed the payback language that it will accept for SSI purposes. The payback provision must not be state specific. SSI requires "the State(s) will receive …," without the naming of a specific state.[10] Notably, the payback language in the Social Security Administration POMS makes specific reference to the term "State(s)." In a 2017 administrative hearing, the Social Security Administration argued that the trust did not meet the special needs exemption rules because the Medicaid reimbursement language within the termination provision of the trust was deficient. In the decision, the Administrative Law Judge held that the repayment language which only referenced "State," in the singular, rather than the plural, did not improperly limit repayment to a particular state, and, therefore, the trust was not deficient and satisfied the special needs exemption rules.[11] Notwithstanding, attorneys must be extremely careful to use the term "State(s)" when drafting Special Needs Trusts.

Early Termination. Prior to the death of the beneficiary, under no circumstances may the beneficiary be authorized to terminate the trust.

The following are circumstances in which early termination may be appropriate:

1. If the Beneficiary is no longer disabled, then the trustee may terminate the trust if the beneficiary no longer meets the medical criteria as disabled;

2. If the Beneficiary becomes ineligible for Supplemental Security Income and Medicaid, or if the beneficiary's eligibility for SSI and Medicaid is terminated, then the trustee may terminate the trust; or
3. If there are insufficient assets held in the trust, then the trustee may terminate the trust during the lifetime of the beneficiary if the trust assets have been reduced to the point that continued administration of the trust is not financially justified.[12]

Planning for Section 8 Housing

The federal government established Section 8 housing that created various public benefit programs, which provide rental subsidies to low income, elderly and disabled individuals in private and government owned housing. Section 8 Housing allows lower income families to have the opportunity to reside in the private sector.[13]

Generally, while assets are reviewed when applying for Section 8 housing, there is no limitation on the value of assets that can be owned. The value of the actual asset is not considered. Instead, the government will calculate the interest, if any, earned from the assets toward the families' income, thereby affecting the family's contribution toward rent.

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An individual living in Section 8 housing may have established and transferred assets to a Special Needs Trust to protect and preserve benefits. In the past, the Section 8 recipient had to be concerned that any distributions made from their Special Needs Trust would adversely affect their Section 8 rent calculation.

On June 14th, 2016, the First Circuit in the case DeCambre v. Brookline Housing Authority[14] held that distributions of principal from a special needs trust are not counted as income for purposes of Section 8 calculations.

This decision is a significant holding for the individual applying for Section 8 Housing.

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Footnotes

1 *See supra* § 13:1.

2 EPTL § 7-1.12.

3 *See supra* § 21:14.

4 *See supra* § 13:1.

5 EPTL § 7-1.12.

6 Matter of La Barbera (Donovan), 4/26/96 N.Y.L.J. 36, col. 6 (Sup. Ct. Suffolk County).

7 Matter of Sutton, 167 Misc. 2d 956, 641 N.Y.S.2d 515 (Sur. Ct. 1996).

8 *See supra* § 10:42.

9 *See* https://secure.ssa.gov/poms.nsf/lnx/0501120203.

10 POMS § SI 01120.203 (effective date July 26, 2018).

11 Soc. Sec. Dec. (C.M. v. SSA) (August 16, 2017).

[12] POMS § SI 01120.199.

[13] 24 C.F.R. § 5.100; *see,* Evans v. Franco, 93 N.Y.2d 823, 687 N.Y.S.2d 615, 710 N.E.2d 261 (1999).

[14] DeCambre v. Brookline Housing Authority, 826 F.3d 1 (1st Cir. 2016).

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N.Y. Elder Law Practice § 21:17 (2024 ed.)

New York Elder Law and Special Needs Practice | May 2024 Update
Vincent J. Russo, Marvin Rachlin

Chapter 21. Living Trusts

§ 21:17. Medicaid: OBRA 1993 Exempt Trusts—Special Needs Trust—Funding and Medicaid Liens

Frequently the need for a Special Needs Trust arises as a result of a recovery in a medical malpractice or negligence action. The services of special needs attorneys are often sought by medical malpractice and negligence attorneys when Medicaid may be involved. A thorough knowledge of Special Needs Trusts is essential to protect the damages recovered.

Funding a Special Needs Trust with the proceeds of a medical malpractice or negligence action against which a Medicaid lien had been placed was usually a problem, depending on the amount of the lien as compared to the amount of the settlement. There were times when Medicaid would voluntarily reduce or waive its lien to permit funding the trust, and times when it would refuse.

In another context, an attempt was made to fund a Special Needs Trust with the monthly Social Security Disability payments being received by the disabled person in an attempt to reduce the income spend down for Medicaid community home care. The Surrogate's Court ruled that the proposed "hoarding" of entitlement funds is contrary to the purpose of the entitlement, and, therefore, violates public policy.[1] The court, on re-argument, reversed itself and permitted the Social Security Disability payments to be paid into the trust.

Later, the same court was confronted with a similar case, this time involving SSI payments.[2] In this case, the

court held that SSI payments which have specific definitions as to what the benefits are for cannot be diverted into a Special Needs Trust.

Litigation arose as to the right of Medicaid to enforce a lien against proceeds that would otherwise go into an exempt Special Needs Trust. Both the New York Supreme Court and the Appellate Division Second Department ruled that Medicaid could not enforce its lien, except from any remaining assets of the Special Needs Trust after the death of the disabled individual.[3]

On appeal[4] the Court of Appeals reversed the Appellate Division, holding that Medicaid was a preferred creditor entitled to recovery from the proceeds prior to funding the Special Needs Trust.

There is no longer any legal issue in New York State regarding the ability of the state to recover its Medicaid lien from proceeds that would otherwise be funded into a Special Needs Trust. Given the state's legal ability to recover, it is up to the elder law/special needs planning attorney to negotiate a reduction or waiver of the lien based on the circumstances of the case. It will be more difficult to negotiate if a large sum of money will be left for the trust after payment of the lien.

The elder law/special needs planning attorney should make every effort to reduce or avoid paying a Medicaid lien which will reduce the amount available to be placed in the trust.[5] Because there is no certainty as to the amount that will be left in the Special Needs Trust following the beneficiary's death, funds that would otherwise have been paid back to Medicaid may be used for the benefit of the beneficiary during their lifetime.

If a Medicaid lien has been filed against the proceeds of an action and the proceeds are intended for a Special Needs Trust, then having the lien waived or reduced will be most difficult. Since there is a legal basis for collecting the lien prior to funding the trust, only special circumstances of the individual case can be used in an effort to waive or reduce the lien.

It is important to understand the limitations that the U.S. Supreme Court has placed on Medicaid recoveries which can result in a reduction of the lien. Medicaid cannot recover any portion of the settlement that is allocated to pain and suffering or for loss of income. Only the portion of the recovery allocated for medical expenses can be claimed by Medicaid.[6]

On December 26, 2013, President Obama signed the Bipartisan Budget Act of 2013. Section 202(b) of the Bipartisan Budget Act of 2013, which modifies portions of the federal Medicaid Act, effectively reversing *Arkansas Dept. of Health & Human Srvs. v. Ahlborn*. The Act was set to take effect on October 1, 2014.[7] This date was pushed back in April of 2014.

HR 4302, which was passed April 2014 by Congress and signed by President Obama, postponed pending Medicare physician payment cuts by one year.[8] At first glance it has nothing to do with Section 202(b), but if you look closely into the legislation there is a one-sentence provision (Sec. 211) that delays the effective date of Section 202(b) of the Bipartisan Budget Act of 2013 for two years. However, revising the effective date of Section 202(b) to October 1, 2016, only delayed the inevitable that Medicaid recipients will receive less in personal injury settlements because their full recovery will be subject to a Medicaid lien. This deadline was further delayed to October 1, 2017, when Medicare Access and the CHIP Reauthorization Act of 2015 (114 P.L. 10) were enacted on April 16, 2015.[9]

As of October 1, 2017, the legislative impact Section 202 of the Bipartisan Budget Act of 2013 has on *Arkansas Dept. of Health & Human Srvs. v. Ahlborn* became effective. Medicaid is now able to assert its lien against the entirety of the award instead of the portion of the award that represents payment for medical expenses. The practical concern with this law is that it will likely make negotiating liens with Medicaid much more difficult and may create problems in setting up Special Needs Trusts as a means to protect a person's eligibility for Medicaid while permitting them to take advantage of funds placed into the trust.

Whenever possible, an attempt should be made by the attorney to have the court, or the parties to a settlement,

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allocate an amount for medical expenses. Simply allocating a majority of the funds to pain and suffering rather than medical expenses will likely not be successful. An accurate allocation, considering liability, medical expenses and pain and suffering is most likely to result in a reduction of the Medicaid lien and an increase in the funds available for the trust.

Frequently, a court is involved with the proceeds of a medical malpractice or negligence action on behalf of a disabled person. The services of an elder law attorney are necessary if the proceeds are to be placed into a Special Needs Trust. The elder law attorney should draft the trust and it should be presented to the court to be used as the vehicle into which the funds will be placed. Not only should the language of the trust be carefully drafted to prevent any loss or diminution of Medicaid benefits, but also the timing of the funding of the trust must be carefully planned.

The proceeds of a personal injury or medical malpractice lawsuit will not be counted by Medicaid from the date of receipt or entitlement until the first day of the second month following the receipt or entitlement, provided the individual intends to place the proceeds into a Special Needs Trust.[10]

In addition, such assets will be disregarded from the date a proceeding to place the assets into the Special Needs Trust is commenced, until the resolution of such proceeding.[11] As a result, some alternate source of payment of the individual's medical expenses will have to be found for at least one month, or longer if the Trust is not funded during the same calendar month that the proceeds are made available.

A better alternative is to have the Special Needs Trust prepared and executed prior to the payment of the proceeds and have the proceeds paid directly into the trust, without being made available to the individual. This will help assure a continuity of Medicaid coverage, without the necessity of privately funding medical expenses for one month or longer.

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Footnotes

1 In re Lynch, 703 N.Y.S.2d 653 (Sur. Ct. 1999), withdrawn at request of court from Official Publication.

2 In re Ullman, 184 Misc. 2d 7, 707 N.Y.S.2d 603 (Sur. Ct. 2000).

3 Matter of Gibson, 162 Misc. 2d 530, 616 N.Y.S.2d 171 (Sup 1994), amended on reargument, 162 Misc. 2d 587, 620 N.Y.S.2d 729 (Sup 1994), order aff'd, 226 A.D.2d 351, 640 N.Y.S.2d 768 (2d Dep't 1996), rev'd, 90 N.Y.2d 296, 660 N.Y.S.2d 679, 683 N.E.2d 301, 53 Soc. Sec. Rep. Serv. 1010 (1997); Cricchio v. Pennisi, 220 A.D.2d 100, 640 N.Y.S.2d 573 (2d Dep't 1996), order rev'd, 90 N.Y.2d 296, 660 N.Y.S.2d 679, 683 N.E.2d 301, 53 Soc. Sec. Rep. Serv. 1010 (1997); *see also*, Merer v. Romoff, 1/23/97 N.Y.L.J. 28, col. 4 (Sup. Ct. New York County).

4 Cricchio v. Pennisi, 90 N.Y.2d 296, 660 N.Y.S.2d 679, 683 N.E.2d 301, 53 Soc. Sec. Rep. Serv. 1010 (1997), *see also* Calvanese v. Calvanese, 250 A.D.2d 564, 672 N.Y.S.2d 410 (2d Dep't 1998), aff'd, 93 N.Y.2d 111, 688 N.Y.S.2d 479, 710 N.E.2d 1079 (1999) and Matter of Link, 1/6/98 N.Y.L.J. 24, col. 1 (Sup. Ct. Suffolk County).

5 *See supra* §§ 17:15 and 17:17.

[6] Arkansas Dept. of Health and Human Services v. Ahlborn, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006), Reversed by the Bipartisan Budget Act of 2013.

[7] PL 113-67, § 202(c), December 26, 2013, 127 Stat 1165.

[8] PL 113-93, § 211, April 1, 2014, 128 Stat 1040.

[9] PL 114-10, § 220, April 16, 2015, 129 Stat 87.

[10] N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

[11] N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

End of Document

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N.Y. Elder Law Practice § 21:34 (2024 ed.)

New York Elder Law and Special Needs Practice | May 2024 Update
Vincent J. Russo, Marvin Rachlin

Chapter 21. Living Trusts

§ 21:34. Form: Special Needs Trust

Type of Trust: Special Needs Trust for the benefit of a disabled individual under age 65 who is disabled. This form of Trust is funded with the settlement proceeds of a personal injury or malpractice claim.
Medicaid Note: This Trust is being established for asset protection in the context of Medicaid planning. The funding of the Trust is not subject to a Medicaid transfer penalty period and the Trust assets are not considered available for purposes of Medicaid eligibility.

Tax Note: The Trust contains provisions which may adversely affect the Creator, Trustee or beneficiaries as to estate, gift and income taxation.
DRAFTING NOTES: This form is designed for the guidance of the attorney who should analyze each case individually before drafting the trust.

***[NAME OF SPECIAL NEEDS BENEFICIARY]* SPECIAL NEEDS TRUST]**

THIS AGREEMENT made and entered into this *[ordinal number of day]* day of *[name of month]*, *[number of year]*, between *[name of creator]*, Defendant (or *[name of creator]*, the *[parent/grandparent/legal guardian]* of *[name of special needs beneficiary]*), (hereinafter referred to as the "Creator") and *[name of trustee]*, Trustee, residing at *[address of trustee]* (hereinafter referred to as the "Trustee").

WITNESSETH:

[EITHER]:

WHEREAS, by Order of the Supreme Court of the State of New York, County of *[name of county]*, dated *[ordinal number of day]* day of *[name of month]*, *[number of year]*, that portion of the proceeds of the settlement in the action entitled *[name of special needs beneficiary]*, *Plaintiff, v. [name of defendant], Defendant*, as is set forth in the said Order (copy attached hereto as Exhibit "A") shall be placed into this Trust to be held by the Trustee as part of the Trust Estate (said monies being hereinafter referred to collectively as the "Trust Estate") for purposes hereinafter set forth;

[OR]:

WHEREAS, *[list of names of legal guardians]*, the legal guardians of *[first name of special needs beneficiary]* are desirous of creating a Trust with the Court's authority expressly for *[first name of special needs beneficiary]*'s supplemental care, maintenance, support and education in addition to the benefits *[first name of special needs beneficiary]* (hereinafter sometimes referred to as "*[first name of special needs beneficiary]*") otherwise receives or may receive from any local, state or federal government, or from any private agencies, or from any private insurance carriers covering *[first name of special needs beneficiary]*. This Trust is to enable *[first name of special needs beneficiary]* to qualify for medical assistance under the Medicaid program as provided for by the Omnibus Budget Reconciliation Act of 1993 ("OBRA 1993"); and *[OR:]*

WHEREAS, by Order of the Surrogate's Court of the State of New York, County of *[name of county]*, dated *[ordinal number of day]* day of *[name of month]*, *[number of year]*, that portion of the assets of *[first name of special needs beneficiary]* as is set forth in the said Order (copy attached hereto as Exhibit "A") shall be placed into this Trust to be held by *[name of trustee]*, (the "Trustee") as part of the Trust Estate (said monies being hereinafter referred to collectively as the "Trust Estate") for purposes hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the Trustee agrees to hold the Trust Estate, IN TRUST, for the following uses and purposes and subject to the terms and conditions hereinafter set forth:

ARTICLE I.
GENERAL PROVISIONS

(1) LAWS GOVERNING

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This Agreement shall be construed and regulated in all respects by the laws of the State of New York.

(2) NAME OF TRUST

This Trust shall be known as the "*[NAME OF SPECIAL NEEDS BENEFICIARY]* SPECIAL NEEDS TRUST" and it shall be sufficient that it be referred to as such in any deed, assignment, bequest or devise.

(3) TRUST IRREVOCABLE

This Trust is hereby declared to be irrevocable and it shall not at any time, by any person or persons, be amended, altered or modified in any manner. Notwithstanding, the Trustees are empowered to amend this Trust, subject to Court order, so as to: (i) qualify and maintain *[first name of special needs beneficiary]*'s eligibility for benefits under governmental programs, including but not limited to the Medicaid program, and (ii) meet the requirements under OBRA 1993 and the New York State implementing statutes and regulations promulgated pursuant thereto.

(4) PURPOSE

This Trust is created expressly for *[name of special needs beneficiary]*'s supplemental care, maintenance, support and education in addition to the benefits *[name of special needs beneficiary]* (hereinafter sometimes referred to as "*[first name of special needs beneficiary]*") otherwise receives or may receive from or be funded by any local, state or federal government, or from any private agencies, any of which provides or funds services or benefits to developmentally disabled, incapacitated or disabled persons, or from any private insurance carriers covering *[first name of special needs beneficiary]*. This Trust is to enable *[first name of special needs beneficiary]* to qualify for medical assistance under the Medicaid program as provided for by the Omnibus Budget Reconciliation Act of 1993 ("OBRA 1993"). In the administration of the Trust, the Trustees shall undertake all acts necessary to establish and maintain *[first name of special needs beneficiary]*'s eligibility for medical assistance under the Medicaid program.

It is intended that the funding and/or administration of this Trust will not subject *[first name of special needs beneficiary]* to a period of ineligibility under Medicaid law pursuant to 42 U.S.C.A. 1396p(d)(4)(A) and N.Y. Social Service Law Sections 366(2)(b)(2)(iii)(A) and 366(5)(d)(3)(ii)(D), as amended.

It is also intended that this Trust shall be treated as a grantor type trust for federal and state income tax purposes and that the funding of the trust shall not be subject to federal and state gift taxation.

[OPTIONAL:]

(5) ADDITIONS TO CORPUS

[First name of special needs beneficiary], [his/her] guardian, or any duly authorized person on behalf of [first name of special needs beneficiary], with written notice to the Trustee, may add from time to time to the Trust Estate any property by deed, Will, court order or otherwise.]

ARTICLE II.

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DISTRIBUTION OF INCOME AND PRINCIPAL DURING LIFETIME OF *[NAME OF SPECIAL NEEDS BENEFICIARY]*

NOTE: The following provision may or may not be approved by a Court, depending upon the Judge. In addition, the local Medicaid agency may object to some of the provisions set forth herein.

(1) DISTRIBUTION DURING *[FIRST NAME OF SPECIAL NEEDS BENEFICIARY]*'S LIFETIME

The Trustee shall hold, manage, invest and reinvest the Trust Estate, and shall pay or apply the income and principal of the Trust Estate in the following manner:

(a) During *[first name of special needs beneficiary]*'s lifetime, the Trustee shall pay from time to time such amounts from income and/or principal ("Trust Funds") for the satisfaction and benefit of *[first name of special needs beneficiary]*'s Special Needs (as hereinafter defined), as the Trustee shall determine in the Trustee's limited discretion, as hereinafter provided. Under no circumstances may the Trustee distribute income or principal directly to *[first name of special needs beneficiary]*. Any income of the Trust not distributed shall be added annually to the principal of the Trust.

(b) The Trustee is prohibited from expending any of the Trust income or principal for any property, services, benefits, or medical care otherwise available from any governmental source or from any insurance carrier required to cover *[first name of special needs beneficiary]*. The Trustee shall seek support and maintenance for *[first name of special needs beneficiary]* from all available public resources, including (but not limited to) the Supplemental Security Income Program (SSI), the Supplemental Income Program (SIP) of any applicable state, the Old Age Survivor and Disability Insurance Program (OASDI), the Medicare program, the Medicaid program and any additional, similar, or successor programs for which *[first name of special needs beneficiary]* is or may in the future be eligible.

(c) "Special Needs" is defined as *[first name of special needs beneficiary]*'s needs that are not covered and/or available by any local, state or federal government, or any private agencies, or any private insurance carriers covering *[first name of special needs beneficiary]*. These special needs include but are not limited to the following:

(i) procurement for *[first name of special needs beneficiary]* of more sophisticated medical, psychological and/or dental treatment, experimental or holistic rehabilitative therapies, private rehabilitative or educational training, and additional home care beyond the care available from any governmental program;

(ii) necessary or reasonable medical costs, drugs, treatment and dietary needs of *[first name of special needs beneficiary]* not available from or covered by Medicaid;

(iii) *[first name of special needs beneficiary]*'s maintenance and living expenses, such as therapy, laundry, diapers, hair cutting and styling, bedding, medical apparatus, supplies and food supplements;

(iv) an automobile and/or van for the benefit of *[first name of special needs beneficiary]*, and modification, improvement and maintenance of such vehicle(s);

(v) items by which *[first name of special needs beneficiary]*'s life will be enriched and made more enjoyable including, but not limited to, furniture, radios, televisions, audio, video and computer equipment, adaptive toys, electronic devices and/or equipment, and the maintenance of same;

(vi) recreational opportunities; trips; family visits; visits to friends and/or relatives; and any other tangible or intangible items which in the sole discretion of the Trustee would enrich or benefit *[first name of special needs beneficiary]*;

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(vii) payment of any premiums and deductible amounts for *[first name of special needs beneficiary]* on any health care insurance policies covering *[first name of special needs beneficiary]* or life insurance policies insuring *[first name of special needs beneficiary]* which are not covered by any governmental program and/or any premiums for life insurance on the lives of *[first name of special needs beneficiary]*'s parents or *[first name of special needs beneficiary]*, but only if this Trust is the beneficiary.

(viii) ongoing maintenance of *[first name of special needs beneficiary]*'s primary residence in the community;

(ix) Attorney fees and disbursements and court fees relating to (a) any Guardianship proceeding brought on behalf of *[first name of special needs beneficiary]*, as well as any appeal therefrom and (b) attorney's fees related to the preparation, funding and maintenance of this Trust, and the obtaining of judicial authorization to implement this Trust.

(x) *[first name of special needs beneficiary]*'s income tax obligation, if any.

(d) Under no circumstances shall the Trustee exercise discretion to utilize Trust Funds for the payment of items or services that would otherwise be borne by any publicly funded program including, but not limited to, Social Security Administration, Veterans Administration, Medicaid, and Supplemental Security Income or Public Assistance Programs. The Trustee shall have no authority to pay for items and services provided by any governmental program and neither *[first name of special needs beneficiary]* nor anyone on his/her behalf shall have the right to seek court directed invasion of Trust Funds pursuant to any provision of federal, state or local law.

(e) The provisions of Section 7-1.6 of the Estates, Powers and Trusts Law of the State of New York, or any successor statute thereto, or any similar statute in any other state or jurisdiction shall not be available to require any invasion of Trust Funds by the Trustee or any court.

(f) In the event the Trustee is requested by any department or agency of federal, state or local government to release principal or income of the Trust to or on behalf of *[first name of special needs beneficiary]* to pay for equipment, medication or services that any department, agency or organization is authorized to provide, or in the event the Trustee is requested by any department or agency administering such benefits to petition the court or an administrative agency for the release of Trust Funds for this purpose, the Trustee shall deny such request and is directed to obtain legal counsel to defend, as an expense of the Trust, any contest of this provision or any other legal challenge to the Trust of any nature. The Trustee shall have complete discretion with regard to the defense of any such claim, including the management of all litigation which may result.

[OPTIONAL]

(2) EARLY TERMINATION OF THE TRUST

(a) ***Beneficiary no longer disabled.*** The Trustee, in the Trustee's sole discretion, may terminate the Trust if *[first name of special needs beneficiary]* no longer meets the medical criteria as disabled under the Social Security Administration.

[AND/OR]:

(b) ***Beneficiary becomes ineligible for Supplemental Security Income and Medicaid.*** If *[first name of special needs beneficiary]*'s eligibility for either Supplemental Security Income and/or Medicaid is terminated, the Trustee, in the Trustee's sole discretion, may terminate the Trust.

[AND/OR]:

(c) ***Insufficient Assets.*** The Trustee, in the Trustee's sole discretion, may terminate the Trust during the lifetime of *[first name of special needs beneficiary]* if the Trust Estate has been reduced to the point that continued

administration is not financially justified.

(d) In the event of an Early Termination, the Trustee will dispose of the trust assets as follows:

(i) first, the Trustee may pay the following types of administrative expenses from the Trust prior to reimbursement of medical assistance to the State(s):

• Taxes due from the trust to the State(s) or Federal government due to the termination of the Trust; and

• Reasonable fees and administrative expenses associated with the termination of the Trust.

(ii) second, the Trustee shall pay the State(s), as primary assignee, all amounts remaining in the Trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s); and

(iii) third, the Trustee shall distribute the remaining Trust Estate to *[first name of special needs beneficiary]*.

Other than payment of those expenses listed in SSA POMS § SI 01120.199E.3, no entity other than the beneficiary may benefit from the Early Termination.

In the event that the mere existence of a provision giving the Trustee discretion to terminate the Trust and make distributions would result in a reduction or loss of *[first name of special needs beneficiary]*'s entitlement program benefits, regardless of whether the Trustee actually exercises the discretion, then such provision shall be null and void, *ab initio*.]

ARTICLE III.
DISPOSITION OF TRUST ESTATE UPON *[NAME OF SPECIAL NEEDS BENEFICIARY]*'S DEMISE

(1) DISTRIBUTION OF INCOME AND PRINCIPAL

(a) Upon *[first name of special needs beneficiary]*'s death, the Trustee shall promptly obtain an accounting from the State (or local Medicaid agency of the State) of Medicaid payments, if any, made on behalf of *[first name of special needs beneficiary]* during his or her lifetime.

Upon receipt of such accounting, the Trustees shall pay to the States (or local Medicaid agency of the States) from the Trust Estate the lesser of: (1) the total amount of Medicaid payments made on behalf of *[first name of special needs beneficiary]* to the extent required by law; or (2) the entire balance of the Trust Estate.

Notwithstanding, the following types of administrative expenses may be paid from the Trust prior to reimbursement of medical assistance to the State(s) as set forth above:

• Taxes due from the Trust to the State(s) or Federal government because of the death of the *[first name of special needs 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.

(b) Then, the Trustee, in the Trustee's sole and absolute discretion, may pay directly or indirectly from the Trust

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Estate, if any, (i) *[first name of special needs beneficiary]*'s funeral expenses, (ii) any and all death taxes imposed on *[first name of special needs beneficiary]*'s estate, (iii) court fees of a probate, administration or estate proceedings relating to *[first name of special needs beneficiary]*'s Estate, and (iv) any and all legal and accounting fees related to *[first name of special needs beneficiary]*'s estate. Any remaining Trust Estate shall be distributed by the Trustee to *[name of beneficiaries]*.

(c) *[First name of special needs beneficiary]* may appoint all or any portion of the principal and any accumulated and accrued income of this Trust to a class of beneficiaries limited to *[first name of special needs beneficiary]*'s immediate family, relatives by blood, marriage, or adoption or charities. No such appointment shall be made to *[first name of special needs beneficiary]*, *[first name of special needs beneficiary]*'s creditors, the *[first name of special needs beneficiary]*'s Estate or the creditors of *[first name of special needs beneficiary]*'s Estate. This limited power of appointment must be exercised by the *[first name of special needs beneficiary]*'s Will, which must be submitted for probate within ninety (90) days of *[first name of special needs beneficiary]*'s death, in the county of Creator's residence, specifically referring to this paragraph. In no event can this limited power of appointment be exercised by *[first name of special needs beneficiary]* through the creation of another power, whether general, non-general or limited. Upon *[first name of special needs beneficiary]*'s death, the Trustee shall pay and distribute the remaining Trust Estate in accordance with the exercise of the *[first name of special needs beneficiary]*'s limited power of appointment as provided for in this paragraph.

(d) In the event that *[first name of special needs beneficiary]* has not exercised the above limited power of appointment, then the Trustee shall pay and distribute the remaining Trust Estate to *[name of beneficiary]*.

ARTICLE IV.
PROVISIONS RELATING TO THE TRUST ESTATE

(1) SPENDTHRIFT PROVISION

No interest in the principal or income of this Trust shall be anticipated, assigned, or encumbered, or be subject to any creditor's claim or to legal process, prior to its actual receipt by *[first name of special needs beneficiary]*. Furthermore, it is the intent of the Trust as expressed herein, that because this Trust is to be conserved and maintained primarily for the supplemental needs of *[first name of special needs beneficiary]*, no part of the corpus hereof, nor principal or undistributed income, shall be subject to the claims of voluntary or involuntary creditors of *[first name of special needs beneficiary]*. No part of the Trust Estate shall be liable to *[first name of special needs beneficiary]*'s creditors during his life or after *[first name of special needs beneficiary]*'s death except as is otherwise provided in this Trust.

(2) POWERS RETAINED BY *[FIRST NAME OF SPECIAL NEEDS BENEFICIARY]*

[First name of special needs beneficiary] has the power to reacquire the Trust principal by substituting other property of an equivalent value.

ARTICLE V.
POWERS AND DUTIES OF TRUSTEE

(1) INVESTMENTS

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(a) The Trustees of the Trust established hereunder (including any Successor Trustees) shall have the authority to invest the trust funds in accordance with New York State EPTL 11-2.2 and 11-2.3, and the Trustees in addition are given such powers as are provided in the Fiduciary Powers Act (EPTL 11-1.1).

(2) ADDITIONAL POWERS

(a) In addition to any statutory authority existing regarding the powers of a trustee, any trustee serving hereunder is authorized to seek and retain the services of social workers, consultants or other individuals or agencies, public or private, skilled in the identification and/or provisions of services for disabled, handicapped or mentally ill individuals, the trustee is further authorized to seek and utilize or reject in his sole discretion the counsel and recommendations of any guardian, or physician of *[first name of special needs beneficiary]*. The examples cited herein are not intended to be a limitation of the trustee's authority.

The trustee shall not be liable to any present or future beneficiary for seeking or not seeking the counsel and recommendations of any expert, whether or not expressly named and authorized herein, or for accepting or rejecting all or part of the counsel and recommendations offered by any such expert. Nor shall the trustee be liable for failing to identify or inquire as to the existence of individuals or agencies, public or private that may be available to meet the needs of *[first name of special needs beneficiary]*.

ARTICLE VI.
PROVISIONS RELATING TO TRUSTEE

(1) TRUSTEE'S REPORTING RESPONSIBILITY

The Trustee shall report, at least every twelve months, to *[first name of special needs beneficiary]* and *[his/her]* legal representative, if any, and also to the next successor Trustee, at the most recent address then known to the Trustee. The Trustee's report shall advise of any change in *[first name of special needs beneficiary]*'s eligibility for public benefit programs and shall list all of the receipts, disbursements, and distributions occurring during the reporting period, along with a complete list of the assets held by the Trust. The account shall be deemed to have been delivered when it has been placed in the United States Mail addressed to that person at the person's last known address. A copy of the most recent bank account statement and a copy of the most recently filed trust tax return shall be attached to the accounting. In addition, the Trustee shall render an annual account to each and every other individual or entity entitled to receive such an account from the Trustee under New York State Law.

(2) NOTIFICATION OF NEW YORK STATE DEPARTMENT OF HEALTH

The Trustees shall promptly notify the New York State Department of Social Services of the happening of any one or more of the following events:

(i) Any transaction(s) resulting in the substantial depletion of the Trust principal, in the event that the Trust principal is valued at more than $100,000 dollars.

(ii) The death of *[first name of special needs beneficiary]*;

(iii) Any transaction(s) involving transfers from the Trust principal for less than fair market value, in advance of the making of any such transaction.

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(3) AVAILABILITY OF RECORDS

The records of the Trustee, along with all trust documentation, shall be available and open at all reasonable times for the inspection by *[first name of special needs beneficiary]*, and/or his/her legal representative, and by any trust remainderman, during regular business hours upon five calendar days prior written notice to the Trustee.

(4) COMPENSATION

The Trustee shall be entitled to receive the statutory compensation for services rendered hereunder as provided for under New York law and shall also be reimbursed for all reasonable expenses incurred in the management and protection of the Trust Estate and travel and lodging expenses to and from the Trustee's residence and *[first name of special needs beneficiary]*'s residence as frequently as the Trustee determines in the Trustee's sole discretion.

[EITHER:]
(5) BOND

No bond or other security shall be required of any Trustee or Successor Trustee of this Trust, unless ordered by a Court.

[OR:]
(5) JOINT CONTROL

The Trustees must deposit the Trust principal with a depository designated by a Court to be held under joint control. Funds can be withdrawn only with the permission of the Court, and the only investments authorized are those authorized by New York State Surrogate's Court Procedure Act Section 1708, which includes bank deposit investments, U.S. Savings Bonds, treasury bills, notes and bonds and municipal bonds.

ARTICLE VII.
TRUSTEES

(1) APPOINTMENT OF SUCCESSOR TRUSTEES

Upon the death, incapacity, resignation or discharge of the Trustee, *[name of successor trustee]* shall be the Successor Trustee.

(2) REMOVAL AND RESIGNATION OF TRUSTEES

(a) The Trustee shall have the right to resign as Trustee at any time by giving thirty (30) days written notice to that effect to the Successor Trustee hereunder. *[Name of successor trustee]*, as Successor Trustee hereunder, shall have the right to resign at any time, subject to the appointment by a court of competent jurisdiction of a successor to the Successor Trustee.

[OPTIONAL:]

(b) *[First name of special needs beneficiary] shall have the right to remove a Trustee and replace said Trustee with a Successor Trustee, subject to approval of a court of competent jurisdiction.]*

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(3) HOLD HARMLESS

No Trustee shall be liable or responsible for any loss or damage arising by reason of any act or omission to or by the Trustee or in connection with any activities carried out under this Trust, except for the Trustee's own gross negligence, willful neglect or unlawful act.

ARTICLE VIII.
COMMON DISASTER PROVISION

If any beneficiary including *[first name of special needs beneficiary]*'s spouse shall die simultaneously with *[first name of special needs beneficiary]* or in such circumstances that there is not sufficient evidence to determine the order of the deaths, then it shall be presumed that *[first name of special needs beneficiary]* survived such beneficiary and the provisions of this Trust shall be construed on that assumption, unless otherwise provided herein.

ARTICLE IX.
MISCELLANEOUS

(1) PARAGRAPH HEADINGS

The paragraph headings used are for convenience only and shall not be resorted to for interpretation of this Trust. Whenever the context so requires, the masculine shall include the feminine or neuter, and vice versa, and the singular shall include the plural and vice versa.

(2) VALIDITY OF PROVISIONS

If any portion of this Trust is held to be void or unenforceable, the balance of this Trust shall nevertheless be carried into effect.

IN WITNESS WHEREOF, *[NAME OF CREATOR]* and *[name of trustee]* have signed and sealed this Trust Agreement.

_____
[Name of creator]
, Creator
By:
[Name of signatory]
[Title of signatory]

_____
[Name of trustee]
, Trustee
[Acknowledgements]
[EITHER:]
EXHIBIT A ORDER SETTLING MEDICAL MALPRACTICE ACTION *[OR:]*

EXHIBIT A ORDER SETTLING PERSONAL INJURY ACTION *[OR:]*

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EXHIBIT A DESCRIPTION OF ASSETS CONTRIBUTED TO THE TRUST

Notes

The Trust must be established by a parent, grandparent, or legal guardian of an individual who is under age 65 and disabled, or by a court for such individual.

Under the heading Special Needs Trust, Option One, use this provision when the Trust is being established by a court order.

Under the heading Special Needs Trust, Option Three, use this provision when the Trust is being established in the context of an S.C.P.A. Article 17-A Guardianship proceeding.

Regarding Article I. (1), *see infra* Article I § 21:33 for alternate language as to situs.

Regarding Article I. (2), it is not necessary to refer to the Trust as a Special Needs Trust as long as the Trust conforms to the Medicaid legislation.

Regarding Article I. (5), this would enable the enlargement of trust principal to better meet the beneficiary's needs—but additions to the Trust will increase the fund available for pay back to New York State.

Regarding Article II, NOTE, *see infra* § 21:35 for an alternate provision.

Regarding Article II. (1)(c)(iii), this provision (iii) and provision (viii) below could affect Supplemental Security Income (SSI) benefits. Since SSI benefits are paid for maintenance and living expenses, currently the Social Security Administration is approving trusts with such language. *See supra* § 21:16.

Regarding Article II. (1)(c)(vii), this provision can affect the level of payment from Supplemental Security Income (SSI).

Regarding Article III. (1)(a), *see supra* § 21:16 Special Needs Trust.

Regarding Article III. (1)(b), this provision has been changed from the Morales decision to comply with SSI requirements for approval.

Regarding Article III. (1)(d), this provision will avoid gift taxation under Internal Revenue Code § 2042 due to the limited power of appointment held by the beneficiary ("[first name of special needs beneficiary]").

Regarding Article IV. (1), this provision has been approved by some of the courts but was not permitted under the Goldblatt decision. (Petition of Goldblatt, 162 Misc. 2d 888, 618 N.Y.S.2d 959 (Sur. Ct. 1994)).

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Regarding Article IV. (2), this provision will qualify the Trust as a Grantor Trust for income tax purposes.

Regarding Article VI. (5), 18 NYCRR § 360-4.5(b)(5)(iii)(e) requires the Trustee to provide the social services district with proof of bonding if the assets of the trust at any time equal or exceed $1 million, unless the requirement has been waived by a court of competent jurisdiction, and to provide proof of bonding if the assets of the trust are less than $1 million, if required by a court of competent jurisdiction.

Regarding Article VI. (6), this provision can be an option as an alternative to bonding. Petition of Goldblatt, 162 Misc. 2d 888, 618 N.Y.S.2d 959 (Sur. Ct. 1994).

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N.Y. Elder Law Practice § 21:35 (2024 ed.)

New York Elder Law and Special Needs Practice | May 2024 Update
Vincent J. Russo, Marvin Rachlin

Chapter 21. Living Trusts

§ 21:35. Form: Variation of Special Needs Trust

Type of Trust: Special Needs Trust for the benefit of an individual under age 65 who is disabled. This form of Trust is funded with the settlement proceeds of a personal injury or malpractice claim.

Medicaid Note: This trust is being established for asset protection in the context of planning. This trust follows the *Morales* type of trust. This type of trust has been followed by certain courts (particularly in guardianship proceedings) and by certain local Medicaid agencies. This form of trust should be utilized in those jurisdictions.

Tax Note: The Trust contains provisions which may adversely affect the Creator, Trustee or beneficiaries as to estate, gift and income taxation.

DRAFTING NOTES: This form is designed for the guidance of the attorney who should analyze each case individually before drafting the trust.

[NAME OF PERSON WITH DISABILITIES] **SUPPLEMENTAL NEEDS TRUST**

This TRUST AGREEMENT made this *[ordinal number of day]* day of *[name of month]*, *[number of year]*, between ***[name of creator]***, as GUARDIAN of the property of ***[name of person with disabilities]***, residing at *[address of guardian]*, *[name of state]*, *[name of creator]*, as "Creator," and *[name of trustee]*, as "Trustee," is established pursuant to an Order of the Supreme Court of the State of New York, ***[name of county]*** County.

ARTICLE I.
GENERAL PROVISIONS

(1) LAWS GOVERNING

This Trust shall be interpreted and the administration of the Trust shall be governed by the laws of the State of New York; provided, however, that Federal law shall govern any matter alluded to herein which shall relate to or involve government entitlements such as Supplemental Security Income ("SSI"), Medicaid, and/or other Federal benefit programs.

With the Court's approval, the situs and governing law of this Trust may be changed by the Trustee.

(2) NAME OF TRUST

This Trust shall be known as the "***[NAME OF PERSON WITH DISABILITIES]*** SUPPLEMENTAL NEEDS TRUST."

(3) DECLARATION OF IRREVOCABILITY

The Trust shall be irrevocable and may not at any time be altered, amended or revoked without Court approval.

(4) PURPOSE

The "Beneficiary" of the Trust is ***[name of person with disabilities]*** (hereinafter sometimes referred to as "***[first name of person with disabilities]***"). The purpose of the Trust is that the Trust's assets be used to supplement, not supplant, impair or diminish any benefits or assistance of any Federal, State, County, City, or other governmental entity for which ***[first name of person with disabilities]*** may otherwise be eligible or which ***[first name of person with disabilities]*** may be receiving. The Trust is intended to conform with New York State EPTL 7-1.12, New York Social Services Law § 366 and 42 U.S.C.A. § 1396p.

(5) ADDITIONS TO PRINCIPAL

With the Trustee's consent, any person may, at any time, from time to time, by Court order, assignment, gift, transfer, deed or will, provide income or add to the principal of the Trust created herein, and any property so added shall be held, administered, and distributed under the terms of this Trust. The Trustee shall execute documents necessary to accept additional contributions to the Trust and shall designate the additions on an amended Schedule A of this Trust.

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ARTICLE II.
DISTRIBUTION OF INCOME AND PRINCIPAL DURING *[NAME OF PERSON WITH DISABILITIES]*'S LIFETIME

(1) ADMINISTRATION OF TRUST DURING *[NAME OF PERSON WITH DISABILITIES]*'S LIFETIME

(a) The property shall be held in trust for ***[first name of person with disabilities]***, and the Trustee shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of ***[first name of person with disabilities]***, so much of the income and principal (even to the extent of the whole) as the Trustee deems advisable in the Trustee's sole and absolute discretion subject to the limitations set forth below and the Order of the Supreme Court of the State of New York, County of ***[name of county]*** dated *[ordinal number of day]* day of *[name of month]*, *[number of year]* (attached hereto as Exhibit "A"). The Trustee shall add the balance of net income not paid or applied to the principal of the Trust.

(b) Consistent with the Trust's purpose, before expending any amounts from the net income and/or principal of this Trust, the Trustee shall consider the availability of all benefits from government or private assistance programs for which ***[first name of person with disabilities]*** may be eligible. The Trustee, where appropriate and to the extent possible, shall endeavor to maximize the collection and facilitate the distribution of these benefits for ***[first name of person with disabilities]***'s benefit.

(c) None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish any governmental benefits or assistance for which ***[first name of person with disabilities]*** may be eligible or which ***[first name of person with disabilities]*** may be receiving.

(d) ***[first name of person with disabilities]*** does not have the power to assign, encumber, direct, distribute, or authorize distributions from this Trust.

(e) Notwithstanding the above provisions, the Trustee may make distributions to meet ***[first name of person with disabilities]***'s need for food, clothing, shelter, health care, or other personal needs, even if those distributions will impair or diminish ***[first name of person with disabilities]***'s receipt or eligibility for government benefits or assistance only if the Trustee determines that the distributions will better meet ***[first name of person with disabilities]***'s needs, and it is in ***[first name of person with disabilities]***'s best interests, notwithstanding the consequent effect on ***[first name of person with disabilities]***'s eligibility for, or receipt of benefits.

However, if the mere existence of this authority to make distributions will result in a reduction or loss of ***[first name of person with disabilities]***'s entitlement program benefits, regardless of whether the Trustee actually exercises this discretion, the preceding paragraph shall be null and void and the Trustee's authority to make these distributions shall terminate and the Trustee's authority to make distributions shall be limited to purchasing supplemental goods and services in a manner that will not adversely affect ***[first name of person with disabilities]***'s government benefits. Furthermore, the Trustee's discretion shall be limited to an amount on a monthly basis which will allow ***[first name of person with disabilities]*** to continue to qualify for Supplemental Security Income ("SSI") benefits.

(f) EPTL § 7-1.6 or any successor statute, or any similar statute of any jurisdiction, shall not be applied by any court having jurisdiction of an *inter vivos* or testamentary trust to compel, against the Trustee's discretion, the

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payment or application of the trust principal to or for the benefit of ***[first name of person with disabilities]***, or any beneficiary for any reason whatsoever.

ARTICLE III.
DISPOSITION OF TRUST ESTATE UPON *[NAME OF PERSON WITH DISABILITIES]*'S DEMISE

(1) DISPOSITION OF TRUST ON *[NAME OF PERSON WITH DISABILITIES]*'S DEATH

The Trust shall terminate upon ***[first name of person with disabilities]***'s death and the Trustee shall distribute any principal and accumulated interest that then remains in the Trust as follows:

(a) The New York State Department of Health, ***[name of county]*** County Department of Social Services, or other appropriate entity providing medical assistance within the State of New York shall be reimbursed from the Trust Estate, all amounts remaining in the Trust up to an amount equal to the total medical assistance provided to ***[first name of person with disabilities]*** during his/her lifetime, as consistent with Federal and State Law. If ***[first name of person with disabilities]*** received medical assistance in more than one State, then the amount distributed to each State shall be based upon each State's proportionate share of the total medical assistance benefits paid by all States on ***[first name of person with disabilities]***'s behalf subsequent to the funding of this trust.

(b) The Trustee, in the Trustee's sole and absolute discretion, may pay directly or indirectly from the Trust Estate: (i) court fees and administration or estate proceedings relating to this Trust, and (ii) any and all reasonable legal and accounting fees related to the Trust, subject to Court approval.

(c) All remaining principal and accumulated income shall be paid to ***[first name of person with disabilities]***'s heirs at law under the laws of the State of New York.

ARTICLE IV.
POWERS AND DUTIES OF TRUSTEES

In addition to any powers which may be conferred upon the Trustee under the law of the State of New York in effect during the life of this Trust, the Trustee shall have all those discretionary powers mentioned in EPTL §§ 11-1.1 et seq., or any successor statute or statutes governing the discretion of a Trustee, so as to confer upon the Trustee the broadest possible powers available for the management of the Trust assets. In the event that the Trustee wishes to exercise powers beyond the express and implied powers of EPTL Article 11, the Trustee shall seek and must obtain judicial approval.

ARTICLE V.
PROVISIONS RELATING TO TRUSTEE

(1) NOTIFICATIONS TO SOCIAL SERVICES DISTRICT

The Trustee shall provide the required notification to the Social Services District in accordance with the requirements of Section 360-4.5 of Title 18 of the Official Regulations of the State Department of Social

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Services, and any other applicable statutes or regulations, as they may be amended. These regulations currently require notification of the creation or funding of the trust; notification of ***[first name of person with disabilities]***'s death; any transactions involving transfers from trust principal for less than fair market value; and in the case of trusts exceeding $100,000, notification in advance of transactions that substantially deplete the trust principal (as defined in that section).

ARTICLE VI.
APPOINTMENT OF TRUSTEE

(1) APPOINTMENTS

(a) ***[Name of trustee]*** is appointed Trustee of this Trust.

(b) If, for any reason, ***[name of trustee]*** is unable to or unwilling to serve as Trustee, then ***[name of trustee successor]*** shall serve as Successor Trustee, subject to the approval of the Supreme Court, ***[name of county]*** County.

(c) Appointment of a Successor Trustee not named in this Trust shall be upon application to the Court.

(2) CONSENT OF TRUSTEE

A Trustee shall file with the Clerk of the Court, ***[name of county]*** County, a "Consent to Act" as Trustee, Oath and Designation, duly acknowledged.

(3) BOND

The Trustee shall be required to execute and file a bond and comply with all applicable law, as determined by the Supreme Court ***[name of county]*** County.

(4) RESIGNATION

A Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) the Supreme Court, ***[name of county]*** County; (ii) the Guardian of ***[first name of person with disabilities]***, if any; and (iii) ***[first name of person with disabilities]***. The Trustee's resignation is subject to approval of the Supreme Court, ***[name of county]*** County.

(5) DISCHARGE AND FINAL ACCOUNTING OF TRUSTEE

No Trustee shall be discharged and released from office and bond, except upon filing a Final Accounting in the form and manner required by § 81.33 and obtaining judicial approval of same.

(6) ANNUAL ACCOUNTING

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The Trustee shall file during the month of May in the Office of the Clerk of the County of ***[name of county]***, an annual report in the form and manner required by Mental Hygiene Law (MHL) § 81.31. Said annual accountings shall be examined in the manner required by MHL § 81.32.

(7) CONTINUING JURISDICTION

The Court shall have continuing jurisdiction over the performance of the duties of the Trustee, the interpretation, administration, and operation of this Trust, the appointment of a successor Trustee and all other related matters.

(8) COMPENSATION OF TRUSTEE

A Trustee shall be entitled to such compensation as may be allowable under the laws of the State of New York. In addition, the Trustee shall be entitled to be reimbursed for reasonable expenses incurred by the Trustee in the administration of this Trust.

ARTICLE VII.
MISCELLANEOUS

(1) BINDING EFFECT

This Trust shall be binding upon the estate, executors, administrators and assigns of the Creator and any individual Trustee, and upon any Successor Trustee.

(2) SAVINGS CLAUSE

If it is determined that any provision hereof shall in any way violate any applicable law, such determination shall not impair the validity of the remaining provisions of the Trust.

(3) USAGE

In construing this Trust, feminine or neuter pronouns shall be substituted for those of the masculine form and vice versa, and the plural for the singular and vice versa in any case in which the context may require.

(4) HEADINGS

Any headings or captions in the Trust are for reference only, and shall not expand, limit, change, or affect the meaning of any provision of the Trust.

(5) SPENDTHRIFT

To the extent permitted by law, no interest of any beneficiary in the income or principal of any trust shall be

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subject to pledge, assignment, sale or transfer in any manner, nor shall any beneficiary have power in any manner to anticipate, charge or encumber his or her interest, nor shall the interest of any beneficiary be liable while in the possession of the Trustee for the debts, contracts, liabilities, engagements or torts of the beneficiary; provided, however, that this exemption shall not apply in any respect to payments made on behalf of ***[first name of person with disabilities]*** for medical assistance provided by the New York State Department of Health, ***[name of county]*** County Department of Social Services, or any entity providing medical assistance in the State of New York.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the day and year first above written.

Dated: *[date of execution]*	Creator: *[Name of creator]*
	[Name of creator] as GUARDIAN of the Property of ***[Name of person with disabilities]***
Dated: *[date of execution]*	TRUSTEE: *[name of trustee]*
	[Name of trustee]

[Acknowledgements]
Schedule "A"

[Text dollar amount of money] ($*[dollar amount of money]*) DOLLARS.

Receipt of the above listed items is hereby acknowledged by:

_____
[Name of trustee], Trustee
DATED:
[date of acknowledgement]

_____
WITNESS
Exhibit "A"
Copy of Order and Judgment

Notes

See In Matter of Application of Morales, 1995 WL 469523 (N.Y. Sup 1995).

This trust is referred to as a "Supplemental Needs Trust" which is the same type of trust referred to as a "Special Needs Trust" in § 21:33 *supra*. Certain courts prefer to call this type of trust a "Supplemental Needs Trust."

Regarding Article VI. (2), this provision applies if the Trust being established is within an Article 81 Guardianship.

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Regarding Article VI. (3), this provision applies if the Trust being established is within an Article 81 Guardianship.

Regarding Article VI. (4), this provision applies if the Trust being established is within an Article 81 Guardianship.

Regarding Article VI. (5), this provision applies if the Trust being established is within an Article 81 Guardianship.

Regarding Article VI. (6), this provision applies if the Trust being established is within an Article 81 Guardianship.

Regarding Article VI. (7), this provision applies if the Trust being established is within an Article 81 Guardianship.

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Statutory Authority

a. 26 U.S.C.A. § 104 – Compensation for injuries or sickness
b. 42 U.S.C.A. § 1382b – Resources
c. 42 U.S.C.A. § 1395y – Exclusions from coverage and Medicare as secondary payer
d. 42 U.S.C.A. § 1396p – Liens, adjustments and recoveries, and transfers of assets
e. 21st Century Cures Act (H.R.34, 114th Congress (2015 to 2016)). Section 5007 of the Act, titled “Fairness in Medicaid Supplemental Needs Trusts.” (PL 114-255, December 13, 2016, 130 Stat1033)
f. NY MHL § 81.21

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle A. Income Taxes (Refs & Annos)
Chapter 1. Normal Taxes and Surtaxes (Refs & Annos)
Subchapter B. Computation of Taxable Income
Part III. Items Specifically Excluded from Gross Income (Refs & Annos)

26 U.S.C.A. § 104, I.R.C. § 104

§ 104. Compensation for injuries or sickness

Effective: March 23, 2018

Currentness

(a) In general.--Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include--

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;

(3) amounts received through accident or health insurance (or through an arrangement having the effect of accident or health insurance) for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer);

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980;

(5) amounts received by an individual as disability income attributable to injuries incurred as a direct result of a terroristic or military action (as defined in section 692(c)(2)); and

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(6) amounts received pursuant to--

(A) section 1201 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796);[1] or

(B) a program established under the laws of any State which provides monetary compensation for surviving dependents of a public safety officer who has died as the direct and proximate result of a personal injury sustained in the line of duty,

except that subparagraph (B) shall not apply to any amounts that would have been payable if death of the public safety officer had occurred other than as the direct and proximate result of a personal injury sustained in the line of duty.

For purposes of paragraph (3), in the case of an individual who is, or has been, an employee within the meaning of section 401(c)(1) (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) which is exempt from tax under section 501(a), or under a plan described in section 403(a), shall, to the extent allowed as deductions under section 404, be treated as contributions by the employer which were not includible in the gross income of the employee. For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care (described in subparagraph (A) or (B) of section 213(d)(1)) attributable to emotional distress.

(b) Termination of application of subsection (a)(4) in certain cases.--

(1) In general.--Subsection (a)(4) shall not apply in the case of any individual who is not described in paragraph (2).

(2) Individuals to whom subsection (a)(4) continues to apply.--An individual is described in this paragraph if--

(A) on or before September 24, 1975, he was entitled to receive any amount described in subsection (a)(4),

(B) on September 24, 1975, he was a member of any organization (or reserve component thereof) referred to in subsection (a)(4) or under a binding written commitment to become such a member,

(C) he receives an amount described in subsection (a)(4) by reason of a combat-related injury, or

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(D) on application therefor, he would be entitled to receive disability compensation from the Department of Veterans Affairs.

(3) Special rules for combat-related injuries.--For purposes of this subsection, the term "combat-related injury" means personal injury or sickness--

(A) which is incurred--

(i) as a direct result of armed conflict,

(ii) while engaged in extrahazardous service, or

(iii) under conditions simulating war; or

(B) which is caused by an instrumentality of war.

In the case of an individual who is not described in subparagraph (A) or (B) of paragraph (2), except as provided in paragraph (4), the only amounts taken into account under subsection (a)(4) shall be the amounts which he receives by reason of a combat-related injury.

(4) Amount excluded to be not less than veterans' disability compensation.--In the case of any individual described in paragraph (2), the amounts excludable under subsection (a)(4) for any period with respect to any individual shall not be less than the maximum amount which such individual, on application therefor, would be entitled to receive as disability compensation from the Veterans' Administration.

(c) Application of prior law in certain cases.--The phrase "(other than punitive damages)" shall not apply to punitive damages awarded in a civil action--

(1) which is a wrongful death action, and

(2) with respect to which applicable State law (as in effect on September 13, 1995 and without regard to any modification after such date) provides, or has been construed to provide by a court of competent jurisdiction pursuant to a decision issued on or before September 13, 1995, that only punitive damages may be awarded

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in such an action.

This subsection shall cease to apply to any civil action filed on or after the first date on which the applicable State law ceases to provide (or is no longer construed to provide) the treatment described in paragraph (2).

(d) Cross references.--

(1) For exclusion from employee's gross income of employer contributions to accident and health plans, see section 106.

(2) For exclusion of part of disability retirement pay from the application of subsection (a)(4) of this section, see section 1403 of title 10, United States Code (relating to career compensation laws).

CREDIT(S)

(Aug. 16, 1954, c. 736, 68A Stat. 30; Pub.L. 86-723, § 51, Sept. 8, 1960, 74 Stat. 847; Pub.L. 87-792, § 7(d), Oct. 10, 1962, 76 Stat. 829; Pub.L. 94-455, Title V, § 505(b), (e)(1), Title XIX, § 1901(a)(18), Oct. 4, 1976, 90 Stat. 1567, 1568, 1766; Pub.L. 96-465, Title II, § 2206(e)(1), Oct. 17, 1980, 94 Stat. 2162; Pub.L. 97-473, Title I, § 101(a), Jan. 14, 1983, 96 Stat. 2605; Pub.L. 101-239, Title VII, § 7641(a), Dec. 19, 1989, 103 Stat. 2379; Pub.L. 104-188, Title I, § 1605(a) to (c), Aug. 20, 1996, 110 Stat. 1838; Pub.L. 104-191, Title III, § 311(b), Aug. 21, 1996, 110 Stat. 2053; Pub.L. 107-134, Title I, § 113(a), Jan. 23, 2002, 115 Stat. 2435; Pub.L. 114-14, § 2, May 22, 2015, 129 Stat. 198; Pub.L. 115-141, Div. U, Title IV, § 401(a)(2)(A), Mar. 23, 2018, 132 Stat. 1184.)

Footnotes

[1] Reclassified as 34 U.S.C.A. § 10281.

26 U.S.C.A. § 104, 26 USCA § 104
Current through P.L. 118-82. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation
United States Code Annotated
Title 42. The Public Health and Welfare

42 U.S.C.A. § 1382b

§ 1382b. Resources

Currentness

(a) Exclusions from resources

In determining the resources of an individual (and his eligible spouse, if any) there shall be excluded--

(1) the home (including the land that appertains thereto);

(2)(A) household goods, personal effects, and an automobile, to the extent that their total value does not exceed such amount as the Commissioner of Social Security determines to be reasonable; and

(B) the value of any burial space or agreement (including any interest accumulated thereon) representing the purchase of a burial space (subject to such limits as to size or value as the Commissioner of Social Security may by regulation prescribe) held for the purpose of providing a place for the burial of the individual, his spouse, or any other member of his immediate family;

(3) other property which is so essential to the means of self-support of such individual (and such spouse) as to warrant its exclusion, as determined in accordance with and subject to limitations prescribed by the Commissioner of Social Security, except that the Commissioner of Social Security shall not establish a limitation on property (including the tools of a tradesperson and the machinery and livestock of a farmer) that is used in a trade or business or by such individual as an employee;

(4) such resources of an individual who is blind or disabled and who has a plan for achieving self-support approved by the Commissioner of Social Security, as may be necessary for the fulfillment of such plan;

(5) in the case of Natives of Alaska, shares of stock held in a Regional or a Village Corporation, during the period of twenty years in which such stock is inalienable, as provided in section 1606(h) and section 1607(c)

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of Title 43;

(6) assistance referred to in section 1382a(b)(11) of this title for the 9-month period beginning on the date such funds are received (or for such longer period as the Commissioner of Social Security shall by regulations prescribe in cases where good cause is shown by the individual concerned for extending such period); and, for purposes of this paragraph, the term "assistance" includes interest thereon which is excluded from income under section 1382a(b)(12) of this title;

(7) any amount received from the United States which is attributable to underpayments of benefits due for one or more prior months, under this subchapter or subchapter II, to such individual (or spouse) or to any other person whose income is deemed to be included in such individual's (or spouse's) income for purposes of this subchapter; but the application of this paragraph in the case of any such individual (and eligible spouse if any), with respect to any amount so received from the United States, shall be limited to the first 9 months following the month in which such amount is received, and written notice of this limitation shall be given to the recipient concurrently with the payment of such amount;

(8) the value of assistance referred to in section 1382a(b)(14) of this title, paid with respect to the dwelling unit occupied by such individual (or such individual and spouse);

(9) for the 9-month period beginning after the month in which received, any amount received by such individual (or such spouse) from a fund established by a State to aid victims of crime, to the extent that such individual (or such spouse) demonstrates that such amount was paid as compensation for expenses incurred or losses suffered as a result of a crime;

(10) for the 9-month period beginning after the month in which received, relocation assistance provided by a State or local government to such individual (or such spouse), comparable to assistance provided under title II of the Uniform Relocation Assistance and Real Property Acquisitions[l] Policies Act of 1970 which is subject to the treatment required by section 216 of such Act;

(11) for the 9-month period beginning after the month in which received--

(A) notwithstanding section 203 of the Economic Growth and Tax Relief Reconciliation Act of 2001, any refund of Federal income taxes made to such individual (or such spouse) under section 24 of the Internal Revenue Code of 1986 (relating to child tax credit) by reason of subsection (d) thereof; and

(B) any refund of Federal income taxes made to such individual (or such spouse) by reason of section 32 of the Internal Revenue Code of 1986 (relating to earned income tax credit), and any payment made to such individual (or such spouse) by an employer under section 3507 of such Code (relating to advance payment of earned income credit);

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(12) any account, including accrued interest or other earnings thereon, established and maintained in accordance with section 1383(a)(2)(F) of this title;

(13) any gift to, or for the benefit of, an individual who has not attained 18 years of age and who has a life-threatening condition, from an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 which is exempt from taxation under section 501(a) of such Code--

(A) in the case of an in-kind gift, if the gift is not converted to cash; or

(B) in the case of a cash gift, only to the extent that the total amount excluded from the resources of the individual pursuant to this paragraph in the calendar year in which the gift is made does not exceed $2,000;

(14) for the 9-month period beginning after the month in which received, any amount received by such individual (or spouse) or any other person whose income is deemed to be included in such individual's (or spouse's) income for purposes of this subchapter as restitution for benefits under this subchapter, subchapter II, or subchapter VIII that a representative payee of such individual (or spouse) or such other person under section 405(j), 1007, or 1383(a)(2) of this title has misused;

(15) for the 9-month period beginning after the month in which received, any grant, scholarship, fellowship, or gift (or portion of a gift) used to pay the cost of tuition and fees at any educational (including technical or vocational education) institution;

(16) for the month of receipt and every month thereafter, any annuity paid by a State to the individual (or such spouse) on the basis of the individual's being a veteran (as defined in section 101 of Title 38), and blind, disabled, or aged; and

(17) any amount received by such individual (or such spouse) which is excluded from income under section 1382a(b)(26) of this title (relating to compensation for participation in a clinical trial involving research and testing of treatments for a rare disease or condition).

In determining the resources of an individual (or eligible spouse) an insurance policy shall be taken into account only to the extent of its cash surrender value; except that if the total face value of all life insurance policies on any person is $1,500 or less, no part of the value of any such policy shall be taken into account.

(b) Disposition of resources; grounds for exemption from disposition requirements

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(1) The Commissioner of Social Security shall prescribe the period or periods of time within which, and the manner in which, various kinds of property must be disposed of in order not to be included in determining an individual's eligibility for benefits. Any portion of the individual's benefits paid for any such period shall be conditioned upon such disposal; and any benefits so paid shall (at the time of the disposal) be considered overpayments to the extent they would not have been paid had the disposal occurred at the beginning of the period for which such benefits were paid.

(2) Notwithstanding the provisions of paragraph (1), the Commissioner of Social Security shall not require the disposition of any real property for so long as it cannot be sold because (A) it is jointly owned (and its sale would cause undue hardship, due to loss of housing, for the other owner or owners), (B) its sale is barred by a legal impediment, or (C) as determined under regulations issued by the Commissioner of Social Security, the owner's reasonable efforts to sell it have been unsuccessful.

(c) Disposal of resources for less than fair market value

(1)(A)(i) If an individual or the spouse of an individual disposes of resources for less than fair market value on or after the look-back date described in clause (ii)(I), the individual is ineligible for benefits under this subchapter for months during the period beginning on the date described in clause (iii) and equal to the number of months calculated as provided in clause (iv).

(ii)(I) The look-back date described in this subclause is a date that is 36 months before the date described in subclause (II).

(II) The date described in this subclause is the date on which the individual applies for benefits under this subchapter or, if later, the date on which the individual (or the spouse of the individual) disposes of resources for less than fair market value.

(iii) The date described in this clause is the first day of the first month in or after which resources were disposed of for less than fair market value and which does not occur in any other period of ineligibility under this paragraph.

(iv) The number of months calculated under this clause shall be equal to--

(I) the total, cumulative uncompensated value of all resources so disposed of by the individual (or the spouse of the individual) on or after the look-back date described in clause (ii)(I); divided by

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(II) the amount of the maximum monthly benefit payable under section 1382(b) of this title, plus the amount (if any) of the maximum State supplementary payment corresponding to the State's payment level applicable to the individual's living arrangement and eligibility category that would otherwise be payable to the individual by the Commissioner pursuant to an agreement under section 1382e(a) of this title or section 212(b) of Public Law 93-66, for the month in which occurs the date described in clause (ii)(II),

rounded, in the case of any fraction, to the nearest whole number, but shall not in any case exceed 36 months.

(B)(i) Notwithstanding subparagraph (A), this subsection shall not apply to a transfer of a resource to a trust if the portion of the trust attributable to the resource is considered a resource available to the individual pursuant to subsection (e)(3) (or would be so considered but for the application of subsection (e)(4)).

(ii) In the case of a trust established by an individual or an individual's spouse (within the meaning of subsection (e)), if from such portion of the trust, if any, that is considered a resource available to the individual pursuant to subsection (e)(3) (or would be so considered but for the application of subsection (e)(4)) or the residue of the portion on the termination of the trust--

(I) there is made a payment other than to or for the benefit of the individual; or

(II) no payment could under any circumstance be made to the individual,

then, for purposes of this subsection, the payment described in clause (I) or the foreclosure of payment described in clause (II) shall be considered a transfer of resources by the individual or the individual's spouse as of the date of the payment or foreclosure, as the case may be.

(C) An individual shall not be ineligible for benefits under this subchapter by reason of the application of this paragraph to a disposal of resources by the individual or the spouse of the individual, to the extent that--

(i) the resources are a home and title to the home was transferred to--

(I) the spouse of the transferor;

(II) a child of the transferor who has not attained 21 years of age, or is blind or disabled;

(III) a sibling of the transferor who has an equity interest in such home and who was residing in the

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transferor's home for a period of at least 1 year immediately before the date the transferor becomes an institutionalized individual; or

(IV) a son or daughter of the transferor (other than a child described in subclause (II)) who was residing in the transferor's home for a period of at least 2 years immediately before the date the transferor becomes an institutionalized individual, and who provided care to the transferor which permitted the transferor to reside at home rather than in such an institution or facility;

(ii) the resources--

(I) were transferred to the transferor's spouse or to another for the sole benefit of the transferor's spouse;

(II) were transferred from the transferor's spouse to another for the sole benefit of the transferor's spouse;

(III) were transferred to, or to a trust (including a trust described in section 1396p(d)(4) of this title) established solely for the benefit of, the transferor's child who is blind or disabled; or

(IV) were transferred to a trust (including a trust described in section 1396p(d)(4) of this title) established solely for the benefit of an individual who has not attained 65 years of age and who is disabled;

(iii) a satisfactory showing is made to the Commissioner of Social Security (in accordance with regulations promulgated by the Commissioner) that--

(I) the individual who disposed of the resources intended to dispose of the resources either at fair market value, or for other valuable consideration;

(II) the resources were transferred exclusively for a purpose other than to qualify for benefits under this subchapter; or

(III) all resources transferred for less than fair market value have been returned to the transferor; or

(iv) the Commissioner determines, under procedures established by the Commissioner, that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Commissioner.

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(D) For purposes of this subsection, in the case of a resource held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the resource (or the affected portion of such resource) shall be considered to be disposed of by the individual when any action is taken, either by the individual or by any other person, that reduces or eliminates the individual's ownership or control of such resource.

(E) In the case of a transfer by the spouse of an individual that results in a period of ineligibility for the individual under this subsection, the Commissioner shall apportion the period (or any portion of the period) among the individual and the individual's spouse if the spouse becomes eligible for benefits under this subchapter.

(F) For purposes of this paragraph--

(i) the term "benefits under this subchapter" includes payments of the type described in section 1382e(a) of this title and of the type described in section 212(b) of Public Law 93-66;

(ii) the term "institutionalized individual" has the meaning given such term in section 1396p(e)(3) of this title; and

(iii) the term "trust" has the meaning given such term in subsection (e)(6)(A) of this section.

(2)(A) At the time an individual (and the individual's eligible spouse, if any) applies for benefits under this subchapter, and at the time the eligibility of an individual (and such spouse, if any) for such benefits is redetermined, the Commissioner of Social Security shall--

(i) inform such individual of the provisions of paragraph (1) and section 1396p(c) of this title providing for a period of ineligibility for benefits under this subchapter and subchapter XIX, respectively, for individuals who make certain dispositions of resources for less than fair market value, and inform such individual that information obtained pursuant to clause (ii) will be made available to the State agency administering a State plan under subchapter XIX (as provided in subparagraph (B)); and

(ii) obtain from such individual information which may be used in determining whether or not a period of ineligibility for such benefits would be required by reason of paragraph (1) or section 1396p(c) of this title.

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(B) The Commissioner of Social Security shall make the information obtained under subparagraph (A)(ii) available, on request, to any State agency administering a State plan approved under subchapter XIX.

(d) Funds set aside for burial expenses

(1) In determining the resources of an individual, there shall be excluded an amount, not in excess of $1,500 each with respect to such individual and his spouse (if any), that is separately identifiable and has been set aside to meet the burial and related expenses of such individual or spouse.

(2) The amount of $1,500, referred to in paragraph (1), with respect to an individual shall be reduced by an amount equal to (A) the total face value of all insurance policies on his life which are owned by him or his spouse and the cash surrender value of which has been excluded in determining the resources of such individual or of such individual and his spouse, and (B) the total of any amounts in an irrevocable trust (or other irrevocable arrangement) available to meet the burial and related expenses of such individual or his spouse.

(3) If the Commissioner of Social Security finds that any part of the amount excluded under paragraph (1) was used for purposes other than those for which it was set aside in cases where the inclusion of any portion of the amount would cause the resources of such individual, or of such individual and spouse, to exceed the limits specified in paragraph (1) or (2) (whichever may be applicable) of section 1382(a) of this title, the Commissioner shall reduce any future benefits payable to the eligible individual (or to such individual and his spouse) by an amount equal to such part.

(4) The Commissioner of Social Security may provide by regulations that whenever an amount set aside to meet burial and related expenses is excluded under paragraph (1) in determining the resources of an individual, any interest earned or accrued on such amount (and left to accumulate), and any appreciation in the value of prepaid burial arrangements for which such amount was set aside, shall also be excluded (to such extent and subject to such conditions or limitations as such regulations may prescribe) in determining the resources (and the income) of such individual.

(e) Trusts

(1) In determining the resources of an individual, paragraph (3) shall apply to a trust (other than a trust described in paragraph (5)) established by the individual.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if any assets of the individual (or of the individual's spouse) are transferred to the trust other than by will.

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(B) In the case of an irrevocable trust to which are transferred the assets of an individual (or of the individual's spouse) and the assets of any other person, this subsection shall apply to the portion of the trust attributable to the assets of the individual (or of the individual's spouse).

(C) This subsection shall apply to a trust without regard to--

(i) the purposes for which the trust is established;

(ii) whether the trustees have or exercise any discretion under the trust;

(iii) any restrictions on when or whether distributions may be made from the trust; or

(iv) any restrictions on the use of distributions from the trust.

(3)(A) In the case of a revocable trust established by an individual, the corpus of the trust shall be considered a resource available to the individual.

(B) In the case of an irrevocable trust established by an individual, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual (or of the individual's spouse), the portion of the corpus from which payment to or for the benefit of the individual (or of the individual's spouse) could be made shall be considered a resource available to the individual.

(4) The Commissioner of Social Security may waive the application of this subsection with respect to an individual if the Commissioner determines that such application would work an undue hardship (as determined on the basis of criteria established by the Commissioner) on the individual.

(5) This subsection shall not apply to a trust described in subparagraph (A) or (C) of section 1396p(d)(4) of this title.

(6) For purposes of this subsection--

(A) the term "trust" includes any legal instrument or device that is similar to a trust;

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(B) the term "corpus" means, with respect to a trust, all property and other interests held by the trust, including accumulated earnings and any other addition to the trust after its establishment (except that such term does not include any such earnings or addition in the month in which the earnings or addition is credited or otherwise transferred to the trust); and

(C) the term "asset" includes any income or resource of the individual (or of the individual's spouse), including--

(i) any income excluded by section 1382a(b) of this title;

(ii) any resource otherwise excluded by this section; and

(iii) any other payment or property to which the individual (or of the individual's spouse) is entitled but does not receive or have access to because of action by--

(I) the individual or spouse;

(II) a person or entity (including a court) with legal authority to act in place of, or on behalf of, the individual or spouse; or

(III) a person or entity (including a court) acting at the direction of, or on the request of, the individual or spouse.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XVI, § 1613, as added Pub.L. 92-603, Title III, § 301, Oct. 30, 1972, 86 Stat. 1470; amended Pub.L. 94-569, § 5, Oct. 20, 1976, 90 Stat. 2700; Pub.L. 95-171, § 9(a), Nov. 12, 1977, 91 Stat. 1355; Pub.L. 96-611, § 5(a), Dec. 28, 1980, 94 Stat. 3567; Pub.L. 97-248, Title I, § 185(a), (b), Sept. 3, 1982, 96 Stat. 406; Pub.L. 98-369, Div. B, Title VI, §§ 2614, 2663(g)(5), July 18, 1984, 98 Stat. 1132, 1168; Pub.L. 100-203, Title IX, §§ 9103(a), 9104(a), 9105(a), 9114(a), Dec. 22, 1987, 101 Stat. 1330-301, 1330-304; Pub.L. 100-360, Title III, § 303(c)(1), July 1, 1988, 102 Stat. 762; Pub.L. 100-647, Title VIII, § 8103(b), Nov. 10, 1988, 102 Stat. 3795; Pub.L. 101-239, Title VIII, §§ 8013(b), 8014(a), Dec. 19, 1989, 103 Stat. 2465; Pub.L. 101-508, Title V, §§ 5031(b), 5035(b), Title XI, § 11115(b)(2), Nov. 5, 1990, 104 Stat. 1388-224, 1388-225, 1388-414; Pub.L. 103-296, Title I, § 107(a)(4), Title III, § 321(h)(2), Aug. 15, 1994, 108 Stat. 1478, 1544; Pub.L. 104-193, Title II, § 213(b), Aug. 22, 1996, 110 Stat. 2195; Pub.L. 105-306, § 7(b), Oct. 28, 1998, 112 Stat. 2928; Pub.L. 106-169, Title II, §§ 205(a), 206(a), Dec. 14, 1999, 113 Stat. 1833, 1834; Pub.L. 108-203, Title I, § 101(c)(2), Title IV, §§ 431(a), (b), 435(b), Mar. 2, 2004, 118 Stat. 496, 539, 540; Pub.L. 110-245,

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Title II, § 202(b), June 17, 2008, 122 Stat. 1638; Pub.L. 111-255, § 3(b), (e), Oct. 5, 2010, 124 Stat. 2641; Pub.L. 114-63, § 2, Oct. 7, 2015, 129 Stat. 549.)

Footnotes

[1] So in original. Probably should be “Acquisition”.

42 U.S.C.A. § 1382b, 42 USCA § 1382b
Current through P.L. 118-82. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Reconsidered by Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services, 11th Cir.(Fla.), Aug. 12, 2011
KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XVIII. Health Insurance for Aged and Disabled (Refs & Annos)
Part E. Miscellaneous Provisions (Refs & Annos)

42 U.S.C.A. § 1395y

§ 1395y. Exclusions from coverage and medicare as secondary payer

Effective: April 6, 2022

Currentness

(a) Items or services specifically excluded

Notwithstanding any other provision of this subchapter, no payment may be made under part A or part B for any expenses incurred for items or services--

(1)(A) which, except for items and services described in a succeeding subparagraph or additional preventive services (as described in section 1395x(ddd)(1) of this title), are not reasonable and necessary for the

diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member,

(B) in the case of items and services described in section 1395x(s)(10) of this title, which are not reasonable and necessary for the prevention of illness,

(C) in the case of hospice care, which are not reasonable and necessary for the palliation or management of terminal illness,

(D) in the case of clinical care items and services provided with the concurrence of the Secretary and with respect to research and experimentation conducted by, or under contract with, the Medicare Payment Advisory Commission or the Secretary, which are not reasonable and necessary to carry out the purposes of section 1395ww(e)(6) of this title,

(E) in the case of research conducted pursuant to section 1320b-12 of this title, which is not reasonable and necessary to carry out the purposes of that section,

(F) in the case of screening mammography, which is performed more frequently than is covered under section 1395m(c)(2) of this title or which is not conducted by a facility described in section 1395m(c)(1)(B) of this title, in the case of screening pap smear and screening pelvic exam, which is performed more frequently than is provided under section 1395x(nn) of this title, and, in the case of screening for glaucoma, which is performed more frequently than is provided under section 1395x(uu) of this title,

(G) in the case of prostate cancer screening tests (as defined in section 1395x(oo) of this title), which are performed more frequently than is covered under such section,

(H) in the case of colorectal cancer screening tests, which are performed more frequently than is covered under section 1395m(d) of this title,

(I) the frequency and duration of home health services which are in excess of normative guidelines that the Secretary shall establish by regulation,

(J) in the case of a drug or biological specified in section 1395w-3a(c)(6)(C) of this title for which payment is made under part B that is furnished in a competitive area under section 1395w-3b of this title, that is not furnished by an entity under a contract under such section,

(K) in the case of an initial preventive physical examination, which is performed more than 1 year after the

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date the individual's first coverage period begins under part B,

(L) in the case of cardiovascular screening blood tests (as defined in section 1395x(xx)(1) of this title), which are performed more frequently than is covered under section 1395x(xx)(2) of this title,

(M) in the case of a diabetes screening test (as defined in section 1395x(yy)(1) of this title), which is performed more frequently than is covered under section 1395x(yy)(3) of this title,

(N) in the case of ultrasound screening for abdominal aortic aneurysm which is performed more frequently than is provided for under section 1395x(s)(2)(AA) of this title,

(O) in the case of kidney disease education services (as defined in paragraph (1) of section 1395x(ggg) of this title), which are furnished in excess of the number of sessions covered under paragraph (4) of such section, and

(P) in the case of personalized prevention plan services (as defined in section 1395x(hhh)(1) of this title), which are performed more frequently than is covered under such section;

(2) for which the individual furnished such items or services has no legal obligation to pay, and which no other person (by reason of such individual's membership in a prepayment plan or otherwise) has a legal obligation to provide or pay for, except in the case of Federally qualified health center services;

(3) which are paid for directly or indirectly by a governmental entity (other than under this chapter and other than under a health benefits or insurance plan established for employees of such an entity), except in the case of rural health clinic services, as defined in section 1395x(aa)(1) of this title, in the case of Federally qualified health center services, as defined in section 1395x(aa)(3) of this title, in the case of services for which payment may be made under section 1395qq(e) of this title, and in such other cases as the Secretary may specify;

(4) which are not provided within the United States (except for inpatient hospital services furnished outside the United States under the conditions described in section 1395f(f) of this title and, subject to such conditions, limitations, and requirements as are provided under or pursuant to this subchapter, physicians' services and ambulance services furnished an individual in conjunction with such inpatient hospital services but only for the period during which such inpatient hospital services were furnished);

(5) which are required as a result of war, or of an act of war, occurring after the effective date of such individual's current coverage under such part;

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(6) which constitute personal comfort items (except, in the case of hospice care, as is otherwise permitted under paragraph (1)(C));

(7) where such expenses are for routine physical checkups, eyeglasses (other than eyewear described in section 1395x(s)(8) of this title) or eye examinations for the purpose of prescribing, fitting, or changing eyeglasses, procedures performed (during the course of any eye examination) to determine the refractive state of the eyes, hearing aids or examinations therefor, or immunizations (except as otherwise allowed under section 1395x(s)(10) of this title and subparagraph (B), (F), (G), (H), (K), or (P) of paragraph (1));

(8) where such expenses are for orthopedic shoes or other supportive devices for the feet, other than shoes furnished pursuant to section 1395x(s)(12) of this title;

(9) where such expenses are for custodial care (except, in the case of hospice care, as is otherwise permitted under paragraph (1)(C));

(10) where such expenses are for cosmetic surgery or are incurred in connection therewith, except as required for the prompt repair of accidental injury or for improvement of the functioning of a malformed body member;

(11) where such expenses constitute charges imposed by immediate relatives of such individual or members of his household;

(12) where such expenses are for services in connection with the care, treatment, filling, removal, or replacement of teeth or structures directly supporting teeth, except that payment may be made under part A in the case of inpatient hospital services in connection with the provision of such dental services if the individual, because of his underlying medical condition and clinical status or because of the severity of the dental procedure, requires hospitalization in connection with the provision of such services;

(13) where such expenses are for--

(A) the treatment of flat foot conditions and the prescription of supportive devices therefor,

(B) the treatment of subluxations of the foot, or

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(C) routine foot care (including the cutting or removal of corns or calluses, the trimming of nails, and other routine hygienic care);

(14) which are other than physicians' services (as defined in regulations promulgated specifically for purposes of this paragraph), services described by section 1395x(s)(2)(K) of this title, certified nurse-midwife services, qualified psychologist services, and services of a certified registered nurse anesthetist, and which are furnished to an individual who is a patient of a hospital or critical access hospital by an entity other than the hospital or critical access hospital, unless the services are furnished under arrangements (as defined in section 1395x(w)(1) of this title) with the entity made by the hospital or critical access hospital;

(15)(A) which are for services of an assistant at surgery in a cataract operation (including subsequent insertion of an intraocular lens) unless, before the surgery is performed, the appropriate quality improvement organization (under part B of subchapter XI) or a carrier under section 1395u of this title has approved of the use of such an assistant in the surgical procedure based on the existence of a complicating medical condition, or

(B) which are for services of an assistant at surgery to which section 1395w-4(i)(2)(B) of this title applies;

(16) in the case in which funds may not be used for such items and services under the Assisted Suicide Funding Restriction Act of 1997;

(17) where the expenses are for an item or service furnished in a competitive acquisition area (as established by the Secretary under section 1395w-3(a) of this title) by an entity other than an entity with which the Secretary has entered into a contract under section 1395w-3(b) of this title for the furnishing of such an item or service in that area, unless the Secretary finds that the expenses were incurred in a case of urgent need, or in other circumstances specified by the Secretary;

(18) which are covered skilled nursing facility services described in section 1395yy(e)(2)(A)(i) of this title and which are furnished to an individual who is a resident of a skilled nursing facility during a period in which the resident is provided covered post-hospital extended care services (or, for services described in section 1395x(s)(2)(D) of this title, which are furnished to such an individual without regard to such period), by an entity other than the skilled nursing facility, unless the services are furnished under arrangements (as defined in section 1395x(w)(1) of this title) with the entity made by the skilled nursing facility;

(19) which are for items or services which are furnished pursuant to a private contract described in section 1395a(b) of this title;

(20) in the case of outpatient physical therapy services, outpatient speech-language pathology services, or outpatient occupational therapy services furnished as an incident to a physician's professional services (as

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described in section 1395x(s)(2)(A) of this title), that do not meet the standards and conditions (other than any licensing requirement specified by the Secretary) under the second sentence of section 1395x(p) of this title (or under such sentence through the operation of subsection (g) or (*ll*)(2) of section 1395x of this title) as such standards and conditions would apply to such therapy services if furnished by a therapist;

(21) where such expenses are for home health services (including medical supplies described in section 1395x(m)(5) of this title, but excluding durable medical equipment to the extent provided for in such section) furnished to an individual who is under a plan of care of the home health agency if the claim for payment for such services is not submitted by the agency;

(22) subject to subsection (h), for which a claim is submitted other than in an electronic form specified by the Secretary;

(23) which are the technical component of advanced diagnostic imaging services described in section 1395m(e)(1)(B) of this title for which payment is made under the fee schedule established under section 1395w-4(b) of this title and that are furnished by a supplier (as defined in section 1395x(d) of this title), if such supplier is not accredited by an accreditation organization designated by the Secretary under section 1395m(e)(2)(B) of this title;

(24) where such expenses are for renal dialysis services (as defined in subparagraph (B) of section 1395rr(b)(14) of this title) for which payment is made under such section unless such payment is made under such section to a provider of services or a renal dialysis facility for such services; or

(25) not later than January 1, 2014, for which the payment is other than by electronic funds transfer (EFT) or an electronic remittance in a form as specified in ASC X12 835 Health Care Payment and Remittance Advice or subsequent standard.

Paragraph (7) shall not apply to Federally qualified health center services described in section 1395x(aa)(3)(B) of this title.

In making a national coverage determination (as defined in paragraph (1)(B) of section 1395ff(f) of this title) the Secretary shall ensure consistent with subsection (l) that the public is afforded notice and opportunity to comment prior to implementation by the Secretary of the determination; meetings of advisory committees with respect to the determination are made on the record; in making the determination, the Secretary has considered applicable information (including clinical experience and medical, technical, and scientific evidence) with respect to the subject matter of the determination; and in the determination, provide a clear statement of the basis for the determination (including responses to comments received from the public), the assumptions underlying that basis, and make available to the public the data (other than proprietary data) considered in making the determination.

(b) Medicare as secondary payer

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(1) Requirements of group health plans

(A) Working aged under group health plans

(i) In general

A group health plan--

(I) may not take into account that an individual (or the individual's spouse) who is covered under the plan by virtue of the individual's current employment status with an employer is entitled to benefits under this subchapter under section 426(a) of this title, and

(II) shall provide that any individual age 65 or older (and the spouse age 65 or older of any individual) who has current employment status with an employer shall be entitled to the same benefits under the plan under the same conditions as any such individual (or spouse) under age 65.

(ii) Exclusion of group health plan of a small employer

Clause (i) shall not apply to a group health plan unless the plan is a plan of, or contributed to by, an employer that has 20 or more employees for each working day in each of 20 or more calendar weeks in the current calendar year or the preceding calendar year.

(iii) Exception for small employers in multiemployer or multiple employer group health plans

Clause (i) also shall not apply with respect to individuals enrolled in a multiemployer or multiple employer group health plan if the coverage of the individuals under the plan is by virtue of current employment status with an employer that does not have 20 or more individuals in current employment status for each working day in each of 20 or more calendar weeks in the current calendar year and the preceding calendar year; except that the exception provided in this clause shall only apply if the plan elects treatment under this clause.

(iv) Exception for individuals with end stage renal disease

Subparagraph (C) shall apply instead of clause (i) to an item or service furnished in a month to an individual if for the month the individual is, or (without regard to entitlement under section 426 of this

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title) would upon application be, entitled to benefits under section 426-1 of this title.

(v) "Group health plan" defined

In this subparagraph, and subparagraph (C), the term "group health plan" has the meaning given such term in section 5000(b)(1) of the Internal Revenue Code of 1986, without regard to section 5000(d) of such Code.

(B) Disabled individuals in large group health plans

(i) In general

A large group health plan (as defined in clause (iii)) may not take into account that an individual (or a member of the individual's family) who is covered under the plan by virtue of the individual's current employment status with an employer is entitled to benefits under this subchapter under section 426(b) of this title.

(ii) Exception for individuals with end stage renal disease

Subparagraph (C) shall apply instead of clause (i) to an item or service furnished in a month to an individual if for the month the individual is, or (without regard to entitlement under section 426 of this title) would upon application be, entitled to benefits under section 426-1 of this title.

(iii) "Large group health plan" defined

In this subparagraph, the term "large group health plan" has the meaning given such term in section 5000(b)(2) of the Internal Revenue Code of 1986, without regard to section 5000(d) of such Code.

(C) Individuals with end stage renal disease

A group health plan (as defined in subparagraph (A)(v))--

(i) may not take into account that an individual is entitled to or eligible for benefits under this subchapter under section 426-1 of this title during the 12-month period which begins with the first month in which the individual becomes entitled to benefits under part A under the provisions of section 426-1 of this title, or, if earlier, the first month in which the individual would have been entitled to benefits under

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such part under the provisions of section 426-1 of this title if the individual had filed an application for such benefits; and

(ii) may not differentiate in the benefits it provides between individuals having end stage renal disease and other individuals covered by such plan on the basis of the existence of end stage renal disease, the need for renal dialysis, or in any other manner;

except that clause (ii) shall not prohibit a plan from paying benefits secondary to this subchapter when an individual is entitled to or eligible for benefits under this subchapter under section 426-1 of this title after the end of the 12-month period described in clause (i). Effective for items and services furnished on or after February 1, 1991, and before August 5, 1997,[1] (with respect to periods beginning on or after February 1, 1990), this subparagraph shall be applied by substituting "18-month" for "12-month" each place it appears. Effective for items and services furnished on or after August 5, 1997,[1] (with respect to periods beginning on or after the date that is 18 months prior to August 5, 1997), clauses (i) and (ii) shall be applied by substituting "30-month" for "12-month" each place it appears.

(D) Treatment of certain members of religious orders

In this subsection, an individual shall not be considered to be employed, or an employee, with respect to the performance of services as a member of a religious order which are considered employment only by virtue of an election made by the religious order under section 3121(r) of the Internal Revenue Code of 1986.

(E) General provisions

For purposes of this subsection:

(i) Aggregation rules

(I) All employers treated as a single employer under subsection (a) or (b) of section 52 of the Internal Revenue Code of 1986 shall be treated as a single employer.

(II) All employees of the members of an affiliated service group (as defined in section 414(m) of such Code) shall be treated as employed by a single employer.

(III) Leased employees (as defined in section 414(n)(2) of such Code) shall be treated as employees of the person for whom they perform services to the extent they are so treated under section 414(n) of such

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Code.

In applying sections of the Internal Revenue Code of 1986 under this clause, the Secretary shall rely upon regulations and decisions of the Secretary of the Treasury respecting such sections.

(ii) "Current employment status" defined

An individual has "current employment status" with an employer if the individual is an employee, is the employer, or is associated with the employer in a business relationship.

(iii) Treatment of self-employed persons as employers

The term "employer" includes a self-employed person.

(iv) Application to certain Postal Service annuitants or family members

Nothing in this paragraph shall prohibit a group health plan from determining an individual's eligibility to enroll in a health benefits plan offered under the Postal Service Health Benefits Program under section 8903c of Title 5, in accordance with subsection (e) of such section.

(F) Limitation on beneficiary liability

An individual who is entitled to benefits under this subchapter and is furnished an item or service for which such benefits are incorrectly paid is not liable for repayment of such benefits under this paragraph unless payment of such benefits was made to the individual.

(2) Medicare secondary payer

(A) In general

Payment under this subchapter may not be made, except as provided in subparagraph (B), with respect to any item or service to the extent that--

(i) payment has been made, or can reasonably be expected to be made, with respect to the item or service as required under paragraph (1), or

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(ii) payment has been made[2] or can reasonably be expected to be made[2] under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance.

In this subsection, the term "primary plan" means a group health plan or large group health plan, to the extent that clause (i) applies, and a workmen's compensation law or plan, an automobile or liability insurance policy or plan (including a self-insured plan) or no fault insurance, to the extent that clause (ii) applies. An entity that engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part.

(B) Conditional payment

(i) Authority to make conditional payment

The Secretary may make payment under this subchapter with respect to an item or service if a primary plan described in subparagraph (A)(ii)[3] has not made or cannot reasonably be expected to make payment with respect to such item or service promptly (as determined in accordance with regulations). Any such payment by the Secretary shall be conditioned on reimbursement to the appropriate Trust Fund in accordance with the succeeding provisions of this subsection.

(ii) Repayment required

Subject to paragraph (9), a primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment made by the Secretary under this subchapter with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service. A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means. If reimbursement is not made to the appropriate Trust Fund before the expiration of the 60-day period that begins on the date notice of, or information related to, a primary plan's responsibility for such payment or other information is received, the Secretary may charge interest (beginning with the date on which the notice or other information is received) on the amount of the reimbursement until reimbursement is made (at a rate determined by the Secretary in accordance with regulations of the Secretary of the Treasury applicable to charges for late payments).

(iii) Action by United States

In order to recover payment made under this subchapter for an item or service, the United States may

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bring an action against any or all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third-party administrator, as an employer that sponsors or contributes to a group health plan, or large group health plan, or otherwise) to make payment with respect to the same item or service (or any portion thereof) under a primary plan. The United States may, in accordance with paragraph (3)(A) collect double damages against any such entity. In addition, the United States may recover under this clause from any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity. The United States may not recover from a third-party administrator under this clause in cases where the third-party administrator would not be able to recover the amount at issue from the employer or group health plan and is not employed by or under contract with the employer or group health plan at the time the action for recovery is initiated by the United States or for whom it provides administrative services due to the insolvency or bankruptcy of the employer or plan. An action may not be brought by the United States under this clause with respect to payment owed unless the complaint is filed not later than 3 years after the date of the receipt of notice of a settlement, judgment, award, or other payment made pursuant to paragraph (8) relating to such payment owed.

(iv) Subrogation rights

The United States shall be subrogated (to the extent of payment made under this subchapter for such an item or service) to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan.

(v) Waiver of rights

The Secretary may waive (in whole or in part) the provisions of this subparagraph in the case of an individual claim if the Secretary determines that the waiver is in the best interests of the program established under this subchapter.

(vi) Claims-filing period

Notwithstanding any other time limits that may exist for filing a claim under an employer group health plan, the United States may seek to recover conditional payments in accordance with this subparagraph where the request for payment is submitted to the entity required or responsible under this subsection to pay with respect to the item or service (or any portion thereof) under a primary plan within the 3-year period beginning on the date on which the item or service was furnished.

(vii) Use of website to determine final conditional reimbursement amount

(I) Notice to Secretary of expected date of a settlement, judgment, etc.

In the case of a payment made by the Secretary pursuant to clause (i) for items and services provided

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to the claimant, the claimant or applicable plan (as defined in paragraph (8)(F)) may at any time beginning 120 days before the reasonably expected date of a settlement, judgment, award, or other payment, notify the Secretary that a payment is reasonably expected and the expected date of such payment.

(II) Secretarial[4] providing access to claims information through a website

The Secretary shall maintain and make available to individuals to whom items and services are furnished under this subchapter (and to authorized family or other representatives recognized under regulations and to an applicable plan which has obtained the consent of the individual) access to information on the claims for such items and services (including payment amounts for such claims), including those claims that relate to a potential settlement, judgment, award, or other payment. Such access shall be provided to an individual, representative, or plan through a website that requires a password to gain access to the information. The Secretary shall update the information on claims and payments on such website in as timely a manner as possible but not later than 15 days after the date that payment is made. Information related to claims and payments subject to the notice under subclause (I) shall be maintained and made available consistent with the following:

(aa) The information shall be as complete as possible and shall include provider or supplier name, diagnosis codes (if any), dates of service, and conditional payment amounts.

(bb) The information accurately identifies those claims and payments that are related to a potential settlement, judgment, award, or other payment to which the provisions of this subsection apply.

(cc) The website provides a method for the receipt of secure electronic communications with the individual, representative, or plan involved.

(dd) The website provides that information is transmitted from the website in a form that includes an official time and date that the information is transmitted.

(ee) The website shall permit the individual, representative, or plan to download a statement of reimbursement amounts (in this clause referred to as a "statement of reimbursement amount") on payments for claims under this subchapter relating to a potential settlement, judgment, award, or other payment.

(III) Use of timely web download as basis for final conditional amount

If an individual (or other claimant or applicable plan with the consent of the individual) obtains a statement of reimbursement amount from the website during the protected period as defined in

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subclause (V) and the related settlement, judgment, award or other payment is made during such period, then the last statement of reimbursement amount that is downloaded during such period and within 3 business days before the date of the settlement, judgment, award, or other payment shall constitute the final conditional amount subject to recovery under clause (ii) related to such settlement, judgment, award, or other payment.

(IV) Resolution of discrepancies

If the individual (or authorized representative) believes there is a discrepancy with the statement of reimbursement amount, the Secretary shall provide a timely process to resolve the discrepancy. Under such process the individual (or representative) must provide documentation explaining the discrepancy and a proposal to resolve such discrepancy. Within 11 business days after the date of receipt of such documentation, the Secretary shall determine whether there is a reasonable basis to include or remove claims on the statement of reimbursement. If the Secretary does not make such determination within the 11 business-day period, then the proposal to resolve the discrepancy shall be accepted. If the Secretary determines within such period that there is not a reasonable basis to include or remove claims on the statement of reimbursement, the proposal shall be rejected. If the Secretary determines within such period that there is a reasonable basis to conclude there is a discrepancy, the Secretary must respond in a timely manner by agreeing to the proposal to resolve the discrepancy or by providing documentation showing with good cause why the Secretary is not agreeing to such proposal and establishing an alternate discrepancy resolution. In no case shall the process under this subclause be treated as an appeals process or as establishing a right of appeal for a statement of reimbursement amount and there shall be no administrative or judicial review of the Secretary's determinations under this subclause.

(V) Protected period

In subclause (III), the term "protected period" means, with respect to a settlement, judgment, award or other payment relating to an injury or incident, the portion (if any) of the period beginning on the date of notice under subclause (I) with respect to such settlement, judgment, award, or other payment that is after the end of a Secretarial response period beginning on the date of such notice to the Secretary. Such Secretarial response period shall be a period of 65 days, except that such period may be extended by the Secretary for a period of an additional 30 days if the Secretary determines that additional time is required to address claims for which payment has been made. Such Secretarial response period shall be extended and shall not include any days for any part of which the Secretary determines (in accordance with regulations) that there was a failure in the claims and payment posting system and the failure was justified due to exceptional circumstances (as defined in such regulations). Such regulations shall define exceptional circumstances in a manner so that not more than 1 percent of the repayment obligations under this subclause would qualify as exceptional circumstances.

(VI) Effective date

The Secretary shall promulgate final regulations to carry out this clause not later than 9 months after January 10, 2013.

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(VII) Website including successor technology

In this clause, the term "website" includes any successor technology.

(viii) Right of appeal for secondary payer determinations relating to liability insurance (including self-insurance), no fault insurance, and workers' compensation laws and plans

The Secretary shall promulgate regulations establishing a right of appeal and appeals process, with respect to any determination under this subsection for a payment made under this subchapter for an item or service for which the Secretary is seeking to recover conditional payments from an applicable plan (as defined in paragraph (8)(F)) that is a primary plan under subsection (A)(ii),[5] under which the applicable plan involved, or an attorney, agent, or third party administrator on behalf of such plan, may appeal such determination. The individual furnished such an item or service shall be notified of the plan's intent to appeal such determination[6]

(C) Treatment of questionnaires

The Secretary may not fail to make payment under subparagraph (A) solely on the ground that an individual failed to complete a questionnaire concerning the existence of a primary plan.

(3) Enforcement

(A) Private cause of action

There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and (2)(A).

(B) Reference to excise tax with respect to nonconforming group health plans

For provision imposing an excise tax with respect to nonconforming group health plans, see section 5000 of the Internal Revenue Code of 1986.

(C) Prohibition of financial incentives not to enroll in a group health plan or a large group health plan

It is unlawful for an employer or other entity to offer any financial or other incentive for an individual

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entitled to benefits under this subchapter not to enroll (or to terminate enrollment) under a group health plan or a large group health plan which would (in the case of such enrollment) be a primary plan (as defined in paragraph (2)(A)). Any entity that violates the previous sentence is subject to a civil money penalty of not to exceed $5,000 for each such violation. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(4) Coordination of benefits

Where payment for an item or service by a primary plan is less than the amount of the charge for such item or service and is not payment in full, payment may be made under this subchapter (without regard to deductibles and coinsurance under this subchapter) for the remainder of such charge, but--

(A) payment under this subchapter may not exceed an amount which would be payable under this subchapter for such item or service if paragraph (2)(A) did not apply; and

(B) payment under this subchapter, when combined with the amount payable under the primary plan, may not exceed--

(i) in the case of an item or service payment for which is determined under this subchapter on the basis of reasonable cost (or other cost-related basis) or under section 1395ww of this title, the amount which would be payable under this subchapter on such basis, and

(ii) in the case of an item or service for which payment is authorized under this subchapter on another basis--

(I) the amount which would be payable under the primary plan (without regard to deductibles and coinsurance under such plan), or

(II) the reasonable charge or other amount which would be payable under this subchapter (without regard to deductibles and coinsurance under this subchapter),

whichever is greater.

(5) Identification of secondary payer situations

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(A) Requesting matching information

(i) Commissioner of Social Security

The Commissioner of Social Security shall, not less often than annually, transmit to the Secretary of the Treasury a list of the names and TINs of medicare beneficiaries (as defined in section 6103(l)(12) of the Internal Revenue Code of 1986) and request that the Secretary disclose to the Commissioner the information described in subparagraph (A) of such section.

(ii) Administrator

The Administrator of the Centers for Medicare & Medicaid Services shall request, not less often than annually, the Commissioner of the Social Security Administration to disclose to the Administrator the information described in subparagraph (B) of section 6103(l)(12) of the Internal Revenue Code of 1986.

(B) Disclosure to fiscal intermediaries and carriers

In addition to any other information provided under this subchapter to fiscal intermediaries and carriers, the Administrator shall disclose to such intermediaries and carriers (or to such a single intermediary or carrier as the Secretary may designate) the information received under subparagraph (A) for purposes of carrying out this subsection.

(C) Contacting employers

(i) In general

With respect to each individual (in this subparagraph referred to as an "employee") who was furnished a written statement under section 6051 of the Internal Revenue Code of 1986 by a qualified employer (as defined in section 6103(l)(12)(E)(iii) of such Code), as disclosed under subparagraph (B), the appropriate fiscal intermediary or carrier shall contact the employer in order to determine during what period the employee or employee's spouse may be (or have been) covered under a group health plan of the employer and the nature of the coverage that is or was provided under the plan (including the name, address, and identifying number of the plan).

(ii) Employer response

Within 30 days of the date of receipt of the inquiry, the employer shall notify the intermediary or carrier making the inquiry as to the determinations described in clause (i). An employer (other than a Federal or

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other governmental entity) who willfully or repeatedly fails to provide timely and accurate notice in accordance with the previous sentence shall be subject to a civil money penalty of not to exceed $1,000 for each individual with respect to which such an inquiry is made. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(D) Obtaining information from beneficiaries

Before an individual applies for benefits under part A or enrolls under part B, the Administrator shall mail the individual a questionnaire to obtain information on whether the individual is covered under a primary plan and the nature of the coverage provided under the plan, including the name, address, and identifying number of the plan.

(E) End date

The provisions of this paragraph shall not apply to information required to be provided on or after July 1, 2016.

(6) Screening requirements for providers and suppliers

(A) In general

Notwithstanding any other provision of this subchapter, no payment may be made for any item or service furnished under part B unless the entity furnishing such item or service completes (to the best of its knowledge and on the basis of information obtained from the individual to whom the item or service is furnished) the portion of the claim form relating to the availability of other health benefit plans.

(B) Penalties

An entity that knowingly, willfully, and repeatedly fails to complete a claim form in accordance with subparagraph (A) or provides inaccurate information relating to the availability of other health benefit plans on a claim form under such subparagraph shall be subject to a civil money penalty of not to exceed $2,000 for each such incident. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(7) Required submission of information by group health plans

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(A) Requirement

On and after the first day of the first calendar quarter beginning after the date that is 1 year after December 29, 2007, an entity serving as an insurer or third party administrator for a group health plan, as defined in paragraph (1)(A)(v), and, in the case of a group health plan that is self-insured and self-administered, a plan administrator or fiduciary, shall--

(i) secure from the plan sponsor and plan participants such information as the Secretary shall specify for the purpose of identifying situations where the group health plan is or has been--

(I) a primary plan to the program under this subchapter; or

(II) for calendar quarters beginning on or after January 1, 2020, a primary payer with respect to benefits relating to prescription drug coverage under part D; and

(ii) submit such information to the Secretary in a form and manner (including frequency) specified by the Secretary.

(B) Enforcement

(i) In general

An entity, a plan administrator, or a fiduciary described in subparagraph (A) that fails to comply with the requirements under such subparagraph shall be subject to a civil money penalty of $1,000 for each day of noncompliance for each individual for which the information under such subparagraph should have been submitted. The provisions of subsections (e) and (k) of section 1320a-7a of this title shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title. A civil money penalty under this clause shall be in addition to any other penalties prescribed by law and in addition to any Medicare secondary payer claim under this subchapter with respect to an individual.

(ii) Deposit of amounts collected

Any amounts collected pursuant to clause (i) shall be deposited in the Federal Hospital Insurance Trust Fund under section 1395i of this title.

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(C) Sharing of information

Notwithstanding any other provision of law, under terms and conditions established by the Secretary, the Secretary--

(i) shall share information on entitlement under part A and enrollment under part B under this subchapter with entities, plan administrators, and fiduciaries described in subparagraph (A);

(ii) may share the entitlement and enrollment information described in clause (i) with entities and persons not described in such clause; and

(iii) may share information collected under this paragraph as necessary for purposes of the proper coordination of benefits.

(D) Implementation

Notwithstanding any other provision of law, the Secretary may implement this paragraph by program instruction or otherwise.

(8) Required submission of information by or on behalf of liability insurance (including self-insurance), no fault insurance, and workers' compensation laws and plans

(A) Requirement

On and after the first day of the first calendar quarter beginning after the date that is 18 months after December 29, 2007, an applicable plan shall--

(i) determine whether a claimant (including an individual whose claim is unresolved) is entitled to benefits under the program under this subchapter on any basis; and

(ii) if the claimant is determined to be so entitled, submit the information described in subparagraph (B) with respect to the claimant to the Secretary in a form and manner (including frequency) specified by the Secretary.

(B) Required information

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The information described in this subparagraph is--

(i) the identity of the claimant for which the determination under subparagraph (A) was made; and

(ii) such other information as the Secretary shall specify in order to enable the Secretary to make an appropriate determination concerning coordination of benefits, including any applicable recovery claim.

Not later than 18 months after January 10, 2013, the Secretary shall modify the reporting requirements under this paragraph so that an applicable plan in complying with such requirements is permitted but not required to access or report to the Secretary beneficiary social security account numbers or health identification claim numbers, except that the deadline for such modification shall be extended by one or more periods (specified by the Secretary) of up to 1 year each if the Secretary notifies the committees of jurisdiction of the House of Representatives and of the Senate that the prior deadline for such modification, without such extension, threatens patient privacy or the integrity of the secondary payer program under this subsection. Any such deadline extension notice shall include information on the progress being made in implementing such modification and the anticipated implementation date for such modification.

(C) Timing

Information shall be submitted under subparagraph (A)(ii) within a time specified by the Secretary after the claim is resolved through a settlement, judgment, award, or other payment (regardless of whether or not there is a determination or admission of liability).

(D) Claimant

For purposes of subparagraph (A), the term “claimant” includes--

(i) an individual filing a claim directly against the applicable plan; and

(ii) an individual filing a claim against an individual or entity insured or covered by the applicable plan.

(E) Enforcement

(i) In general

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An applicable plan that fails to comply with the requirements under subparagraph (A) with respect to any claimant may be subject to a civil money penalty of up to $1,000 for each day of noncompliance with respect to each claimant. The provisions of subsections (e) and (k) of section 1320a-7a of this title shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title. A civil money penalty under this clause shall be in addition to any other penalties prescribed by law and in addition to any Medicare secondary payer claim under this subchapter with respect to an individual.

(ii) Deposit of amounts collected

Any amounts collected pursuant to clause (i) shall be deposited in the Federal Hospital Insurance Trust Fund.

(F) Applicable plan

In this paragraph, the term "applicable plan" means the following laws, plans, or other arrangements, including the fiduciary or administrator for such law, plan, or arrangement:

(i) Liability insurance (including self-insurance).

(ii) No fault insurance.

(iii) Workers' compensation laws or plans.

(G) Sharing of information

(i) In general

The Secretary may share information collected under this paragraph as necessary for purposes of the proper coordination of benefits.

(ii) Specified information

In responding to any query made on or after the date that is 1 year after December 11, 2020, from an applicable plan related to a determination described in subparagraph (A)(i), the Secretary,

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notwithstanding any other provision of law, shall provide to such applicable plan--

(I) whether a claimant subject to the query is, or during the preceding 3-year period has been, entitled to benefits under the program under this subchapter on any basis; and

(II) to the extent applicable, the plan name and address of any Medicare Advantage plan under part C and any prescription drug plan under part D in which the claimant is enrolled or has been enrolled during such period.

(H) Implementation

Notwithstanding any other provision of law, the Secretary may implement this paragraph by program instruction or otherwise.

(I) Regulations

Not later than 60 days after January 10, 2013, the Secretary shall publish a notice in the Federal Register soliciting proposals, which will be accepted during a 60-day period, for the specification of practices for which sanctions will and will not be imposed under subparagraph (E), including not imposing sanctions for good faith efforts to identify a beneficiary pursuant to this paragraph under an applicable entity responsible for reporting information. After considering the proposals so submitted, the Secretary, in consultation with the Attorney General, shall publish in the Federal Register, including a 60-day period for comment, proposed specified practices for which such sanctions will and will not be imposed. After considering any public comments received during such period, the Secretary shall issue final rules specifying such practices.

(9) Exception

(A) In general

Clause (ii) of paragraph (2)(B) and any reporting required by paragraph (8) shall not apply with respect to any settlement, judgment, award, or other payment by an applicable plan arising from liability insurance (including self-insurance) and from alleged physical trauma-based incidents (excluding alleged ingestion, implantation, or exposure cases) constituting a total payment obligation to a claimant of not more than the single threshold amount calculated by the Secretary under subparagraph (B) for the year involved.

(B) Annual computation of threshold

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(i) In general

Not later than November 15 before each year, the Secretary shall calculate and publish a single threshold amount for settlements, judgments, awards, or other payments for obligations arising from liability insurance (including self-insurance) and for alleged physical trauma-based incidents (excluding alleged ingestion, implantation, or exposure cases) subject to this section for that year. The annual single threshold amount for a year shall be set such that the estimated average amount to be credited to the Medicare trust funds of collections of conditional payments from such settlements, judgments, awards, or other payments arising from liability insurance (including self-insurance) and for such alleged incidents subject to this section shall equal the estimated cost of collection incurred by the United States (including payments made to contractors) for a conditional payment arising from liability insurance (including self-insurance) and for such alleged incidents subject to this section for the year. At the time of calculating, but before publishing, the single threshold amount for 2014, the Secretary shall inform, and seek review of, the Comptroller General of the United States with regard to such amount.

(ii) Publication

The Secretary shall include, as part of such publication for a year--

(I) the estimated cost of collection incurred by the United States (including payments made to contractors) for a conditional payment arising from liability insurance (including self-insurance) and for such alleged incidents; and

(II) a summary of the methodology and data used by the Secretary in computing such threshold amount and such cost of collection.

(C) Exclusion of ongoing expenses

For purposes of this paragraph and with respect to a settlement, judgment, award, or other payment not otherwise addressed in clause (ii) of paragraph (2)(B) that includes ongoing responsibility for medical payments (excluding settlements, judgments, awards, or other payments made by a workers' compensation law or plan or no fault insurance), the amount utilized for calculation of the threshold described in subparagraph (A) shall include only the cumulative value of the medical payments made under this subchapter.

(D) Report to Congress

Not later than November 15 before each year, the Secretary shall submit to the Congress a report on the single threshold amount for settlements, judgments, awards, or other payments for conditional payment

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obligations arising from liability insurance (including self-insurance) and alleged incidents described in subparagraph (A) for that year and on the establishment and application of similar thresholds for such payments for conditional payment obligations arising from worker compensation cases and from no fault insurance cases subject to this section for the year. For each such report, the Secretary shall--

(i) calculate the threshold amount by using the methodology applicable to certain liability claims described in subparagraph (B); and

(ii) include a summary of the methodology and data used in calculating each threshold amount and the amount of estimated savings under this subchapter achieved by the Secretary implementing each such threshold.

(c) Drug products

No payment may be made under part B for any expenses incurred for--

(1) a drug product--

(A) which is described in section 107(c)(3) of the Drug Amendments of 1962,

(B) which may be dispensed only upon prescription,

(C) for which the Secretary has issued a notice of an opportunity for a hearing under subsection (e) of section 355 of Title 21 on a proposed order of the Secretary to withdraw approval of an application for such drug product under such section because the Secretary has determined that the drug is less than effective for all conditions of use prescribed, recommended, or suggested in its labeling, and

(D) for which the Secretary has not determined there is a compelling justification for its medical need; and

(2) any other drug product--

(A) which is identical, related, or similar (as determined in accordance with section 310.6 of title 21 of the Code of Federal Regulations) to a drug product described in paragraph (1), and

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(B) for which the Secretary has not determined there is a compelling justification for its medical need,

until such time as the Secretary withdraws such proposed order.

(d) Items or services provided for emergency medical conditions

For purposes of subsection (a)(1)(A), in the case of any item or service that is required to be provided pursuant to section 1395dd of this title to an individual who is entitled to benefits under this subchapter, determinations as to whether the item or service is reasonable and necessary shall be made on the basis of the information available to the treating physician or practitioner (including the patient's presenting symptoms or complaint) at the time the item or service was ordered or furnished by the physician or practitioner (and not on the patient's principal diagnosis). When making such determinations with respect to such an item or service, the Secretary shall not consider the frequency with which the item or service was provided to the patient before or after the time of the admission or visit.

(e) Item or service by excluded individual or entity or at direction of excluded physician; limitation of liability of beneficiaries with respect to services furnished by excluded individuals and entities

(1) No payment may be made under this subchapter with respect to any item or service (other than an emergency item or service, not including items or services furnished in an emergency room of a hospital) furnished--

(A) by an individual or entity during the period when such individual or entity is excluded pursuant to section 1320a-7, 1320a-7a, 1320c-5 or 1395u(j)(2) of this title from participation in the program under this subchapter; or

(B) at the medical direction or on the prescription of a physician during the period when he is excluded pursuant to section 1320a-7, 1320a-7a, 1320c-5 or 1395u(j)(2) of this title from participation in the program under this subchapter and when the person furnishing such item or service knew or had reason to know of the exclusion (after a reasonable time period after reasonable notice has been furnished to the person).

(2) Where an individual eligible for benefits under this subchapter submits a claim for payment for items or services furnished by an individual or entity excluded from participation in the programs under this subchapter, pursuant to section 1320a-7, 1320a-7a, 1320c-5, 1320c-9 (as in effect on September 2, 1982), 1395u(j)(2), 1395y(d) (as in effect on August 18, 1987), or 1395cc of this title, and such beneficiary did not know or have reason to know that such individual or entity was so excluded, then, to the extent permitted by this subchapter, and notwithstanding such exclusion, payment shall be made for such items or services. In each such case the Secretary shall notify the beneficiary of the exclusion of the individual or entity furnishing the items or services. Payment shall not be made for items or services furnished by an excluded individual or entity to a beneficiary after a reasonable time (as determined by the Secretary in regulations) after the Secretary has notified the beneficiary of the exclusion of that individual or entity.

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(f) Utilization guidelines for provision of home health services

The Secretary shall establish utilization guidelines for the determination of whether or not payment may be made, consistent with paragraph (1)(A) of subsection (a), under part A or part B for expenses incurred with respect to the provision of home health services, and shall provide for the implementation of such guidelines through a process of selective postpayment coverage review by intermediaries or otherwise.

(g) Contracts with quality improvement organizations

(1) The Secretary shall, in making the determinations under paragraphs (1) and (9) of subsection (a), and for the purposes of promoting the effective, efficient, and economical delivery of health care services, and of promoting the quality of services of the type for which payment may be made under this subchapter, enter into contracts with quality improvement organizations pursuant to part B of subchapter XI of this chapter.

(2) In addition to any funds otherwise available, there are appropriated to the Secretary, out of any monies in the Treasury not otherwise obligated, $200,000,000, to remain available until expended, for purposes of requiring multiple organizations described in paragraph (1) to provide to skilled nursing facilities (as defined in section 1395i-3(a) of this title), infection control and vaccination uptake support relating to the prevention or mitigation of COVID-19, as determined appropriate by the Secretary.

(h) Waiver of electronic form requirement

(1) The Secretary--

(A) shall waive the application of subsection (a)(22) in cases in which--

(i) there is no method available for the submission of claims in an electronic form; or

(ii) the entity submitting the claim is a small provider of services or supplier; and

(B) may waive the application of such subsection in such unusual cases as the Secretary finds appropriate.

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(2) For purposes of this subsection, the term "small provider of services or supplier" means--

(A) a provider of services with fewer than 25 full-time equivalent employees; or

(B) a physician, practitioner, facility, or supplier (other than provider of services) with fewer than 10 full-time equivalent employees.

(i) Awards and contracts for original research and experimentation of new and existing medical procedures; conditions

In order to supplement the activities of the Medicare Payment Advisory Commission under section 1395ww(e) of this title in assessing the safety, efficacy, and cost-effectiveness of new and existing medical procedures, the Secretary may carry out, or award grants or contracts for, original research and experimentation of the type described in clause (ii) of section 1395ww(e)(6)(E) of this title with respect to such a procedure if the Secretary finds that--

(1) such procedure is not of sufficient commercial value to justify research and experimentation by a commercial organization;

(2) research and experimentation with respect to such procedure is not of a type that may appropriately be carried out by an institute, division, or bureau of the National Institutes of Health; and

(3) such procedure has the potential to be more cost-effective in the treatment of a condition than procedures currently in use with respect to such condition.

(j) Nonvoting members and experts

(1) Any advisory committee appointed to advise the Secretary on matters relating to the interpretation, application, or implementation of subsection (a)(1) shall assure the full participation of a nonvoting member in the deliberations of the advisory committee, and shall provide such nonvoting member access to all information and data made available to voting members of the advisory committee, other than information that--

(A) is exempt from disclosure pursuant to subsection (a) of section 552 of Title 5 by reason of subsection (b)(4) of such section (relating to trade secrets); or

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(B) the Secretary determines would present a conflict of interest relating to such nonvoting member.

(2) If an advisory committee described in paragraph (1) organizes into panels of experts according to types of items or services considered by the advisory committee, any such panel of experts may report any recommendation with respect to such items or services directly to the Secretary without the prior approval of the advisory committee or an executive committee thereof.

(k) Dental benefits under group health plans

(1) Subject to paragraph (2), a group health plan (as defined in subsection (a)(1)(A)(v))[7] providing supplemental or secondary coverage to individuals also entitled to services under this subchapter shall not require a medicare claims determination under this subchapter for dental benefits specifically excluded under subsection (a)(12) as a condition of making a claims determination for such benefits under the group health plan.

(2) A group health plan may require a claims determination under this subchapter in cases involving or appearing to involve inpatient dental hospital services or dental services expressly covered under this subchapter pursuant to actions taken by the Secretary.

(l) National and local coverage determination process

(1) Factors and evidence used in making national coverage determinations

The Secretary shall make available to the public the factors considered in making national coverage determinations of whether an item or service is reasonable and necessary. The Secretary shall develop guidance documents to carry out this paragraph in a manner similar to the development of guidance documents under section 371(h) of Title 21.

(2) Timeframe for decisions on requests for national coverage determinations

In the case of a request for a national coverage determination that--

(A) does not require a technology assessment from an outside entity or deliberation from the Medicare Coverage Advisory Committee, the decision on the request shall be made not later than 6 months after the date of the request; or

(B) requires such an assessment or deliberation and in which a clinical trial is not requested, the decision

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on the request shall be made not later than 9 months after the date of the request.

(3) Process for public comment in national coverage determinations

(A) Period for proposed decision

Not later than the end of the 6-month period (or 9-month period for requests described in paragraph (2)(B)) that begins on the date a request for a national coverage determination is made, the Secretary shall make a draft of proposed decision on the request available to the public through the Internet website of the Centers for Medicare & Medicaid Services or other appropriate means.

(B) 30-day period for public comment

Beginning on the date the Secretary makes a draft of the proposed decision available under subparagraph (A), the Secretary shall provide a 30-day period for public comment on such draft.

(C) 60-day period for final decision

Not later than 60 days after the conclusion of the 30-day period referred to under subparagraph (B), the Secretary shall--

(i) make a final decision on the request;

(ii) include in such final decision summaries of the public comments received and responses to such comments;

(iii) make available to the public the clinical evidence and other data used in making such a decision when the decision differs from the recommendations of the Medicare Coverage Advisory Committee; and

(iv) in the case of a final decision under clause (i) to grant the request for the national coverage determination, the Secretary shall assign a temporary or permanent code (whether existing or unclassified) and implement the coding change.

(4) Consultation with outside experts in certain national coverage determinations

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With respect to a request for a national coverage determination for which there is not a review by the Medicare Coverage Advisory Committee, the Secretary shall consult with appropriate outside clinical experts.

(5) Local coverage determination process

(A) Plan to promote consistency of coverage determinations

The Secretary shall develop a plan to evaluate new local coverage determinations to determine which determinations should be adopted nationally and to what extent greater consistency can be achieved among local coverage determinations.

(B) Consultation

The Secretary shall require the fiscal intermediaries or carriers providing services within the same area to consult on all new local coverage determinations within the area.

(C) Dissemination of information

The Secretary should serve as a center to disseminate information on local coverage determinations among fiscal intermediaries and carriers to reduce duplication of effort.

(D) Local coverage determinations

The Secretary shall require each Medicare administrative contractor that develops a local coverage determination to make available on the Internet website of such contractor and on the Medicare Internet website, at least 45 days before the effective date of such determination, the following information:

(i) Such determination in its entirety.

(ii) Where and when the proposed determination was first made public.

(iii) Hyperlinks to the proposed determination and a response to comments submitted to the contractor with respect to such proposed determination.

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(iv) A summary of evidence that was considered by the contractor during the development of such determination and a list of the sources of such evidence.

(v) An explanation of the rationale that supports such determination.

(6) National and local coverage determination defined

For purposes of this subsection--

(A) National coverage determination

The term "national coverage determination" means a determination by the Secretary with respect to whether or not a particular item or service is covered nationally under this subchapter.

(B) Local coverage determination

The term "local coverage determination" has the meaning given that in section 1395ff(f)(2)(B) of this title.

(m) Coverage of routine costs associated with certain clinical trials of category A devices

(1) In general

In the case of an individual entitled to benefits under part A, or enrolled under part B, or both who participates in a category A clinical trial, the Secretary shall not exclude under subsection (a)(1) payment for coverage of routine costs of care (as defined by the Secretary) furnished to such individual in the trial.

(2) Category A clinical trial

For purposes of paragraph (1), a "category A clinical trial" means a trial of a medical device if--

(A) the trial is of an experimental/investigational (category A) medical device (as defined in regulations under section 405.201(b) of title 42, Code of Federal Regulations (as in effect as of September 1, 2003));

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(B) the trial meets criteria established by the Secretary to ensure that the trial conforms to appropriate scientific and ethical standards; and

(C) in the case of a trial initiated before January 1, 2010, the device involved in the trial has been determined by the Secretary to be intended for use in the diagnosis, monitoring, or treatment of an immediately life-threatening disease or condition.

(n) Requirement of a surety bond for certain providers of services and suppliers

(1) In general

The Secretary may require a provider of services or supplier described in paragraph (2) to provide the Secretary on a continuing basis with a surety bond in a form specified by the Secretary in an amount (not less than $50,000) that the Secretary determines is commensurate with the volume of the billing of the provider of services or supplier. The Secretary may waive the requirement of a bond under the preceding sentence in the case of a provider of services or supplier that provides a comparable surety bond under State law.

(2) Provider of services or supplier described

A provider of services or supplier described in this paragraph is a provider of services or supplier the Secretary determines appropriate based on the level of risk involved with respect to the provider of services or supplier, and consistent with the surety bond requirements under sections 1395m(a)(16)(B) and 1395x(o)(7)(C) of this title.

(o) Suspension of payments pending investigation of credible allegations of fraud

(1) In general

The Secretary may suspend payments to a provider of services or supplier under this subchapter pending an investigation of a credible allegation of fraud against the provider of services or supplier, unless the Secretary determines there is good cause not to suspend such payments.

(2) Consultation

The Secretary shall consult with the Inspector General of the Department of Health and Human Services in

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determining whether there is a credible allegation of fraud against a provider of services or supplier.

(3) Promulgation of regulations

The Secretary shall promulgate regulations to carry out this subsection, section 1395w-112(b)(7) of this title (including as applied pursuant to section 1395w-27(f)(3)(D) of this title), and section 1396b(i)(2)(C) of this title.

(4) Credible allegation of fraud

In carrying out this subsection, section 1395w-112(b)(7) of this title (including as applied pursuant to section 1395w-27(f)(3)(D) of this title), and section 1396b(i)(2)(C) of this title, a fraud hotline tip (as defined by the Secretary) without further evidence shall not be treated as sufficient evidence for a credible allegation of fraud.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XVIII, § 1862, as added Pub.L. 89-97, Title I, § 102(a), July 30, 1965, 79 Stat. 325; amended Pub.L. 90-248, Title I, §§ 127(b), 128, Jan. 2, 1968, 81 Stat. 846, 847; Pub.L. 92-603, Title II, §§ 210, 211(c)(1), 229(a), 256(c), Oct. 30, 1972, 86 Stat. 1382, 1384, 1408, 1447; Pub.L. 93-233, § 18(k)(3), Dec. 31, 1973, 87 Stat. 970; Pub.L. 93-480, § 4(a), Oct. 26, 1974, 88 Stat. 1454; Pub.L. 94-182, Title I, § 103, Dec. 31, 1975, 89 Stat. 1051; Pub.L. 95-142, §§ 7(a), 13(a), (b)(1), (2), Oct. 25, 1977, 91 Stat. 1192, 1197, 1198; Pub.L. 95-210, § 1(f), Dec. 13, 1977, 91 Stat. 1487; Pub.L. 96-272, Title III, § 308(a), June 17, 1980, 94 Stat. 531; Pub.L. 96-499, Title IX, §§ 913(b), 936(c), 939(a), 953, Dec. 5, 1980, 94 Stat. 2620, 2640, 2647; Pub.L. 96-611, § 1(a)(3), Dec. 28, 1980, 94 Stat. 3566; Pub.L. 97-35, Title XXI, §§ 2103(a)(1), 2146(a), 2152(a), Aug. 13, 1981, 95 Stat. 787, 800, 802; Pub.L. 97-248, Title I, §§ 116(b), 122(f), (g)(1), 128(a)(2) to (4), 142, 148(a), Sept. 3, 1982, 96 Stat. 353, 362, 366, 381, 394; Pub.L. 97-448, Title III, § 309(b)(10), Jan. 12, 1983, 96 Stat. 2409; Pub.L. 98-21, Title VI, §§ 601(f), 602(e), Apr. 20, 1983, 97 Stat. 162, 163; Pub.L. 98-369, Div. B, Title III, §§ 2301(a), 2304(c), 2313(c), 2344(a) to (c), 2354(b)(30), (31), July 18, 1984, 98 Stat. 1063, 1068, 1078, 1095, 1101, 1102; Pub.L. 99-272, Title IX, §§ 9201(a), 9307(a), 9401(c)(1), Apr. 7, 1986, 100 Stat. 170, 193, 199; Pub.L. 99-509, Title IX, §§ 9316(b), 9319(a), (b), 9320(h)(1), 9343(c)(1), Oct. 21, 1986, 100 Stat. 2007, 2010, 2011, 2016, 2040; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 100-93, §§ 8(c)(1), (3), 10, Aug. 18, 1987, 101 Stat. 692, 693, 696; Pub.L. 100-203, Title IV, §§ 4009(j)(6)(C), 4034(a), 4036(a)(1), 4039(c)(1), 4072(c), 4085(i)(15), (16), Dec. 22, 1987, 101 Stat. 1330-59, 1330-77, 1330-79, 1330-82, 1330-117, 1330-133; Pub.L. 100-360, Title II, §§ 202(d), 204(d)(2), 205(e)(1), Title IV, § 411(f)(4)(D)(i), (i)(4)(D), July 1, 1988, 102 Stat. 715, 729, 731, 778, 790; Pub.L. 100-485, Title VI, § 608(d)(7), (24)(C), Oct. 13, 1988, 102 Stat. 2415, 2421; Pub.L. 101-234, Title II, § 201(a), Dec. 13, 1989, 103 Stat. 1981; Pub.L. 101-239, Title VI, §§ 6003(g)(3)(D)(xi), 6103(b)(3)(B), 6115(b), 6202(a)(2)(A), (b)(1), (e)(1), 6411(d)(2), Dec. 19, 1989, 103 Stat. 2154, 2199, 2219, 2228, 2229, 2234, 2271; Pub.L. 101-508, Title IV, §§ 4107(b), 4153(b)(2)(B), 4157(c)(1), 4161(a)(3)(C), 4163(d)(2), 4203(a)(1), (b), (c)(1), 4204(g)(1), Nov. 5, 1990, 104 Stat. 1388-62, 1388-84, 1388-89, 1388-94, 1388-100, 1388-107, 1388-112; Pub.L. 103-66, Title XIII, §§ 13561(a)(1), (b) to (d)(1), (e)(1), 13581(b)(1), Aug. 10, 1993, 107 Stat. 593, 594, 611; Pub.L. 103-432, Title I, §§ 145(c)(1), 147(e)(6), 151(a)(1)(A), (C), (2)(A), (b)(3)(A), (B), (c)(1), (4) to (6), (9)(B), 156(a)(2)(D), 157(b)(7), Oct. 31, 1994, 108 Stat. 4427, 4430, 4432 to 4436, 4441, 4442; Pub.L. 104-224, § 1, Oct. 2, 1996, 110 Stat. 3031; Pub.L. 104-226, § 1(b)(1), Oct. 2, 1996, 110 Stat. 3033; Pub.L. 105-12, § 9(a)(1), Apr. 30, 1997, 111 Stat. 26; Pub.L. 105-33, Title IV, §§ 4022(b)(1)(B), 4102(c), 4103(c), 4104(c)(3), 4201(c)(1), 4319(b), 4432(b)(1), 4507(a)(2)(B),

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4511(a)(2)(C), 4541(b), 4603(c)(2)(C), 4614(a), 4631(a)(1), (b), (c)(1), 4632(a), 4633(a), (b), Aug. 5, 1997, 111 Stat. 354, 361, 362, 365, 373, 394, 420, 441, 442, 456, 471, 474, 486, 487; Pub.L. 106-113, Div. B, § 1000(a)(6) [Title III, §§ 305(b), 321(k)(10)], Nov. 29, 1999, 113 Stat. 1536, 1501A-362, 1501A-367; Pub.L. 106-554, § 1(a)(6) [Title I, § 102(c), Title III, § 313(a), Title IV, § 432(b)(1), Title V, § 522(b)], Dec. 21, 2000, 114 Stat. 2763, 2763A-468, 2763A-499, 2763A-526, 2763A-546; Pub.L. 107-105, § 3(a), Dec. 27, 2001, 115 Stat. 1006; Pub.L. 108-173, Title III, §§ 301(a) to (c), 303(i)(3)(B), Title VI, §§ 611(d)(1), 612(c), 613(c), Title VII, § 731(a)(1), (b)(1), Title IX, §§ 900(e)(1)(J), 944(a)(1), 948(a), 950(a), Dec. 8, 2003, 117 Stat. 2221, 2254, 2304 to 2306, 2349, 2351, 2372, 2422, 2425, 2426; Pub.L. 109-171, Title V, § 5112(d), Feb. 8, 2006, 120 Stat. 44; Pub.L. 110-173, Title I, § 111(a), Dec. 29, 2007, 121 Stat. 2497; Pub.L. 110-275, Title I, §§ 101(a)(3), (b)(3), (4), 135(a)(2)(A), 143(b)(7), 152(b)(1)(D), 153(b)(2), July 15, 2008, 122 Stat. 2497, 2498, 2535, 2543, 2552, 2555; Pub.L. 111-148, Title I, § 1104(d), Title IV, § 4103(d), Title VI, § 6402(g)(3), (h)(1), Mar. 23, 2010, 124 Stat. 153, 556, 759, 760; Pub.L. 112-40, Title II, § 261(a)(3)(A), Oct. 21, 2011, 125 Stat. 423; Pub.L. 112-242, Title II, §§ 201, 202(a), 203 to 205(a), Jan. 10, 2013, 126 Stat. 2375, 2378, 2380, 2381; Pub.L. 113-188, Title IX, § 902(d), Nov. 26, 2014, 128 Stat. 2022; Pub.L. 114-10, Title V, § 516(a), Apr. 16, 2015, 129 Stat. 175; Pub.L. 114-255, Div. A, Title IV, § 4009(a), Dec. 13, 2016, 130 Stat. 1185; Pub.L. 115-271, Title II, § 2008(c), (d), Title IV, § 4002, Oct. 24, 2018, 132 Stat. 3931, 3959; Pub.L. 116-215, Div. B, Title III, § 1301, Dec. 11, 2020, 134 Stat. 1045; Pub.L. 117-2, Title IX, § 9401, Mar. 11, 2021, 135 Stat. 127; Pub.L. 117-108, Title I, § 101(a)(2)(C), Apr. 6, 2022, 136 Stat. 1136.)

Footnotes

1 So in original. The comma probably should not appear.

2 So in original. Probably should be “made,”.

3 So in original. Probably should be “subparagraph (A),”.

4 So in original.

5 So in original. Probably should be “subparagraph (A),”.

6 So in original. Probably should be followed by a period.

7 So in original. Probably should be “(b)(1)(A)(v))”.

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42 U.S.C.A. § 1395y, 42 USCA § 1395y
Current through P.L. 118-82. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XIX. Grants to States for Medical Assistance Programs (Refs & Annos)

42 U.S.C.A. § 1396p

§ 1396p. Liens, adjustments and recoveries, and transfers of assets

Currentness

(a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except--

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(B) in the case of the real property of an individual--

(i) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing (in accordance with procedures established by the State), that he cannot reasonably be expected to be discharged from the

medical institution and to return home,

except as provided in paragraph (2).

(2) No lien may be imposed under paragraph (1)(B) on such individual's home if--

(A) the spouse of such individual,

(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title, or

(C) a sibling of such individual (who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution),

is lawfully residing in such home.

(3) Any lien imposed with respect to an individual pursuant to paragraph (1)(B) shall dissolve upon that individual's discharge from the medical institution and return home.

(b) Adjustment or recovery of medical assistance correctly paid under a State plan

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B), the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of--

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(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan (but not including medical assistance for medicare cost-sharing or for benefits described in section 1396a(a)(10)(E) of this title).

(C)(i) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, the State shall seek adjustment or recovery from the individual's estate on account of medical assistance paid on behalf of the individual for nursing facility and other long-term care services.

(ii) Clause (i) shall not apply in the case of an individual who received medical assistance under a State plan of a State which had a State plan amendment approved as of May 14, 1993, and which satisfies clause (iv), or which has a State plan amendment that provides for a qualified State long-term care insurance partnership (as defined in clause (iii)) which provided for the disregard of any assets or resources--

(I) to the extent that payments are made under a long-term care insurance policy; or

(II) because an individual has received (or is entitled to receive) benefits under a long-term care insurance policy.

(iii) For purposes of this paragraph, the term "qualified State long-term care insurance partnership" means an approved State plan amendment under this subchapter that provides for the disregard of any assets or resources in an amount equal to the insurance benefit payments that are made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy if the following requirements are met:

(I) The policy covers an insured who was a resident of such State when coverage first became effective under the policy.

(II) The policy is a qualified long-term care insurance policy (as defined in section 7702B(b) of the Internal Revenue Code of 1986) issued not earlier than the effective date of the State plan amendment.

(III) The policy meets the model regulations and the requirements of the model Act specified in paragraph (5).

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(IV) If the policy is sold to an individual who--

(aa) has not attained age 61 as of the date of purchase, the policy provides compound annual inflation protection;

(bb) has attained age 61 but has not attained age 76 as of such date, the policy provides some level of inflation protection; and

(cc) has attained age 76 as of such date, the policy may (but is not required to) provide some level of inflation protection.

(V) The State Medicaid agency under section 1396a(a)(5) of this title provides information and technical assistance to the State insurance department on the insurance department's role of assuring that any individual who sells a long-term care insurance policy under the partnership receives training and demonstrates evidence of an understanding of such policies and how they relate to other public and private coverage of long-term care.

(VI) The issuer of the policy provides regular reports to the Secretary, in accordance with regulations of the Secretary, that include notification regarding when benefits provided under the policy have been paid and the amount of such benefits paid, notification regarding when the policy otherwise terminates, and such other information as the Secretary determines may be appropriate to the administration of such partnerships.

(VII) The State does not impose any requirement affecting the terms or benefits of such a policy unless the State imposes such requirement on long-term care insurance policies without regard to whether the policy is covered under the partnership or is offered in connection with such a partnership.

In the case of a long-term care insurance policy which is exchanged for another such policy, subclause (I) shall be applied based on the coverage of the first such policy that was exchanged. For purposes of this clause and paragraph (5), the term "long-term care insurance policy" includes a certificate issued under a group insurance contract.

(iv) With respect to a State which had a State plan amendment approved as of May 14, 1993, such a State satisfies this clause for purposes of clause (ii) if the Secretary determines that the State plan amendment provides for consumer protection standards which are no less stringent than the consumer protection standards which applied under such State plan amendment as of December 31, 2005.

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(v) The regulations of the Secretary required under clause (iii)(VI) shall be promulgated after consultation with the National Association of Insurance Commissioners, issuers of long-term care insurance policies, States with experience with long-term care insurance partnership plans, other States, and representatives of consumers of long-term care insurance policies, and shall specify the type and format of the data and information to be reported and the frequency with which such reports are to be made. The Secretary, as appropriate, shall provide copies of the reports provided in accordance with that clause to the State involved.

(vi) The Secretary, in consultation with other appropriate Federal agencies, issuers of long-term care insurance, the National Association of Insurance Commissioners, State insurance commissioners, States with experience with long-term care insurance partnership plans, other States, and representatives of consumers of long-term care insurance policies, shall develop recommendations for Congress to authorize and fund a uniform minimum data set to be reported electronically by all issuers of long-term care insurance policies under qualified State long-term care insurance partnerships to a secure, centralized electronic query and report-generating mechanism that the State, the Secretary, and other Federal agencies can access.

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time--

(A) when he has no surviving child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title; and

(B) in the case of a lien on an individual's home under subsection (a)(1)(B), when--

(i) no sibling of the individual (who was residing in the individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), and

(ii) no son or daughter of the individual (who was residing in the individual's home for a period of at least two years immediately before the date of the individual's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution),

is lawfully residing in such home who has lawfully resided in such home on a continuous basis since the date of the individual's admission to the medical institution.

(3)(A) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.

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(B) The standards specified by the Secretary under subparagraph (A) shall require that the procedures established by the State agency under subparagraph (A) exempt income, resources, and property that are exempt from the application of this subsection as of April 1, 2003, under manual instructions issued to carry out this subsection (as in effect on such date) because of the Federal responsibility for Indian Tribes and Alaska Native Villages. Nothing in this subparagraph shall be construed as preventing the Secretary from providing additional estate recovery exemptions under this subchapter for Indians.

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual--

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

(5)(A) For purposes of clause (iii)(III), the model regulations and the requirements of the model Act specified in this paragraph are:

(i) In the case of the model regulation, the following requirements:

(I) Section 6A (relating to guaranteed renewal or noncancellability), other than paragraph (5) thereof, and the requirements of section 6B of the model Act relating to such section 6A.

(II) Section 6B (relating to prohibitions on limitations and exclusions) other than paragraph (7) thereof.

(III) Section 6C (relating to extension of benefits).

(IV) Section 6D (relating to continuation or conversion of coverage).

(V) Section 6E (relating to discontinuance and replacement of policies).

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(VI) Section 7 (relating to unintentional lapse).

(VII) Section 8 (relating to disclosure), other than sections 8F, 8G, 8H, and 8I thereof.

(VIII) Section 9 (relating to required disclosure of rating practices to consumer).

(IX) Section 11 (relating to prohibitions against post-claims underwriting).

(X) Section 12 (relating to minimum standards).

(XI) Section 14 (relating to application forms and replacement coverage).

(XII) Section 15 (relating to reporting requirements).

(XIII) Section 22 (relating to filing requirements for marketing).

(XIV) Section 23 (relating to standards for marketing), including inaccurate completion of medical histories, other than paragraphs (1), (6), and (9) of section 23C.

(XV) Section 24 (relating to suitability).

(XVI) Section 25 (relating to prohibition against preexisting conditions and probationary periods in replacement policies or certificates).

(XVII) The provisions of section 26 relating to contingent nonforfeiture benefits, if the policyholder declines the offer of a nonforfeiture provision described in paragraph (4).

(XVIII) Section 29 (relating to standard format outline of coverage).

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(XIX) Section 30 (relating to requirement to deliver shopper's guide).

(ii) In the case of the model Act, the following:

(I) Section 6C (relating to preexisting conditions).

(II) Section 6D (relating to prior hospitalization).

(III) The provisions of section 8 relating to contingent nonforfeiture benefits.

(IV) Section 6F (relating to right to return).

(V) Section 6G (relating to outline of coverage).

(VI) Section 6H (relating to requirements for certificates under group plans).

(VII) Section 6J (relating to policy summary).

(VIII) Section 6K (relating to monthly reports on accelerated death benefits).

(IX) Section 7 (relating to incontestability period).

(B) For purposes of this paragraph and paragraph (1)(C)--

(i) the terms "model regulation" and "model Act" mean the long-term care insurance model regulation, and the long-term care insurance model Act, respectively, promulgated by the National Association of Insurance Commissioners (as adopted as of October 2000);

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(ii) any provision of the model regulation or model Act listed under subparagraph (A) shall be treated as including any other provision of such regulation or Act necessary to implement the provision; and

(iii) with respect to a long-term care insurance policy issued in a State, the policy shall be deemed to meet applicable requirements of the model regulation or the model Act if the State plan amendment under paragraph (1)(C)(iii) provides that the State insurance commissioner for the State certifies (in a manner satisfactory to the Secretary) that the policy meets such requirements.

(C) Not later than 12 months after the National Association of Insurance Commissioners issues a revision, update, or other modification of a model regulation or model Act provision specified in subparagraph (A), or of any provision of such regulation or Act that is substantively related to a provision specified in such subparagraph, the Secretary shall review the changes made to the provision, determine whether incorporating such changes into the corresponding provision specified in such subparagraph would improve qualified State long-term care insurance partnerships, and if so, shall incorporate the changes into such provision.

(c) Taking into account certain transfers of assets

(1)(A) In order to meet the requirements of this subsection for purposes of section 1396a(a)(18) of this title, the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in subparagraph (C)(ii)) during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

(B)(i) The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d) or in the case of any other disposal of assets made on or after February 8, 2006, 60 months) before the date specified in clause (ii).

(ii) The date specified in this clause, with respect to--

(I) an institutionalized individual is the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State plan, or

(II) a noninstitutionalized individual is the date on which the individual applies for medical assistance under the State plan or, if later, the date on which the individual disposes of assets for less than fair market value.

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(C)(i) The services described in this subparagraph with respect to an institutionalized individual are the following:

(I) Nursing facility services.

(II) A level of care in any institution equivalent to that of nursing facility services.

(III) Home or community-based services furnished under a waiver granted under subsection (c) or (d) of section 1396n of this title.

(ii) The services described in this subparagraph with respect to a noninstitutionalized individual are services (not including any services described in clause (i)) that are described in paragraph (7), (22), or (24) of section 1396d(a) of this title, and, at the option of a State, other long-term care services for which medical assistance is otherwise available under the State plan to individuals requiring long-term care.

(D)(i) In the case of a transfer of asset made before February 8, 2006, the date specified in this subparagraph is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this subsection.

(ii) In the case of a transfer of asset made on or after February 8, 2006, the date specified in this subparagraph is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.

(E)(i) With respect to an institutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall be equal to--

(I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by

(II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of

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the State, in the community in which the individual is institutionalized) at the time of application.

(ii) With respect to a noninstitutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall not be greater than a number equal to--

(I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by

(II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.

(iii) The number of months of ineligibility otherwise determined under clause (i) or (ii) with respect to the disposal of an asset shall be reduced--

(I) in the case of periods of ineligibility determined under clause (i), by the number of months of ineligibility applicable to the individual under clause (ii) as a result of such disposal, and

(II) in the case of periods of ineligibility determined under clause (ii), by the number of months of ineligibility applicable to the individual under clause (i) as a result of such disposal.

(iv) A State shall not round down, or otherwise disregard any fractional period of ineligibility determined under clause (i) or (ii) with respect to the disposal of assets.

(F) For purposes of this paragraph, the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless--

(i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual under this subchapter; or

(ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.

(G) For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes an annuity

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purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services under this subchapter unless--

(i) the annuity is--

(I) an annuity described in subsection (b) or (q) of section 408 of the Internal Revenue Code of 1986; or

(II) purchased with proceeds from--

(aa) an account or trust described in subsection (a), (c), or (p) of section 408 of such Code;

(bb) a simplified employee pension (within the meaning of section 408(k) of such Code); or

(cc) a Roth IRA described in section 408A of such Code; or

(ii) the annuity--

(I) is irrevocable and nonassignable;

(II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and

(III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

(H) Notwithstanding the preceding provisions of this paragraph, in the case of an individual (or individual's spouse) who makes multiple fractional transfers of assets in more than 1 month for less than fair market value on or after the applicable look-back date specified in subparagraph (B), a State may determine the period of ineligibility applicable to such individual under this paragraph by--

(i) treating the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) during all months on or after the look-back date specified in subparagraph (B) as 1

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transfer for purposes of clause (i) or (ii) (as the case may be) of subparagraph (E); and

(ii) beginning such period on the earliest date which would apply under subparagraph (D) to any of such transfers.

(I) For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes funds used to purchase a promissory note, loan, or mortgage unless such note, loan, or mortgage--

(i) has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration);

(ii) provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and

(iii) prohibits the cancellation of the balance upon the death of the lender.

In the case of a promissory note, loan, or mortgage that does not satisfy the requirements of clauses (i) through (iii), the value of such note, loan, or mortgage shall be the outstanding balance due as of the date of the individual's application for medical assistance for services described in subparagraph (C).

(J) For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least 1 year after the date of the purchase.

(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that--

(A) the assets transferred were a home and title to the home was transferred to--

(i) the spouse of such individual;

(ii) a child of such individual who (I) is under age 21, or (II) (with respect to States eligible to participate in the State program established under subchapter XVI) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title;

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(iii) a sibling of such individual who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date the individual becomes an institutionalized individual; or

(iv) a son or daughter of such individual (other than a child described in clause (ii)) who was residing in such individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual, and who (as determined by the State) provided care to such individual which permitted such individual to reside at home rather than in such an institution or facility;

(B) the assets--

(i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse,

(ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse,

(iii) were transferred to, or to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II), or

(iv) were transferred to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title);

(C) a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration, (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or (iii) all assets transferred for less than fair market value have been returned to the individual; or

(D) the State determines, under procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Secretary.

The procedures established under subparagraph (D) shall permit the facility in which the institutionalized individual is residing to file an undue hardship waiver application on behalf of the individual with the consent of the individual or the personal representative of the individual.

While an application for an undue hardship waiver is pending under subparagraph (D) in the case of an

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individual who is a resident of a nursing facility, if the application meets such criteria as the Secretary specifies, the State may provide for payments for nursing facility services in order to hold the bed for the individual at the facility, but not in excess of payments for 30 days.

(3) For purposes of this subsection, in the case of an asset held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset (or the affected portion of such asset) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset.

(4) A State (including a State which has elected treatment under section 1396a(f) of this title) may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection. In the case of a transfer by the spouse of an individual which results in a period of ineligibility for medical assistance under a State plan for such individual, a State shall, using a reasonable methodology (as specified by the Secretary), apportion such period of ineligibility (or any portion of such period) among the individual and the individual's spouse if the spouse otherwise becomes eligible for medical assistance under the State plan.

(5) In this subsection, the term "resources" has the meaning given such term in section 1382b of this title, without regard to the exclusion described in subsection (a)(1) thereof.

(d) Treatment of trust amounts

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

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(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to--

(i) the purposes for which a trust is established,

(ii) whether the trustees have or exercise any discretion under the trust,

(iii) any restrictions on when or whether distributions may be made from the trust, or

(iv) any restrictions on the use of distributions from the trust.

(3)(A) In the case of a revocable trust--

(i) the corpus of the trust shall be considered resources available to the individual,

(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c).

(B) In the case of an irrevocable trust--

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(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income--

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c), and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

(4) This subsection shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

(B) A trust established in a State for the benefit of an individual if--

(i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

(ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter, and

(iii) the State makes medical assistance available to individuals described in section 1396a(a)(10)(A)(ii)(V) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396a(a)(10)(C) of this title.

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(C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:

(i) The trust is established and managed by a nonprofit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

(5) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection with respect to an individual if the individual establishes that such application would work an undue hardship on the individual as determined on the basis of criteria established by the Secretary.

(6) The term "trust" includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies.

(e) Disclosure and treatment of annuities

(1) In order to meet the requirements of this section for purposes of section 1396a(a)(18) of this title, a State shall require, as a condition for the provision of medical assistance for services described in subsection (c)(1)(C)(i) (relating to long-term care services) for an individual, the application of the individual for such assistance (including any recertification of eligibility for such assistance) shall disclose a description of any interest the individual or community spouse has in an annuity (or similar financial instrument, as may be specified by the Secretary), regardless of whether the annuity is irrevocable or is treated as an asset. Such application or recertification form shall include a statement that under paragraph (2) the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance.

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(2)(A) In the case of disclosure concerning an annuity under subsection (c)(1)(F), the State shall notify the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the individual. Nothing in this paragraph shall be construed as preventing such an issuer from notifying persons with any other remainder interest of the State's remainder interest under such subsection.

(B) In the case of such an issuer receiving notice under subparagraph (A), the State may require the issuer to notify the State when there is a change in the amount of income or principal being withdrawn from the amount that was being withdrawn at the time of the most recent disclosure described in paragraph (1). A State shall take such information into account in determining the amount of the State's obligations for medical assistance or in the individual's eligibility for such assistance.

(3) The Secretary may provide guidance to States on categories of transactions that may be treated as a transfer of asset for less than fair market value.

(4) Nothing in this subsection shall be construed as preventing a State from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity described in paragraph (1).

(f) Disqualification for long-term care assistance for individuals with substantial home equity

(1)(A) Notwithstanding any other provision of this subchapter, subject to subparagraphs (B) and (C) of this paragraph and paragraph (2), in determining eligibility of an individual for medical assistance with respect to nursing facility services or other long-term care services, the individual shall not be eligible for such assistance if the individual's equity interest in the individual's home exceeds $500,000.

(B) A State may elect, without regard to the requirements of section 1396a(a)(1) of this title (relating to statewideness) and section 1396a(a)(10)(B) of this title (relating to comparability), to apply subparagraph (A) by substituting for "$500,000", an amount that exceeds such amount, but does not exceed $750,000.

(C) The dollar amounts specified in this paragraph shall be increased, beginning with 2011, from year to year based on the percentage increase in the consumer price index for all urban consumers (all items; United States city average), rounded to the nearest $1,000.

(2) Paragraph (1) shall not apply with respect to an individual if--

(A) the spouse of such individual, or

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(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title,

is lawfully residing in the individual's home.

(3) Nothing in this subsection shall be construed as preventing an individual from using a reverse mortgage or home equity loan to reduce the individual's total equity interest in the home.

(4) The Secretary shall establish a process whereby paragraph (1) is waived in the case of a demonstrated hardship.

(g) Treatment of entrance fees of individuals residing in continuing care retirement communities

(1) In general

For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, the rules specified in paragraph (2) shall apply to individuals residing in continuing care retirement communities or life care communities that collect an entrance fee on admission from such individuals.

(2) Treatment of entrance fee

For purposes of this subsection, an individual's entrance fee in a continuing care retirement community or life care community shall be considered a resource available to the individual to the extent that--

(A) the individual has the ability to use the entrance fee, or the contract provides that the entrance fee may be used, to pay for care should other resources or income of the individual be insufficient to pay for such care;

(B) the individual is eligible for a refund of any remaining entrance fee when the individual dies or terminates the continuing care retirement community or life care community contract and leaves the community; and

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(C) the entrance fee does not confer an ownership interest in the continuing care retirement community or life care community.

(h) Definitions

In this section, the following definitions shall apply:

(1) The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action--

(A) by the individual or such individual's spouse,

(B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or

(C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

(2) The term "income" has the meaning given such term in section 1382a of this title.

(3) The term "institutionalized individual" means an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in section 1396a(a)(10)(A)(ii)(VI) of this title.

(4) The term "noninstitutionalized individual" means an individual receiving any of the services specified in subsection (c)(1)(C)(ii).

(5) The term "resources" has the meaning given such term in section 1382b of this title, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XIX, § 1917, as added Pub.L. 97-248, Title I, § 132(b), Sept. 3, 1982, 96 Stat. 370;

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amended Pub.L. 97-448, Title III, § 309(b)(21), (22), Jan. 12, 1983, 96 Stat. 2410; Pub.L. 100-203, Title IV, § 4211(h)(12), Dec. 22, 1987, 101 Stat. 1330-207; Pub.L. 100-360, Title III, § 303(b), Title IV, § 411(l)(3)(I), July 1, 1988, 102 Stat. 760, 803; Pub.L. 100-485, Title VI, § 608(d)(16)(B), Oct. 13, 1988, 102 Stat. 2417; Pub.L. 101-239, Title VI, § 6411(e)(1), Dec. 19, 1989, 103 Stat. 2271; Pub.L. 103-66, Title XIII, §§ 13611(a) to (c), 13612(a) to (c), Aug. 10, 1993, 107 Stat. 622 to 628; Pub.L. 109-171, Title VI, §§ 6011(a), (b), (e), 6012(a) to (c), 6014(a), 6015(b), 6016(a) to (d), 6021(a)(1), Feb. 8, 2006, 120 Stat. 61 to 68; Pub.L. 109-432, Div. B, Title IV, § 405(b)(1), Dec. 20, 2006, 120 Stat. 2998; Pub.L. 110-275, Title I, § 115(a), July 15, 2008, 122 Stat. 2507; Pub.L. 111-5, Div. B, Title V, § 5006(c), Feb. 17, 2009, 123 Stat. 507; Pub.L. 113-67, Div. A, Title II, § 202(b)(3), Dec. 26, 2013, 127 Stat. 1177; Pub.L. 114-255, Div. A, Title V, § 5007(a), Dec. 13, 2016, 130 Stat. 1197; Pub.L. 115-123, Div. E, Title XII, § 53102(b)(1), Feb. 9, 2018, 132 Stat. 298.)

42 U.S.C.A. § 1396p, 42 USCA § 1396p
Current through P.L. 118-82. Some statute sections may be more current, see credits for details.

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McKinney's Mental Hygiene Law § 81.21

§ 81.21 Powers of guardian; property management

Effective: September 25, 2015

Currentness

(a) Consistent with the functional limitations of the incapacitated person, that person's understanding and appreciation of the harm that he or she is likely to suffer as the result of the inability to manage property and financial affairs, and that person's personal wishes, preferences, and desires with regard to managing the activities of daily living, and the least restrictive form of intervention, the court may authorize the guardian to exercise those powers necessary and sufficient to manage the property and financial affairs of the incapacitated person; to provide for the maintenance and support of the incapacitated person, and those persons depending upon the incapacitated person; to transfer a part of the incapacitated person's assets to or for the benefit of another person on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act.

Transfers made pursuant to this article may be in any form that the incapacitated person could have employed if he or she had the requisite capacity, except in the form of a will or codicil.

Those powers which may be granted include, but are not limited to, the power to:

1. make gifts;

2. provide support for persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide that support;

3. convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incidental to joint tenancy or tenancy by the entirety;

4. exercise or release powers held by the incapacitated person as trustee, personal representative, guardian for minor, guardian, or donee of a power of appointment;

5. enter into contracts;

6. create revocable or irrevocable trusts of property of the estate which may extend beyond the incapacity or life of the incapacitated person;

7. exercise options of the incapacitated person to purchase securities or other property;

8. exercise rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value;

9. exercise any right to an elective share in the estate of the incapacitated person's deceased spouse;

10. renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with paragraph (d) of section 2-1.11 of the estates, powers and trusts law;

11. authorize access to or release of confidential records;

12. apply for government and private benefits;

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13. marshall assets;

14. pay the funeral expenses of the incapacitated person;

15. pay such bills as may be reasonably necessary to maintain the incapacitated person;

16. invest funds of the incapacitated person as permitted by section 11-2.3 of the estates, powers and trusts law;

17. lease the primary residence for up to three years;

18. retain an accountant;

19. pay bills after the death of the incapacitated person provided the authority existed to pay such bills prior to death until a temporary administrator or executor is appointed; and

20. defend or maintain any judicial action or proceeding to a conclusion until an executor or administrator is appointed.

The guardian may also be granted any power pursuant to this subdivision granted to committees and conservators and guardians by other statutes subject to the limitations, conditions, and responsibilities of the exercise thereof unless the granting of such power is inconsistent with the provisions of this article.

(b) If the petitioner or the guardian seeks the authority to exercise a power which involves the transfer of a part of the incapacitated person's assets to or for the benefit of another person, including the petitioner or guardian, the petition shall include the following information:

1. whether any prior proceeding has at any time been commenced by any person seeking such power with respect to the property of the incapacitated person and, if so, a description of the nature of such application and the disposition made of such application;

2. the amount and nature of the financial obligations of the incapacitated person including funds presently and prospectively required to provide for the incapacitated person's own maintenance, support, and well-being and

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to provide for other persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide that support; a copy of any court order or written agreement setting forth support obligations of the incapacitated person shall be attached to the petition if available to the petitioner or guardian;

3. the property of the incapacitated person that is the subject of the present application;

4. the proposed disposition of such property and the reasons why such disposition should be made;

5. whether the incapacitated person has sufficient capacity to make the proposed disposition; if the incapacitated person has such capacity, his or her written consent shall be attached to the petition;

6. whether the incapacitated person has previously executed a will or similar instrument and if so, the terms of the most recently executed will together with a statement as to how the terms of the will became known to the petitioner or guardian; for purposes of this article, the term "will" shall have the meaning specified in section 1-2.19 of the estates, powers and trusts law and "similar instrument" shall include a revocable or irrevocable trust:

(i) if the petitioner or guardian can, with reasonable diligence, obtain a copy, a copy of the most recently executed will or similar instrument shall be attached to the petition; in such case, the petition shall contain a statement as to how the copy was secured and the basis for the petitioner or guardian's belief that such copy is a copy of the incapacitated person's most recently executed will or similar instrument.

(ii) if the petitioner or guardian is unable to obtain a copy of the most recently executed will or similar instrument, or if the petitioner or guardian is unable to determine whether the incapacitated person has previously executed a will or similar instrument, what efforts were made by the petitioner or guardian to ascertain such information.

(iii) if a copy of the most recently executed will or similar instrument is not otherwise available, the court may direct an attorney or other person who has the original will or similar instrument in his or her possession to turn a photocopy over to the court for its examination, in camera. A photocopy of the will or similar instrument shall then be turned over by the court to the parties in such proceeding unless the court finds that to do so would be contrary to the best interests of the incapacitated person;

7. a description of any significant gifts or patterns of gifts made by the incapacitated person;

8. the names, post-office addresses and relationships of the presumptive distributees of the incapacitated person as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure

act and of the beneficiaries under the most recent will or similar instrument executed by the incapacitated person.

(c) Notice of a petition seeking relief under this section shall be served upon:

(i) the persons entitled to notice in accordance with paragraph one of subdivision (e) of section 81.07 of this article;

(ii) if known to the petitioner or guardian, the presumptive distributees of the incapacitated person as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act unless the court dispenses with such notice; and

(iii) if known to the petitioner or guardian, any person designated in the most recent will or similar instrument of the incapacitated person as beneficiary whose rights or interests would be adversely affected by the relief requested in the petition unless the court dispenses with such notice.

(d) In determining whether to approve the application, the court shall consider:

1. whether the incapacitated person has sufficient capacity to make the proposed disposition himself or herself, and, if so, whether he or she has consented to the proposed disposition;

2. whether the disability of the incapacitated person is likely to be of sufficiently short duration such that he or she should make the determination with respect to the proposed disposition when no longer disabled;

3. whether the needs of the incapacitated person and his or her dependents or other persons depending upon the incapacitated person for support can be met from the remainder of the assets of the incapacitated person after the transfer is made;

4. whether the donees or beneficiaries of the proposed disposition are the natural objects of the bounty of the incapacitated person and whether the proposed disposition is consistent with any known testamentary plan or pattern of gifts he or she has made;

5. whether the proposed disposition will produce estate, gift, income or other tax savings which will significantly benefit the incapacitated person or his or her dependents or other persons for whom the incapacitated person would be concerned; and

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6. such other factors as the court deems relevant.

(e) The court may grant the application if satisfied by clear and convincing evidence of the following and shall make a record of these findings:

1. the incapacitated person lacks the requisite mental capacity to perform the act or acts for which approval has been sought and is not likely to regain such capacity within a reasonable period of time or, if the incapacitated person has the requisite capacity, that he or she consents to the proposed disposition;

2. a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances; and

3. the incapacitated person has not manifested an intention inconsistent with the performance of the act or acts for which approval has been sought at some earlier time when he or she had the requisite capacity or, if such intention was manifested, the particular person would be likely to have changed such intention under the circumstances existing at the time of the filing of the petition.

(f) Nothing in this article imposes any duty on the guardian to commence a special proceeding pursuant to this article seeking to transfer a part of the assets of the incapacitated person to or for the benefit of another person and the guardian shall not be liable or accountable to any person for having failed to commence a special proceeding pursuant to this article seeking to transfer a part of the assets of the incapacitated person to or for the benefit of another person.

Credits

(Added L.1992, c. 698, § 3. Amended L.1993, c. 32, §§ 10, 11; L.2004, c. 438, § 16, eff. Dec. 13, 2004; L.2010, c. 27, § 3, eff. Jan. 1, 2011; L.2015, c. 243, § 1, eff. Sept. 25, 2015.)

McKinney's Mental Hygiene Law § 81.21, NY MENT HYG § 81.21
Current through L.2024, chapters 1 to 334. Some statute sections may be more current, see credits for details.

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PL 114-255, December 13, 2016, 130 Stat 1033

UNITED STATES PUBLIC LAWS

114th Congress - Second Session

Convening January 06, 2016

Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed
Vetoes are indicated by ~~Text~~;
stricken material by ~~Text~~.

PL 114–255 [HR 34]
December 13, 2016
21ST CENTURY CURES ACT

An Act To accelerate the discovery, development, and delivery of 21st century cures, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 5007. FAIRNESS IN MEDICAID SUPPLEMENTAL NEEDS TRUSTS.

<< 42 USCA § 1396p >>

(a) IN GENERAL.—Section 1917(d)(4)(A) of the Social Security Act (42 U.S.C. 1396p(d)(4)(A)) is amended by inserting "the individual," after "for the benefit of such individual by".

<< 42 USCA § 1396p NOTE >>

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to trusts established on or after the date of the enactment of this Act.

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Case Law

a. In re Larson, 190 Misc.2d 482 (2002)
b. Arkansas Dept. of Health & Human Srvs. v. Ahlborn (2006)
c. Wos v. E.M.A. ex rel. Johnson (2013)

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190 Misc.2d 482
Surrogate's Court, Nassau County, New York.

In the Matter of the Guardianship of David B. LARSON, a Mentally Retarded Person.

Feb. 14, 2002.

Synopsis
Application was made to create device similar to supplemental needs trust, to provide for inheritance of approximately $25,000 bequeathed to developmentally disabled resident of state facility. The Surrogate's Court, Nassau County, John B. Riordan, J., held that inheritance could be transferred to Commissioner of State of New York, for deposit into account similar to statutory supplemental needs trust, to be used for maintenance of residence.

Approval granted.

Attorneys and Law Firms

****827 *483** Robert, Lerner & Bigler, Rockville Centre, for A. William Larson and another, petitioners.

Eliot Spitzer, Attorney General, New York City (Mark D. Brody of counsel), for New York State Office of Mental Retardation and Developmental Disabilities.

Opinion

JOHN B. RIORDAN, S.

This is an application to create a device similar to a Supplemental Needs Trust pursuant to § 13.29 of the Mental Hygiene Law. The petitioners, A. William Larson and Barbara Peters, are co-guardians of their developmentally disabled son, David. David resides at the Sara Daley State Operated Individualized Residential Alternative which is a residence under the jurisdiction of the New York State Office of Mental Retardation and Developmental Disabilities. He is under the age of 65 and receives both Medicaid and SSI.

In 1987, David's grandmother died and left David an inheritance of approximately $25,000. As David's eligibility for government benefits would have been jeopardized upon the receipt of the inheritance or, in the alternative, the full amount would have to be used to repay Medicaid, an application was made to establish a Supplemental Needs trust. The application was granted by this court on March 9, 1995. For various reasons, the Supplemental Needs Trust was never established or funded.

The petitioners, joined by James Whitehead—the director of the Hudson Valley Developmental Disabilities Services Office, have asked the court for permission to transfer the inheritance to the state to be deposited into a device similar to a Supplemental Needs Trust pursuant to Mental Hygiene Law § 13.29. Such a device would not jeopardize David's eligibility for either Medicaid or SSI because it would be a trust[1] as set forth in 42 U.S.C.A. § 1396p(4)(A), Social Services Law § 366(2)(b)(2)(iv) and 18 NYCRR § 360–4.5(e). The proffered reason behind the ****828** establishment of these accounts is to protect the small inheritance of a developmentally disabled or mentally retarded resident in a state facility when the patient has no responsible relative available or willing to administer the inheritance.

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***484** Section 13.29 of the Mental Hygiene Law entitled "Gifts" provides that the Commissioner "on behalf of the state, and if in the public interest shall accept, hold in trust, administer, apply, execute or use gifts, devises, bequests, grants, powers, or trusts of personal or real property made to the state ... which are to be used or may be used for purposes of the office of mental retardation and developmental disabilities, including, but not limited to, the maintenance, support, or benefit of one or more patients in a facility." This section of the law, with variations thereof, has been the law of the State of New York for one hundred and sixty years, having been enacted in 1842 as part of an "act to organize the state Lunatic Asylum, and move effectually to provide for the care, maintenance and recovery of the insane" (¶ 135, L.1842[2]). As originally enacted, the law provided that "managers may take and hold, in trust for the state, any grant or devise of land or any donation or bequest of money or other personal property, to be applied to the maintenance of insane persons and the general use of the state Lunatic Asylum" (¶ 135, § 6, L.1842).

Although the law has been in effect for one hundred and sixty years, there have been only two decisions where section 13.29 of the Mental Hygiene Law has been analyzed by the courts.[3] Where the Commissioner in Lunacy tried to exercise a right of election on behalf of one of his patients, the court held "[i]t is true that this statute vests in the commissioners in lunacy, among other general powers, the right to hold a devise of bequest to any state hospital in trust for the support of an insane person, but the act does not specifically or by inference authorize any election by the commissioner on behalf of a widow in a case of this sort; and, in the absence of clear intent, the courts should not hold the statute sufficiently broad to allow the commissioners to exercise a right which has been given as a personal one to the incompetent" (*Camardella v. Schwartz,* 126 App.Div. 334, 110 N.Y.S. 611).

In the *Matter of Patrick BB,* 284 A.D.2d 636, 725 N.Y.S.2d 731, Patrick, a developmentally disabled man, inherited approximately $20,000 and an application was made, inter alia, to establish a "13.29" fund ***485** with the inheritance. The court held that the statute "regulates the receipt and management of property in the form of 'gifts, devises, bequests, grants, powers, or trusts of property essentially 'made to the state' for the use of petitioner or its facilities.' Supreme Court's order did not 'gift' respondent's inheritance to the State. Clearly, the inheritance remained patient property. Thus, we find Mental Hygiene Law § 13.29(a) inapplicable in the instant case" (*Matter of Patrick BB, supra,* at 638, 725 N.Y.S.2d 731).

In response to the Appellate Division's decision in the *Matter of Patrick BB (supra),* ****829** the petitioners have asked the court for permission to conditionally gift the property to the Commissioner of the State of New York to be held in a "13.29" account.[4]

Guardians of developmentally disabled individuals have been allowed to gift property of the ward under the doctrine of substituted judgment (*Matter of Daly,* 142 Misc.2d 85, 536 N.Y.S.2d 393). The duty of the court is to "inquire as to what a reasonable and prudent person would do in the circumstances" (*Daly, supra,* at 88, 536 N.Y.S.2d 393 citing *Matter of Christiansen v. Christiansen,* 248 Cal.App.2d 398, 56 Cal.Rptr. 505). It is clear that a guardian appointed pursuant to Article 17–A of the Surrogate's Court Procedure Act has the authority, with court permission, to transfer an inheritance to a Supplemental Needs Trust (*Matter of Goldblatt,* 162 Misc.2d 888, 618 N.Y.S.2d 959). A reasonable and prudent person under the circumstances would elect to give the property to the state to be used for his or her own maintenance, rather than have the property used to pay claims for assistance rendered on his or her behalf.

The analysis, however, does not end here. As court approval is required in establishing the device similar to a Supplemental Needs Trust when a developmentally disabled person's property is the subject of the proceeding, the court may condition the "exercise of the privilege in such manner as it believes will sufficiently protect the interest of the disabled person" (*Matter of Goldblatt, supra* at 889, 618 N.Y.S.2d 959 and *DiGennaro v. Community Hospital of Glen Cove,* 204 A.D.2d 259, 611 N.Y.S.2d 591). Accordingly, the device is approved but must include a provision requiring the Commissioner to ***486** file an annual inventory and account with the Surrogate's Court, Nassau County.

All Citations

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190 Misc.2d 482, 738 N.Y.S.2d 827, 2002 N.Y. Slip Op. 22024

Footnotes

1 Trust is defined in 42 USCA § 1396p(6) as including "any legal instrument of device that is similar to a trust ...".

2 The law was amended in 1902 and the original board of managers was replaced by a "Commissioner of Lunacy". The primary purpose of the revision, and of subsequent revisions, was to correct the "scandals and all the extravagance which have marked the administration..". (1902 Memorandum filed with Approved Assembly Bill No. 438, Amending the Insanity Law at 75).

3 The Attorney General's office has provided the court with eight additional Supreme Court and Surrogate Court orders where approval for the funding of accounts pursuant to Section 13.29 of the Mental Hygiene Law was given.

4 Pursuant to 42 USC § 1382b(c), where an individual transfers resources for less than fair market value, the individual will be ineligible for SSI for a period of time. The Attorney General has taken the position that the proposed transfer will not effect David's eligibility for SSI benefits because the transfer is for other valuable consideration pursuant to 42 USC § 1382b(c)(1)(C)(ii)(*I*) as any possible claim by OMRDD will be waived.

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KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in L.Q. v. California Hospital Medical Center, Cal.App. 2 Dist., September 30, 2021

126 S.Ct. 1752
Supreme Court of the United States

ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Petitioners,
v.
Heidi AHLBORN.

No. 04–1506.
|
Argued Feb. 27, 2006.
|
Decided May 1, 2006.

Synopsis
Background: Medicaid recipient sued Arkansas Department of Human Services (ADHS), challenging ADHS's assertion of claim or lien against proceeds received by recipient in settlement of personal injury lawsuit. The United States District Court for the Eastern District of Arkansas, 280 F.Supp.2d 881, G. Thomas Eisele, J., granted state's motion for summary judgment, and appeal was taken. The Court of Appeals, 397 F.3d 620,

Colloton, Circuit Judge, reversed. Certiorari was granted.

Holdings: The Supreme Court, Justice Stevens, held that:

Arkansas statute automatically imposing lien in favor of ADHS on tort settlement proceeds was not authorized by federal Medicaid law, to extent that statute allowed encumbrance or attachment of proceeds meant to compensate recipient for damages distinct from medical costs, and

anti-lien provision of federal Medicaid law precluded Arkansas statute's encumbrance or attachment of proceeds related to damages other than medical costs; *Arkansas Dept. of Human Servs. v. Ferrel,* 336 Ark. 297, 984 S.W.2d 807.

Affirmed.

West Codenotes

Limited on Preemption Grounds
West's A.C.A. § 20–77–307(a, c).

****1753 *268** *Syllabus*[*]

Federal Medicaid law requires participating States to "ascertain the legal liability of third parties ... to pay for [an individual benefits recipient's] care and services available under the [State's] plan," 42 U.S.C. § 1396a(a)(25)(A); to "seek reimbursement for [medical] assistance to the extent of such legal liability," ****1754** § 1396a(a)(25)(B); to enact "laws under which, to the extent that payment has been made ... for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services," § 1396a(a)(25)(H); to "provide that, as a condition of [Medicaid] eligibility ..., the individual is required ... (A) to assign the State any rights ... to payment for medical care from any third party; ... (B) to cooperate with the State ... in obtaining [such] payments ... and ... (C) ... in identifying, and providing information to assist the State in pursuing, any third party who may be liable," § 1396k(a)(1). Finally, "any amount collected by the State under an assignment made" as described above "shall be retained by the State ... to reimburse it for [Medicaid] payments made on behalf of" the recipient. § 1396k(b). "[T]he remainder of such amount collected shall be paid" to the recipient. *Ibid.* Acting pursuant to its understanding of these provisions, Arkansas passed laws under which, when a state Medicaid recipient obtains a tort settlement following payment of medical costs on her behalf, a lien is automatically imposed on the settlement in an amount equal to Medicaid's costs. When that amount exceeds the portion of the settlement representing medical costs, satisfaction of the State's lien requires payment out of proceeds meant to compensate the recipient for damages distinct from medical costs, such as pain and suffering, lost wages, and loss of future earnings.

Following respondent Ahlborn's car accident with allegedly negligent third parties, petitioner Arkansas Department of Health and Human Services, then named Arkansas Department of Human Services (ADHS), determined that Ahlborn was eligible for Medicaid and paid providers $215,645.30 on her behalf. She filed a state-court suit against the alleged tortfeasors seeking damages for past medical costs and for ***269** other items including pain and suffering, loss of earnings and working time, and permanent impairment of her future earning ability. The case was settled out of court for $550,000, which was not allocated between categories of damages. ADHS did not participate or ask to participate in the settlement negotiations, and did not seek to reopen the judgment after the case was dismissed, but did intervene in the suit and assert a lien against the settlement proceeds for the full amount it had paid for Ahlborn's care. She filed this action in Federal District Court seeking a declaration that the State's lien violated federal law insofar as its satisfaction would require

depletion of compensation for her injuries other than past medical expenses. The parties stipulated, *inter alia,* that the settlement amounted to approximately one-sixth of the reasonable value of Ahlborn's claim and that, if her construction of federal law was correct, ADHS would be entitled to only the portion of the settlement ($35,581.47) that constituted reimbursement for medical payments made. In granting ADHS summary judgment, the court held that under Arkansas law, which it concluded did not conflict with federal law, Ahlborn had assigned ADHS her right to recover the full amount of Medicaid's payments for her benefit. The Eighth Circuit reversed, holding that ADHS was entitled only to that portion of the settlement that represented payments for medical care.

Held: Federal Medicaid law does not authorize ADHS to assert a lien on Ahlborn's settlement in an amount exceeding $35,581.47, and the federal anti-lien provision affirmatively prohibits it from doing so. Arkansas' third-party liability provisions are unenforceable insofar as they compel a different conclusion. Pp. 1760–1767.

****1755** (a) Arkansas' statute finds no support in the federal third-party liability provisions. That ADHS cannot claim more than the portion of Ahlborn's settlement that represents medical expenses is suggested by § 1396k(a)(1)(A), which requires that Medicaid recipients, as a condition of eligibility, "assign the State any rights ... *to payment for medical care* from any third party" (emphasis added), not their rights to payment for, *e.g.,* lost wages. The other statutory language ADHS relies on is not to the contrary, but reinforces the assignment provision's implicit limitation. First, statutory context shows that § 1396a(a)(25)(B)'s requirement that States "seek reimbursement for [medical] assistance *to the extent of such legal liability* " refers to "the legal liability of third parties ... *to pay for care and services available under the plan,*" § 1396a(a)(25)(A) (emphasis added). Here, because the tortfeasors accepted liability for only one-sixth of Ahlborn's overall damages, and ADHS has stipulated that only $35,581.47 of that sum represents compensation for medical expenses, the relevant "liability" extends no further ***270** than that amount. Second, § 1396a(a)(25)(H)'s requirement that the State enact laws giving it the right to recover from liable third parties "to the extent [it made] payment ... for medical assistance for health care items or services furnished to an individual" does not limit the State's recovery only by the amount it paid out on the recipient's behalf, since the rest of the provision makes clear that the State must be assigned "the rights of [the recipient] to payment by any other party *for such health care items or services*." (Emphasis added.) Finally, § 1396k(b)'s requirement that, where the State actively pursues recovery from the third party, Medicaid be reimbursed fully from "any amount collected by the State under an assignment" before "the remainder of such amount collected" is remitted to the recipient does not show that the State must be paid in full from any settlement. Rather, because the State's assigned rights extend only to recovery of medical payments, what § 1396k(b) requires is that the State be paid first out of any damages for medical care before the recipient can recover any of her own medical costs. Pp. 1760–1762.

(b) Arkansas' statute squarely conflicts with the federal Medicaid law's anti-lien provision, § 1396p(a)(1), which prohibits States from imposing liens "against the property of any individual prior to his death on account of medical assistance paid ... on his behalf under the State plan." Even if the State's lien is assumed to be consistent with federal law insofar as it encumbers proceeds designated as medical payments, the anti-lien provision precludes attachment or encumbrance of the remainder of the settlement. ADHS' attempt to avoid the anti-lien provision by characterizing the settlement proceeds as not Ahlborn's "property," but as the State's, fails for two reasons. First, because the settlement is not "received from a third party," as required by the state statute, until Ahlborn's chose in action has been reduced to proceeds in her possession, the assertion that any of the proceeds belonged to the State all along lacks merit. Second, the State's argument that Ahlborn lost her property rights in the proceeds the instant she applied for medical assistance is inconsistent with the creation of a statutory lien on those proceeds: ADHS would not need a lien on its own property. Pp. 1762–1764.

(c) The Court rejects as unpersuasive ADHS' and the United States' arguments that a rule permitting a lien on more than medical damages ought to apply here either because Ahlborn breached her duty to "cooperate" with ADHS or because there ****1756** is an inherent danger of manipulation in cases where the parties to a tort case settle without judicial oversight or input from the State. As § 1396k(a)(1)(C) demonstrates, the duty to cooperate arises principally, if not exclusively, in proceedings initiated *by the State* to recover from third parties. In any event, the ***271** aspersions cast upon Ahlborn are entirely unsupported; all the record reveals is that ADHS neither asked to be nor was involved in the settlement negotiations. Whatever the bounds of the duty

to cooperate, there is no evidence that it was breached here. Although more colorable, the alternative argument that a rule of full reimbursement is needed generally to avoid the risk of settlement manipulation also fails. The risk that parties to a tort suit will allocate away the State's interest can be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision. Pp. 1764–1765.

(d) Also rejected is ADHS' contention that the Eighth Circuit accorded insufficient weight to two decisions by the Departmental Appeals Board (Board) of the federal Department of Health and Human Services (HHS) rejecting appeals by two States from denial of reimbursement for costs they paid on behalf of Medicaid recipients who had settled tort claims. Although HHS generally has broad regulatory authority in the Medicaid area, the Court declines to treat the Board's reasoning in those cases as controlling because they address a different question from the one posed here, make no mention of the anti-lien provision, and rest on a questionable construction of the federal third-party liability provisions. Pp. 1765–1767.

397 F.3d 620, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

Lori Freno, for petitioners.

Patricia A. Millett, for United States as amicus curiae, by special leave of the Court, supporting the petitioners.

H. David Blair, for respondent.

Mike Beebe, Arkansas Attorney General, Lori Freno, Assistant Attorney General, Counsel of Record, Little Rock, AR, Attorneys for Petitioners Arkansas Department of Health and Human Services, et al.

H. David Blair, Attorney at Law, Batesville, AR, Counsel of Record, Phillip Farris, Attorney at Law, Batesville, AR, Attorneys for Respondent Heidi Ahlborn.

Opinion

Justice STEVENS delivered the opinion of the Court.

***272** When a Medicaid recipient in Arkansas obtains a tort settlement following payment of medical costs on her behalf by Medicaid, Arkansas law automatically imposes a lien on the settlement in an amount equal to Medicaid's costs. When that amount exceeds the portion of the settlement that represents medical costs, satisfaction of the State's lien requires payment out of proceeds meant to compensate the recipient for damages distinct from medical costs—like pain and suffering, lost wages, and loss of future earnings. The Court of Appeals for the Eighth Circuit held that this statutory lien contravened federal law and was therefore unenforceable. *Ahlborn v. Arkansas Dept. of Human Servs.,* 397 F.3d 620 (2005). Other courts have upheld similar lien provisions. See, *e.g., Houghton v. Department of Health,* 2002 UT 101, 57 P.3d 1067; ****1757** *Wilson v. Washington,* 142 Wash.2d 40, 10 P.3d 1061 (2000) (en banc). We granted certiorari to resolve the conflict, 545 U.S. 1165, 126 S.Ct. 35, 162 L.Ed.2d 933 (2005), and now affirm.

I

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On January 2, 1996, respondent Heidi Ahlborn, then a 19–year–old college student and aspiring teacher, suffered severe ***273** and permanent injuries as a result of a car accident. She was left brain damaged, unable to complete her college education, and incapable of pursuing her chosen career. Although she possessed a claim of uncertain value against the alleged tortfeasors who caused her injuries, Ahlborn's liquid assets were insufficient to pay for her medical care. Petitioner Arkansas Department of Health and Human Services (ADHS)[1] accordingly determined that she was eligible for medical assistance and paid providers $215,645.30 on her behalf under the State's Medicaid plan.

ADHS required Ahlborn to complete a questionnaire about her accident, and sent her attorney periodic letters advising him about Medicaid outlays. These letters noted that, under Arkansas law, ADHS had a claim to reimbursement from "any settlement, judgment, or award" obtained by Ahlborn from "a third party who may be liable for" her injuries, and that no settlement "shall be satisfied without first giving [ADHS] notice and a reasonable opportunity to establish its interest."[2] ADHS has never asserted, however, that Ahlborn has a duty to reimburse it out of any other subsequently acquired assets or earnings.

On April 11, 1997, Ahlborn filed suit against two alleged tortfeasors in Arkansas state court seeking compensation for the injuries she sustained in the January 1996 car accident. She claimed damages not only for past medical costs, but also for permanent physical injury; future medical expenses; past and future pain, suffering, and mental anguish; past loss of earnings and working time; and permanent impairment of the ability to earn in the future.

ADHS was neither named as a party nor formally notified of the suit. Ahlborn's counsel did, however, keep ADHS informed of details concerning insurance coverage as they became known during the litigation.

***274** In February 1998, ADHS intervened in Ahlborn's lawsuit to assert a lien on the proceeds of any third-party recovery Ahlborn might obtain. In October 1998, ADHS asked Ahlborn's counsel to notify the agency if there was a hearing in the case. No hearing apparently occurred, and the case was settled out of court sometime in 2002 for a total of $550,000. The parties did not allocate the settlement between categories of damages. ADHS did not participate or ask to participate in settlement negotiations. Nor did it seek to reopen the judgment after the case had been dismissed. ADHS did, however, assert a lien against the settlement proceeds in the amount of $215,645.30—the total cost of payments made by ADHS for Ahlborn's care.

On September 30, 2002, Ahlborn filed this action in the United States District Court for the Eastern District of Arkansas seeking a declaration that the lien violated the federal Medicaid laws insofar as its satisfaction would require depletion of compensation for injuries other than past medical expenses. To facilitate the District Court's resolution of the legal questions presented, the parties stipulated that Ahlborn's entire claim was reasonably valued at $3,040,708.12; that the settlement amounted to approximately one-sixth of that sum; and that, if Ahlborn's construction ****1758** of federal law was correct, ADHS would be entitled to only the portion of the settlement ($35,581.47) that constituted reimbursement for medical payments made. See App. 17–20.

Ruling on cross-motions for summary judgment, the District Court held that under Arkansas law, which it concluded did not conflict with federal law, Ahlborn had assigned to ADHS her right to any recovery from the third-party tortfeasors to the full extent of Medicaid's payments for her benefit. Accordingly, ADHS was entitled to a lien in the amount of $215,645.30.

***275** The Eighth Circuit reversed. It held that ADHS was entitled only to that portion of the judgment that represented payments for medical care. For the reasons that follow, we affirm.

II

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The crux of the parties' dispute lies in their competing constructions of the federal Medicaid laws. The Medicaid program, which provides joint federal and state funding of medical care for individuals who cannot afford to pay their own medical costs, was launched in 1965 with the enactment of Title XIX of the Social Security Act (SSA), as added, 79 Stat. 343, 42 U.S.C. § 1396 *et seq*. (2000 ed. and Supp. III). Its administration is entrusted to the Secretary of Health and Human Services (HHS), who in turn exercises his authority through the Centers for Medicare and Medicaid Services (CMS).[3]

States are not required to participate in Medicaid, but all of them do. The program is a cooperative one; the Federal Government pays between 50% and 83% of the costs the State incurs for patient care,[4] and, in return, the State pays its portion of the costs and complies with certain statutory requirements for making eligibility determinations, collecting and maintaining information, and administering the program. See § 1396a.

One such requirement is that the state agency in charge of Medicaid (here, ADHS) "take all reasonable measures to ascertain the legal liability of third parties ... to pay for care and services available under the plan." § 1396a(a)(25)(A) ***276** 2000 ed.).[5] The agency's obligation extends beyond mere identification, however;

> "in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability." § 1396a(a)(25)(B).

To facilitate its reimbursement from liable third parties, the State must,

> "to the extent that payment has been made under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, [have] in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to ****1759** have acquired the rights of such individual to payment by any other party for such health care items or services." § 1396a(a)(25)(H).

The obligation to enact assignment laws is reiterated in another provision of the SSA, which reads as follows:

> "(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance shall—
>
> "(1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who ***277** has the legal capacity to execute an assignment for himself, the individual is required—
>
> "(A) to assign the State any rights ... to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;
>
> "(B) to cooperate with the State ... in obtaining support and payments (described in subparagraph (A)) for himself ...; and
>
> "(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan ...." § 1396k(a).

Finally, "any amount collected by the State under an assignment made" as described above "shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of" the Medicaid recipient. § 1396k(b). "[T]he remainder of such amount collected shall be paid" to the recipient. *Ibid.*

Acting pursuant to its understanding of these third-party liability provisions, the State of Arkansas passed laws that purport to allow both ADHS and the Medicaid recipient, either independently or together, to recover "the cost of benefits" from third parties. Ark.Code Ann. §§ 20–77–301 through 20–77–309 (2001). Initially, "[a]s a condition of eligibility" for Medicaid, an applicant "shall automatically assign his or her right to any settlement, judgment, or award which may be obtained against any third party to [ADHS] to the full extent of any amount which may be paid by Medicaid for the benefit of the applicant." § 20–77–307(a). Accordingly, "[w]hen medical assistance benefits are provided" to the recipient "because of injury, disease, or disability for which

another person is liable," ADHS "shall have a right to recover from the person the cost of benefits so provided." § 20–77– ***278** 301(a).[6]278 ADHS' suit "shall" not, however, "be a bar to any action upon the claim or cause of action of the recipient." § 20–77–301(b). Indeed, the statute envisions that the recipient will sometimes sue together with ADHS, see § 20–77–303, or even alone. If the latter, the assignment described in § 20–77–307(a) "shall be considered a statutory lien on any settlement, judgment, or award received ... from a third party." § 20–77–307(c); see also § 20–77–302(a) ("When an action or claim is brought by a medical assistance recipient ..., any settlement, judgment, or award obtained is subject to the division's claim for reimbursement of ****1760** the benefits provided to the recipient under the medical assistance program").[7]

The State, through this statute, claims an entitlement to more than just that portion of a judgment or settlement that represents payment for medical expenses. It claims a right to recover the entirety of the costs it paid on the Medicaid recipient's behalf. Accordingly, if, for example, a recipient sues alone and settles her entire action against a third-party tortfeasor for $20,000, and ADHS has paid that amount or more to medical providers on her behalf, ADHS gets the whole settlement and the recipient is left with nothing. This is so even when the parties to the settlement allocate damages between medical costs, on the one hand, and other injuries like lost wages, on the other. The same rule also ***279** would apply, it seems, if the recovery were the result not of a settlement but of a jury verdict. In that case, under the Arkansas statute, ADHS could recover the full $20,000 in the face of a jury allocation of, say, only $10,000 for medical expenses.[8]

That this is what the Arkansas statute requires has been confirmed by the State's Supreme Court. In *Arkansas Dept. of Human Servs. v. Ferrel,* 336 Ark. 297, 984 S.W.2d 807 (1999), the court refused to endorse an equitable, nontextual interpretation of the statute. Rejecting a Medicaid recipient's argument that he ought to retain some of a settlement that was insufficient to cover both his and Medicaid's expenses, the court explained:

> "Given the clear, unambiguous language of the statute, it is apparent that the legislature intended that ADHS's ability to recoup Medicaid payments from third parties or recipients not be restricted by equitable subrogation principles such as the 'made whole' rule stated in [*Franklin v. Healthsource of Arkansas,* 328 Ark. 163, 942 S.W.2d 837 (1997)]. By creating an automatic legal assignment which expressly becomes a statutory lien, [Ark.Code Ann. § 20–77–307 (1991)] makes an unequivocal statement that the ADHS's ability to recover Medicaid payments from insurance settlements, if it so chooses, is superior to that of the recipient even when the settlement does not pay all the recipient's medical costs." *Id.,* at 308, 984 S.W.2d, at 811.

Accordingly, the Arkansas statute, if enforceable against Ahlborn, authorizes imposition of a lien on her settlement proceeds in the amount of $215,645.30. Ahlborn's argument before the District Court, the Eighth Circuit, and this Court ***280** has been that Arkansas law goes too far. We agree. Arkansas' statute finds no support in the federal third-party liability provisions, and in fact squarely conflicts with the anti-lien provision of the federal Medicaid laws.

III

We must decide whether ADHS can lay claim to more than the portion of Ahlborn's settlement that represents medical expenses.[9] The text of the federal ****1761** third-party liability provisions suggests not; it focuses on recovery of payments for medical care. Medicaid recipients must, as a condition of eligibility, "assign the State any rights ... *to payment for medical care* from any third party," 42 U.S.C. § 1396k(a)(1)(A) (emphasis added), not rights to payment for, for example, lost wages. The other statutory language that ADHS relies upon is not to the contrary; indeed, it reinforces the limitation implicit in the assignment provision.

First, ADHS points to § 1396a(a)(25)(B)'s requirement that States "seek reimbursement for [medical] assistance *to the extent of such legal liability* " (emphasis added) and suggests that this means that the entirety of a

recipient's settlement is fair game. In fact, as is evident from the context of the emphasized language, "such legal liability" refers to "the legal liability of third parties ... *to pay for care and services available under the plan*." § 1396a(a)(25)(A) (emphasis added). Here, the tortfeasor has accepted liability for only one-sixth of the recipient's overall damages, and ADHS has stipulated that only $35,581.47 of that sum represents compensation for medical expenses. Under the circumstances, ***281** the relevant "liability" extends no further than that amount.[10]

Second, ADHS argues that the language of § 1396a(a)(25)(H) favors its view that it can demand full reimbursement of its costs from Ahlborn's settlement. That provision, which echoes the requirement of a mandatory assignment of rights in § 1396k(a), says that the State must have in effect laws that, "to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual," give the State the right to recover from liable third parties. This must mean, says ADHS, that the agency's recovery is limited only by the amount it paid out on the recipient's behalf—and not by the third-party tortfeasor's particular liability for medical expenses. But that reading ignores the rest of the provision, which makes clear that the State must be assigned "the rights of [the recipient] to payment by any other party *for such health care items or services*." § 1396a(a)(25)(H) (emphasis added). Again, the statute does not sanction an assignment of rights to payment for anything other than medical expenses—not lost wages, not pain and suffering, not an inheritance.

Finally, ADHS points to the provision requiring that, where the State actively pursues recovery from the third party, Medicaid be reimbursed fully from "any amount collected by the State under an assignment" before "the remainder of such amount collected" is remitted to the recipient. § 1396k(b). In ADHS' view, this shows that the State must be paid in full from any settlement. See Brief for Petitioners 13. But, even assuming the provision applies in cases where the State does not actively participate in the litigation, ADHS' conclusion rests on a false premise: The ***282** "amount recovered ... under an assignment" is not, as ADHS assumes, the entire settlement; as explained above, under the federal statute the State's assigned rights extend only to recovery of payments ****1762** for medical care. Accordingly, what § 1396k(b) requires is that the State be paid first out of any damages representing payments for medical care before the recipient can recover any of her own costs for medical care.[11]

At the very least, then, the federal third-party liability provisions *require* an assignment of no more than the right to recover that portion of a settlement that represents payments for medical care.[12] They did not mandate the enactment of the Arkansas scheme that we have described.

***283** IV

If there were no other relevant provisions in the federal statute, the State might plausibly argue that federal law supplied a recovery "floor" upon which States were free to build. In fact, though, the federal statute places express limits on the State's powers to pursue recovery of funds it paid on the recipient's behalf. These limitations are contained in 42 U.S.C. §§ 1396a(a)(18) and 1396p. Section 1396a(a)(18) requires that a state Medicaid plan comply with § 1396p, which in turn prohibits States (except in circumstances not relevant here) from placing liens against, or seeking recovery of benefits paid from, a Medicaid recipient:

> "(a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan
>
> "(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except—
>
> "(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual,

or

"(B) [in certain circumstances not relevant here]

. . . . .

"(b) Adjustment or recovery of medical assistance correctly paid under a State plan

****1763** "(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the ***284** State plan may be made, except [in circumstances not relevant here]." § 1396p.

Read literally and in isolation, the anti-lien prohibition contained in § 1396p(a) would appear to ban even a lien on that portion of the settlement proceeds that represents payments for medical care.[13] Ahlborn does not ask us to go so far, though; she assumes that the State's lien is consistent with federal law insofar as it encumbers proceeds designated as payments for medical care. Her argument, rather, is that the anti-lien provision precludes attachment or encumbrance of the remainder of the settlement.

We agree. There is no question that the State can require an assignment of the right, or chose in action, to receive payments for medical care. So much is expressly provided for by §§ 1396a(a)(25) and 1396k(a). And we assume, as do the parties, that the State can also demand as a condition of Medicaid eligibility that the recipient "assign" in advance any payments that may constitute reimbursement for medical costs. To the extent that the forced assignment is expressly authorized by the terms of §§ 1396a(a)(25) and 1396k(a), it is an exception to the anti-lien provision. See *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler,* 537 U.S. 371, 383–385, and n. 7, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003). But that does not mean that the State can force an assignment of, or place a lien on, any other portion of Ahlborn's property. As explained above, the exception carved out by ***285** §§ 1396a(a)(25) and 1396k(a) is limited to payments for medical care. Beyond that, the anti-lien provision applies.

ADHS tries to avoid the anti-lien provision by characterizing the settlement proceeds as not Ahlborn's "property."[14] Its argument appears to be that the automatic assignment effected by the Arkansas statute rendered the proceeds the property of the State.[15] See Brief for Petitioners 31 ("[U]nder Arkansas law, the lien does not attach to the recipient's 'property' because it attaches only to those proceeds already assigned to the Department as a condition of Medicaid eligibility"). That argument fails for two reasons. First, ADHS insists that Ahlborn at all times until judgment retained her entire chose in action—a right that included her claim for medical damages. The statutory lien, then, cannot have attached until the proceeds materialized. That much is clear ****1764** from the text of the Arkansas statute, which says that the "assignment shall be considered a statutory lien on any settlement ... *received by the recipient from a third party*." Ark.Code Ann. § 20–77–307(c) (2001) (emphasis added). The settlement is not "received" until the chose in action has been reduced to proceeds in Ahlborn's possession. Accordingly, the assertion that any of the proceeds belonged to the State all along lacks merit.

Second, the State's argument that Ahlborn lost her property rights in the proceeds the instant she applied for medical assistance is inconsistent with the creation of a statutory ***286** lien on those proceeds. Why, after all, would ADHS need a lien on its own property? A lien typically is imposed on the property of *another* for payment of a debt owed by that other. See Black's Law Dictionary 922 (6th ed.1990). Nothing in the Arkansas statute defines the term otherwise.

That the lien is also called an "assignment" does not alter the analysis. The terms that Arkansas employs to describe the mechanism by which it lays claim to the settlement proceeds do not, by themselves, tell us whether the statute violates the anti-lien provision. See *United States v. Craft,* 535 U.S. 274, 279, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002); *Drye v. United States,* 528 U.S. 49, 58–61, 120 S.Ct. 474, 145 L.Ed.2d 466 (1999). Although denominated an "assignment," the effect of the statute here was not to divest Ahlborn of all her property interest; instead, Ahlborn retained the right to sue for medical care payments, and the State asserted a

right to the fruits of that suit once they materialized. In effect, and as at least some of the statutory language recognizes, Arkansas has imposed a lien on Ahlborn's property.[16] Since none of the federal third-party liability provisions excepts that lien from operation of the anti-lien provision, its imposition violates federal law.

***287** V

ADHS and its *amici* urge, however, that even if a lien on more than medical damages would violate federal law in some cases, a rule permitting such a lien ought to apply here either because Ahlborn breached her duty to "cooperate" with ADHS or because there is an inherent danger of manipulation in cases where the parties to a tort case settle without judicial oversight or input from the State. Neither argument is persuasive.

The United States proposes a default rule of full reimbursement whenever the recipient breaches her duty to "cooperate," and asserts that Ahlborn in fact breached that duty.[17] But, even if the Government's ****1765** allegations of obstruction were supported by the record, its conception of the duty to cooperate strays far beyond the text of the statute and the relevant regulations. The duty to cooperate arises principally, if not exclusively, in proceedings initiated *by the State* to recover from third parties. See 42 U.S.C. § 1396k(a)(1)(C) (recipients must "cooperate with the State in identifying ... and providing information to assist the State in pursuing" third parties). Most of the accompanying federal regulations simply echo this basic duty; all they add is that the recipient must "[p]ay to the agency any support or medical care funds received that are covered by the assignment of rights." 42 CFR § 433.147(b)(4) (2005).

In any event, the aspersions the United States casts upon Ahlborn are entirely unsupported; all the record reveals is that ADHS, despite having intervened in the lawsuit and ***288** asked to be apprised of any hearings, neither asked to be nor was involved in the settlement negotiations. Whatever the bounds of the duty to cooperate, there is no evidence that it was breached here.

ADHS' and the United States' alternative argument that a rule of full reimbursement is needed generally to avoid the risk of settlement manipulation is more colorable, but ultimately also unpersuasive. The issue is not, of course, squarely presented here; ADHS has stipulated that only $35,581.47 of Ahlborn's settlement proceeds properly are designated as payments for medical costs. Even in the absence of such a postsettlement agreement, though, the risk that parties to a tort suit will allocate away the State's interest can be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision.[18] For just as there are risks in underestimating the value of readily calculable damages in settlement negotiations, so also is there a countervailing concern that a rule of absolute priority might preclude settlement in a large number of cases, and be unfair to the recipient in others.[19]

***289** VI

Finally, ADHS contends that the Court of Appeals' decision below accords insufficient weight to two decisions by the Departmental Appeals Board of HHS (Board) rejecting appeals by the States of California and Washington from denial of reimbursement for costs those States paid on ****1766** behalf of Medicaid recipients who had settled tort claims. See App. to Pet. for Cert. 45–67 (reproducing *In re Washington State Dept. of Social & Health Servs.,* Dec. No. 1561, 1996 WL 157123 (HHS Dept.App. Bd., Feb. 7, 1996)); App. to Pet. for Cert. 68–86 (reproducing *In re California Dept. of Health Servs.,* Dec. No. 1504, 1995 WL 66334 (HHS Dept.App. Bd., Jan. 5, 1995)). Because the opinions in those cases address a different question from the one posed here, make no mention of the anti-lien provision, and, in any event, rest on a questionable construction of

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the federal third-party liability provisions, we conclude that they do not control our analysis.

Normally, if a State recovers from a third party the cost of Medicaid benefits paid on behalf of a recipient, the Federal Government owes the State no reimbursement, and any funds already paid by the Federal Government must be returned. See 42 CFR § 433.140(a)(2) (2005) (federal financial participation "is not available in Medicaid payments if ... [t]he agency received reimbursement from a liable third party"); § 433.140(c). Washington and California both had adopted schemes according to which the State refrained from claiming full reimbursement from tort settlements and instead took only a portion of each settlement. (In California, the recipient typically could keep at least 50% of her settlement, see App. to Pet. for Cert. 72; in Washington, the proportion varied from case to case, see *id.,* at 48–51.) Each scheme resulted in the State's having to pay a portion of the recipient's medical costs—a portion for which the State sought partial reimbursement from the Federal Government. CMS (then called HCFA) denied this partial reimbursement ***290** on the ground that the States had an absolute duty to seek full payment of medical expenses from third-party tortfeasors.

The Board upheld CMS' determinations. In California's appeal, which came first, the Board concluded that the State's duty to seek recovery of benefits "from available third party sources to the fullest extent possible" included demanding full reimbursement from the entire proceeds of a Medicaid recipient's tort settlement. *Id.,* at 76. The Board acknowledged that § 1396k(a) "refers to assignment only of 'payment for medical care,' " but thought that "the statutory scheme as a whole contemplates that the actual recovery might be greater and, if it is, that Medicaid should be paid first." *Ibid.* The Board gave two other reasons for siding with CMS: First, the legislative history of the third-party liability evinced a congressional intent that "the Medicaid program ... be reimbursed from available third party sources to the fullest extent possible," *ibid.;* and, second, California had long been on notice that it would not be reimbursed for any shortfall resulting from failure to fully recoup Medicaid's costs from tort settlements, see *id.,* at 77. The Board also opined that the State could not escape its duty to seek full reimbursement by relying on the Medicaid recipient's efforts in litigating her claims. See *id.,* at 79–80.

Finally, responding to the State's argument that its scheme gave Medicaid recipients incentives to sue third-party tortfeasors and thus resulted in both greater recovery and lower costs for the State, the Board observed that "a state is free to allow recipients to retain the state's share" of any recovery, so long as it does not compromise the Federal Government's share. *Id.,* at 85.

The Board reached the same conclusion, by the same means, in the Washington case. See *id.,* at 53–64.

Neither of these adjudications compels us to conclude that Arkansas' statutory ****1767** lien comports with federal law. First, the Board's rulings address a different question from the one ***291** presented here. The Board was concerned with the Federal Government's obligation to reimburse States that had, in its view, failed to seek full recovery of Medicaid's costs and had instead relied on recipients to act as private attorneys general. The Board neither discussed nor even so much as cited the federal anti-lien provision.

Second, the Board's acknowledgment that the assignment of rights required by § 1396k(a) is limited to payments for medical care only reinforces the clarity of the statutory language. Moreover, its resort to "the statutory scheme as a whole" as justification for muddying that clarity is nowhere explained. Given that the only statutory provisions CMS relied on are §§ 1396a(a)(25), 1396k(a), and 1396k(b), see *id.,* at 75–76; *id.,* at 54–55, and given the Board's concession that the first two of these limit the State's assignment to payments for medical care, the "statutory scheme" must mean § 1396k(b). But that provision does not authorize the State to demand reimbursement from portions of the settlement allocated or allocable to nonmedical damages; instead, it gives the State a priority disbursement from the medical expenses portion alone. See *supra,* at 1762. In fact, in its adjudication in the Washington case, the Board conceded as much: "[CMS] may require a state to assert a collection priority over funds obtained by Medicaid recipients in [third-party liability] suits *even though the distribution methodology set forth in section [1396k(b)] refers only to payments collected pursuant to assignments for medical care*." App. to Pet. for Cert. 54 (emphasis added). The Board's reasoning therefore is internally inconsistent.

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Third, the Board's reliance on legislative history is misplaced. The Board properly observed that Congress, in crafting the Medicaid legislation, intended that Medicaid be a "payer of last resort." S.Rep. No. 99–146, p. 313 (1985). That does not mean, however, that Congress meant to authorize States to seek reimbursement from Medicaid recipients themselves; in fact, with the possible exception of a lien ***292** on payments for medical care, the statute expressly prohibits liens against the property of Medicaid beneficiaries. See 42 U.S.C. § 1396p(a). We recognize that Congress has delegated "broad regulatory authority to the Secretary [of HHS] in the Medicaid area," *Wisconsin Dept. of Health and Family Servs. v. Blumer,* 534 U.S. 473, 496, n. 13, 122 S.Ct. 962, 151 L.Ed.2d 935 (2002), and that agency adjudications typically warrant deference. Here, however, the Board's reasoning couples internal inconsistency with a conscious disregard for the statutory text. Under these circumstances, we decline to treat the agency's reasoning as controlling.

VII

Federal Medicaid law does not authorize ADHS to assert a lien on Ahlborn's settlement in an amount exceeding $35,581.47, and the federal anti-lien provision affirmatively prohibits it from doing so. Arkansas' third-party liability provisions are unenforceable insofar as they compel a different conclusion. The judgment of the Court of Appeals is affirmed.

It is so ordered.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 ADHS was then named Arkansas Department of Human Services.

2 Affidavit of Wayne E. Olive, Exhs. 5 and 6 (Mar. 6, 2003).

3 Until 2001, CMS was known as the Health Care Financing Administration or HCFA. See 66 Fed.Reg. 35437.

4 The exact percentage of the federal contribution is calculated pursuant to a formula keyed to each State's per capita income. See 42 U.S.C. § 1396d(b).

5 A "third party" is defined by regulation as "any individual, entity or program that is or may be liable to pay all or

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part of the expenditures for medical assistance furnished under a State plan." 42 CFR § 433.136 (2005).

6 Under the Arkansas statute, ADHS' right to recover medical costs appears to be broader than that of the recipient. When ADHS sues, "no contributory or comparative fault of a recipient shall be attributed to the state, nor shall any restitution awarded to the state be denied or reduced by any amount or percentage of fault attributed to a recipient." § 20–77–301(d)(1) (2001).

7 The Arkansas Supreme Court has held that ADHS has an independent, nonderivative right to recover the cost of benefits from a third-party tortfeasor under § 20–77–301 even when the Medicaid recipient also sues for recovery of medical expenses. See *National Bank of Commerce v. Quirk,* 323 Ark. 769, 792–794, 918 S.W.2d 138, 151–152 (1996).

8 ADHS denies that it would actually demand the full $20,000 in such a case, see Brief for Petitioners 49, n. 13, but points to no provision of the Arkansas statute that would prevent it from doing so.

9 The parties here assume, as do we, that a State can fulfill its obligations under the federal third-party liability provisions by requiring an "assignment" of part of, or placing a lien on, the settlement that a Medicaid recipient procures on her own. Cf. §§ 1396k(a)(1)(B)–(C) (the recipient has a duty to identify liable third parties and to "provid[e] information to *assist the State in pursuing* " those parties (emphasis added)).

10 The effect of the stipulation is the same as if a trial judge had found that Ahlborn's damages amounted to $3,040,708.12 (of which $215,645.30 were for medical expenses), but because of her contributory negligence, she could only recover one-sixth of those damages.

11 Implicit in ADHS' interpretation of this provision is the assumption that there can be no "remainder" to remit to the Medicaid recipient if all the State has been assigned is the right to damages for medical expenses. That view in turn seems to rest on an assumption either that Medicaid will have paid all the recipient's medical expenses or that Medicaid's expenses will always exceed the portion of any third-party recovery earmarked for medical expenses. Neither assumption holds up. First, as both the Solicitor General and CMS acknowledge, the recipient often will have paid medical expenses out of her own pocket. See Brief for United States as *Amicus Curiae* 12 (under § 1396k(b), "the beneficiary retains the right to payment for any additional medical expenses personally incurred either before or subsequent to Medicaid eligibility and for other damages"); CMS, State Medicaid Manual § 3907, available at https://www. lexis.com>Legal>Secondary Legal>CCH>Health Law>CMS Program Manuals>CCH CMS Program Manuals P 3907 (as updated Mar. 25, 2006, and available in Clerk of Court's case file) (envisioning that "medical insurance payments," for example, will be remitted to the recipient if possible). Second, even if Medicaid's outlays often exceed the portion of the recovery earmarked for medical expenses in tort cases, the third-party liability provisions were not drafted exclusively with tort settlements in mind. In the case of health insurance, for example, the funds available under the policy may be enough to cover both Medicaid's costs and the recipient's own medical expenses.

12 ADHS concedes that, had a jury or judge allocated a sum for medical payments out of a larger award in this case, the agency would be entitled to reimburse itself only from the portion so allocated. See Brief for Petitioners 49, n. 13; see also Brief for United States as *Amicus Curiae* 22, n. 14 (noting that the Secretary of HHS "ordinarily accepts" a jury allocation of medical damages in satisfaction of the Medicaid debt, even where smaller than the amount of Medicaid's expenses). Given the stipulation between ADHS and Ahlborn, there is no textual basis for treating the settlement here differently from a judge-allocated settlement or even a jury award; all such awards typically establish

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a third party's "liability" for both "payment for medical care" and other heads of damages.

13 Likewise, subsection (b) would appear to forestall any attempt by the State to recover benefits paid, at least from the "individual." See, *e.g., Martin ex rel. Hoff v. Rochester,* 642 N.W.2d 1, 8, n. 6 (Minn.2002); *Wallace v. Estate of Jackson,* 972 P.2d 446, 450 (Utah 1998) (Durham, J., dissenting) (reading § 1396p to "prohibi[t] not only liens against Medicaid recipients but also any recovery for medical assistance correctly paid"). The parties here, however, neither cite nor discuss the antirecovery provision of § 1396p(b). Accordingly, we leave for another day the question of its impact on the analysis.

14 "Property" is defined by regulation as "the homestead and all other personal and real property in which the recipient has a legal interest." 42 CFR § 433.36(b) (2005).

15 The United States as *amicus curiae* makes the different argument that the proceeds never became Ahlborn's "property" because "to the extent the third party's payment passes through the recipient's hands en route to the State, it comes with the State's lien already attached." Brief as *Amicus Curiae* 18. Even if that reading were consistent with the Arkansas statute (and it is not, see *infra,* at 1764), the United States' characterization of the "assignment" simply reinforces Ahlborn's point: This is a lien that attaches *to the property of the recipient*.

16 Because ADHS insists that "Arkansas law did *not* require Ahlborn to assign her claim or her right to sue," Brief for Petitioners 33 (emphasis in original), we need not reach the question whether a State may force a recipient to assign a chose in action to receive as much of the settlement as is necessary to pay Medicaid's costs. The Eighth Circuit thought this would be impermissible because the State cannot "circumvent the restrictions of the federal anti-lien statute simply by requiring an applicant for Medicaid benefits to assign property rights to the State before the applicant liquidates the property to a sum certain." App. to Pet. for Cert. 6. Indeed, ADHS acknowledges that Arkansas cannot, for example, require a Medicaid applicant to assign in advance any right she may have to recover an inheritance or an award in a civil case not related to her injuries or medical care. This arguably is no different; as with assignment of those other choses in action, assignment of the right to compensation for lost wages and other nonmedical damages is nowhere authorized by the federal third-party liability provisions.

17 See, *e.g.,* Brief for United States as *Amicus Curiae* 14 (alleging that Ahlborn "omitt[ed] or understat[ed] the medical damages claim from her lawsuit and attempt[ed] to horde for herself the third-party liability payments"); *id.,* at 15 ("[H]aving forsaken her federal and state statutory duties of candid and forthcoming cooperation[,] respondent, rather than the taxpayers, must bear the financial consequences of her actions"); *id.,* at 21, 24 (referring to Ahlborn's "backdoor settlement" and "obstruction and attrition," as well as her "calculated evasion of her legal obligations").

18 As one *amicus* observes, some States have adopted special rules and procedures for allocating tort settlements in circumstances where, for example, private insurers' rights to recovery are at issue. See Brief for Association of Trial Lawyers of America 20–21. Although we express no view on the matter, we leave open the possibility that such rules and procedures might be employed to meet concerns about settlement manipulation.

19 The point is illustrated by state cases involving the recovery of workers' compensation benefits paid to an employee (or the family of an employee) whose injuries were caused by a third-party tortfeasor. In *Flanigan v. Department of Labor and Industries,* 123 Wash.2d 418, 869 P.2d 14 (1994), for example, the court concluded that the state agency could not satisfy its lien out of damages the injured worker's spouse recovered as compensation for loss of consortium. The court explained that the department could not "share in damages for which it has provided no compensation" because such a result would be "absurd and fundamentally unjust." *Id.,* at 426, 869 P.2d, at 17.

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 KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Farah v. Department of Medical Assistance Services, Va., February 17, 2022

133 S.Ct. 1391
Supreme Court of the United States

Aldona WOS, Secretary, North Carolina Department of Health and Human Services, Petitioner
v.
E.M.A., a minor, by and through her guardian ad litem, Daniel H. JOHNSON, et al.

No. 12–98
|
Argued Jan. 8, 2013.
|
Decided March 20, 2013.

Synopsis
Background: Guardian at litem for minor child, who had been a recipient of Medicaid benefits and who had received an award from settlement of medical malpractice suit, brought § 1983 action against North Carolina Department of Health and Human Services, which had placed Medicaid lien on settlement proceeds, seeking declaratory and injunctive relief for deprivation of child's rights under federal Medicaid anti-lien provision. The United States District Court for the Western District of North Carolina, Richard L. Voorhees, J., 722 F.Supp.2d 653, granted summary judgment in favor of State. Guardian appealed. The United States Court of Appeals for the Fourth Circuit, Davis, Circuit Judge, 674 F.3d 290, vacated and remanded. Certiorari was granted.

The Supreme Court, Justice Kennedy, held that North Carolina statute governing the State's reimbursement from the proceeds of tort damages recovered by a Medicaid beneficiary is preempted by the federal Medicaid anti-lien provision, to the extent that the North Carolina statute can be interpreted as creating a conclusive presumption that one-third of a Medicaid beneficiary's tort recovery represents compensation for medical expenses, abrogating *Andrews v. Haygood*, 362 N.C. 599, 669 S.E.2d 310.

Court of Appeals affirmed.

Justice Breyer filed a concurring opinion.

Chief Justice Roberts filed a dissenting opinion, in which Justice Scalia and Justice Thomas joined.

West Codenotes

Recognized as Preempted
West's Ann.Cal.Penal Code § 599f(b)

Limited on Preemption Grounds
West's N.C.G.S.A. § 108A–57

****1392** *Syllabus*[*]

The federal Medicaid statute's anti-lien provision, 42 U.S.C. § 1396p(a)(1), pre-empts a State's effort to take any portion of a Medicaid beneficiary's tort judgment or settlement not "designated as payments for medical care," ****1393** *Arkansas Dept. of Health and Human Servs. v. Ahlborn,* 547 U.S. 268, 284, 126 S.Ct. 1752, 164 L.Ed.2d 459. A North Carolina statute requires that up to one-third of any damages recovered by a beneficiary for a tortious injury be paid to the State to reimburse it for payments it made for medical treatment on account of the injury.

Respondent E.M.A. was born with multiple serious birth injuries that require her to receive between 12 and 18 hours of skilled nursing care per day and that will prevent her from being able to work, live independently, or provide for her basic needs. North Carolina's Medicaid program pays part of the cost of her ongoing medical care. E.M.A. and her parents filed a medical malpractice suit against the physician who delivered her and the hospital where she was born. They presented expert testimony estimating their damages to exceed $42 million, but they ultimately settled for $2.8 million, due in large part to insurance policy limits. The settlement did not allocate money among their various medical and nonmedical claims. In approving the settlement, the state court placed one-third of the recovery into escrow pending a judicial determination of the amount of the lien owed by E.M.A. to the State. E.M.A. and her parents then sought declaratory and injunctive relief in Federal District Court, claiming that the State's reimbursement scheme violated the Medicaid anti-lien provision. While that litigation was pending, the North Carolina Supreme Court held in another case that the irrebuttable statutory one-third presumption was a reasonable method for determining the amount due the State for medical expenses. The Federal District Court, in the instant case, agreed. But the Fourth Circuit vacated and remanded, concluding that the State's statutory scheme could not be reconciled with *Ahlborn.*

Held: The federal anti-lien provision pre-empts North Carolina's irrebuttable statutory presumption that one-third of a tort recovery is attributable to medical expenses. Pp. 1396 – 1402.

(a) In *Ahlborn,* the Court held that the federal Medicaid statute sets both a floor and a ceiling on a State's potential share of a beneficiary's tort recovery. Federal law requires an assignment to the State of "the right to recover that portion of a settlement that represents payments for medical care," but also "precludes attachment or encumbrance of the remainder of the settlement." 547 U.S., at 282, 284, 126 S.Ct. 1752. *Ahlborn* did not, however, resolve the question of how to determine what portion of a settlement represents payment for medical care. As North Carolina construes its statute, when the State's Medicaid expenditures exceed one-third of a beneficiary's tort recovery, the statute establishes a conclusive presumption that one-third of the recovery represents compensation for medical expenses, even if the settlement or verdict expressly allocates a lower percentage of the judgment to medical expenses. Pp. 1396 – 1398.

(b) North Carolina's law is pre-empted insofar as it would permit the State to take a portion of a Medicaid beneficiary's tort judgment or settlement not designated for medical care. It directly conflicts with the federal Medicaid statute and therefore "must give way." *PLIVA, Inc. v. Mensing,* 564 U.S. ——, ——, 131 S.Ct. 2567, 180 L.Ed.2d 580. The state law has no process for determining what portion of a beneficiary's tort recovery is attributable to medical expenses. Instead, the State has picked an arbitrary percentage and by statutory command labeled that portion of a beneficiary's tort recovery as representing payment for medical care. A State may not evade pre-emption through creative statutory interpretation or description, "framing" its law in a way that is at odds ****1394** with the statute's intended operation and effect. *National Meat Assn. v. Harris,* 565 U.S. ——, ——, 132 S.Ct. 965, 181 L.Ed.2d 950. North Carolina's argument, if accepted, would frustrate the Medicaid anti-lien provision in the context of tort recoveries. It lacks any limiting principle: If a State could

arbitrarily designate one-third of any recovery as payment for medical expenses, it could arbitrarily designate half or all of the recovery in the same way. The State offers no evidence showing that its allocation is reasonable in the mine run of cases, and the law provides no mechanism for determining whether its allocation is reasonable in any particular case.

No estimate of an allocation will be necessary where there has been a judicial finding or approval of an allocation between medical and nonmedical damages. In some cases, including *Ahlborn,* this binding stipulation or judgment will attribute to medical expenses less than one-third of the settlement. Yet even in these circumstances, North Carolina's statute would permit the State to take one-third of the total recovery. A conflict thus exists between North Carolina's law and the Medicaid anti-lien provision.

This case is not as clear-cut as *Ahlborn* was, for here there was no such stipulation or judgment. But *Ahlborn* 's reasoning and the federal statute's design contemplate that possibility: They envisioned that a judicial or administrative proceeding would be necessary where a beneficiary and the State are unable to agree on what portion of a settlement represents compensation for medical expenses. See 547 U.S., at 288, 126 S.Ct. 1752. North Carolina's irrebuttable, one-size-fits-all statutory presumption is incompatible with the Medicaid Act's clear mandate that a State may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses. Pp. 1398 – 1399.

(c) None of North Carolina's responses to this reasoning is persuasive. Pp. 1399 – 1402.

674 F.3d 290, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed a concurring opinion. ROBERTS, C.J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

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Opinion

Justice KENNEDY delivered the opinion of the Court.

***630** A federal statute prohibits States from attaching a lien on the property of a Medicaid beneficiary to recover benefits paid ****1395** by the State on the beneficiary's behalf. 42 U.S.C. § 1396p(a)(1). The anti-lien provision pre-empts a State's effort to take any portion of a Medicaid beneficiary's tort judgment or settlement not "designated as payments for medical care." *Arkansas Dept. of Health and Human Servs. v. Ahlborn,* 547 U.S. 268, 284, 126 S.Ct. 1752, 164 L.Ed.2d 459 (2006). North Carolina has enacted a statute requiring that up

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to one-third of any damages recovered by a beneficiary for a tortious injury be paid to the State to reimburse it for payments it made for medical treatment on account of the injury. See N.C. Gen.Stat. Ann. § 108A–57 (Lexis 2011); *Andrews v. Haygood,* 362 N.C. 599, 604–605, 669 S.E.2d 310, 314 (2008). The question presented is whether the North Carolina statute is compatible with the federal anti-lien provision.

I

When respondent E.M.A. was born in February 2000, she suffered multiple serious birth injuries which left her deaf, blind, and unable to sit, walk, crawl, or talk. The injuries also cause her to suffer from mental retardation and a seizure disorder. She requires between 12 and 18 hours of skilled nursing care per day. She will not be able to work, live independently, or provide for her basic needs. The cost ***631** of her ongoing medical care is paid in part by the State of North Carolina's Medicaid program.

In February 2003, E.M.A. and her parents filed a medical malpractice suit in North Carolina state court against the physician who delivered E.M.A. at birth and the hospital where she was born. The expert witnesses for E.M.A. and her parents in that proceeding estimated damages in excess of $42 million for medical and life-care expenses, loss of future earning capacity, and other assorted expenses such as architectural renovations to their home and specialized transportation equipment. App. 91–112. By far the largest part of this estimate was for "Skilled Home Care," totaling more than $37 million over E.M.A.'s lifetime. *Id.,* at 112. E.M.A. and her parents also sought damages for her pain and suffering and for her parents' emotional distress. *Id.,* at 64–65, 67–68, 72–73, 75–76. Their experts did not estimate the damages in these last two categories.

Assisted by a mediator, the parties began settlement negotiations. E.M.A. and her parents informed the North Carolina Department of Health and Human Services of the negotiations. The department had a statutory right to intervene in the malpractice suit and participate in the settlement negotiations in order to obtain reimbursement for the medical expenses it paid on E.M.A.'s behalf, up to one-third of the total recovery. See N.C. Gen.Stat. Ann. §§ 108A–57, 108A–59. It elected not to do so, though its representative informed E.M.A. and her parents that the State's Medicaid program had expended $1.9 million for E.M.A.'s medical care, which it would seek to recover from any tort judgment or settlement.

In November 2006, the court approved a $2.8 million settlement. The amount, apparently, was dictated in large part by the policy limits on the defendants' medical malpractice insurance coverage. See Brief for Respondents 5. The settlement agreement did not allocate the money among the different claims E.M.A. and her parents had advanced. In ***632** approving the settlement the court placed one-third of the $2.8 million recovery into an interest-bearing escrow account "until such time as the actual amount of the lien owed by [E.M.A.] to [the State] is conclusively judicially determined." App. 87.

E.M.A. and her parents then filed this action under Rev. Stat. § 1979, ****1396** 42 U.S.C. § 1983, in the United States District Court for the Western District of North Carolina. They sought declaratory and injunctive relief, arguing that the State's reimbursement scheme violated the Medicaid anti-lien provision, § 1396p(a)(1). While that litigation was pending, the North Carolina Supreme Court confronted the same question in *Andrews, supra*. It held that the irrebuttable statutory presumption that one-third of a Medicaid beneficiary's tort recovery is attributable to medical expenses was "a reasonable method for determining the State's medical reimbursements." *Id.,* at 604, 669 S.E.2d, at 314. The United States District Court, in the instant case, agreed. *Armstrong v. Cansler,* 722 F.Supp.2d 653 (2010).

The Court of Appeals for the Fourth Circuit vacated and remanded. *E.M.A. v. Cansler,* 674 F.3d 290 (2012). It concluded that North Carolina's statutory scheme could not be reconciled with "*Ahlborn* 's clear holding that the general anti-lien provision in federal Medicaid law prohibits a state from recovering any portion of a settlement or judgment not attributable to medical expenses." *Id.,* at 310. In some cases, the court reasoned, the actual portion of a beneficiary's tort recovery representing payment for medical care would be less than one-third. North Carolina's statutory presumption that one-third of a tort recovery is attributable to medical

expenses therefore must be "subject to adversarial testing" in a judicial or administrative proceeding. *Id.,* at 311.

To resolve the conflict between the opinion of the Court of Appeals in this case and the decision of the North Carolina Supreme Court in *Andrews,* this Court granted certiorari. 567 U.S. ——, 133 S.Ct. 99, —— L.Ed.2d —— (2012).

II

***633** At issue is the interaction between certain provisions of the federal Medicaid statute and state law. Congress has directed States, in administering their Medicaid programs, to seek reimbursement for medical expenses incurred on behalf of beneficiaries who later recover from third-party tortfeasors. States must require beneficiaries "to assign the State any rights ... to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party." 42 U.S.C. § 1396k(a)(1)(A). States receiving Medicaid funds must also

> "ha[ve] in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services." § 1396a(a)(25)(H).

A separate provision of the Medicaid statute, however, exists in some tension with these requirements. It says that, with exceptions not relevant here, "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan." § 1396p(a)(1).

In *Ahlborn,* the Court addressed this tension and held that the Medicaid statute sets both a floor and a ceiling on a State's potential share of a beneficiary's tort recovery. Federal law requires an assignment to the State of "the right to recover that portion of a settlement that represents payments for medical care," but it also "precludes attachment or encumbrance of the remainder of the settlement." 547 U.S., at 282, 284, 126 S.Ct. 1752. This is so because the beneficiary has a property right in the proceeds of the settlement, bringing it within the ambit of ****1397** the anti-lien provision. *Id.,* at 285, 126 S.Ct. 1752. ***634** That property right is subject to the specific statutory "exception" requiring a State to seek reimbursement for medical expenses paid on the beneficiary's behalf, but the anti-lien provision protects the beneficiary's interest in the remainder of the settlement. *Id.,* at 284, 126 S.Ct. 1752.

A question the Court had no occasion to resolve in *Ahlborn* is how to determine what portion of a settlement represents payment for medical care. The parties in that case stipulated that about 6 percent of respondent Ahlborn's tort recovery (approximately $35,600 of a $550,000 settlement) represented compensation for medical care. *Id.,* at 274, 126 S.Ct. 1752. The Court nonetheless anticipated the concern that some settlements would not include an itemized allocation. It also recognized the possibility that Medicaid beneficiaries and tortfeasors might collaborate to allocate an artificially low portion of a settlement to medical expenses. The Court noted that these problems could "be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision." *Id.,* at 288, 126 S.Ct. 1752.

North Carolina has attempted a different approach. Its statute provides:

> "Notwithstanding any other provisions of the law, to the extent of payments under this Part, the State, or the county providing medical assistance benefits, shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of this assistance.... The county attorney, or an attorney retained by the county or the State or both, or an attorney retained by the beneficiary of the assistance if this attorney has actual notice of payments made under this Part shall enforce this section. Any attorney retained by the beneficiary of the assistance shall, out of the proceeds obtained on behalf of the beneficiary by settlement with, judgment against, or otherwise from a third party by reason of injury or death, distribute to the Department the ***635**

> amount of assistance paid by the Department on behalf of or to the beneficiary, as prorated with the claims of all others having medical subrogation rights or medical liens against the amount received or recovered, but the amount paid to the Department shall not exceed one-third of the gross amount obtained or recovered." N.C. Gen.Stat. Ann. § 108A–57(a).

Before *Ahlborn* was decided, North Carolina and the state courts interpreted this statute to allow the State to "recover the costs of medical treatment provided ... even when the funds received by the [beneficiary] are not reimbursement for medical expenses." *Campbell v. North Carolina Dept. of Human Resources,* 153 N.C.App. 305, 307–308, 569 S.E.2d 670, 672 (2002). See also *Ezell v. Grace Hospital, Inc.,* 360 N.C. 529, 631 S.E.2d 131 (2006) (*per curiam*). Under *Ahlborn,* however, this construction of the statute is at odds with the Medicaid anti-lien provision, which "precludes attachment or encumbrance" of any portion of a settlement not "designated as payments for medical care." 547 U.S., at 284, 126 S.Ct. 1752.

In response to *Ahlborn,* the State advanced—and the North Carolina Supreme Court in *Andrews* accepted—a new interpretation of its statute. Under this interpretation the statute "defines 'the portion of the settlement that represents payment for medical expenses' as the lesser of the State's past medical expenditures or one-third of the plaintiff's total recovery." *Andrews,* 362 N.C., at 604, 669 S.E.2d, at 314. In other words, when the State's Medicaid expenditures on behalf of a beneficiary exceed one-third of the beneficiary's tort ****1398** recovery, the statute establishes a conclusive presumption that one-third of the recovery represents compensation for medical expenses. Under this reading of the statute the presumption operates even if the settlement or a jury verdict expressly allocates a lower percentage of the judgment to medical expenses. See Tr. of Oral Arg. 10, 16–17. Cf. *Andrews, supra,* at 602–604, 669 S.E.2d, at 313.

III

A

***636** Under the Supremacy Clause, "[w]here state and federal law 'directly conflict,' state law must give way." *PLIVA, Inc. v. Mensing,* 564 U.S. ——, ——, 131 S.Ct. 2567, 2577, 180 L.Ed.2d 580 (2011). The Medicaid anti-lien provision prohibits a State from making a claim to any part of a Medicaid beneficiary's tort recovery not "designated as payments for medical care." *Ahlborn, supra,* at 284, 126 S.Ct. 1752. North Carolina's statute, therefore, is pre-empted if, and insofar as, it would operate that way.

And it is pre-empted for that reason. The defect in § 108A–57 is that it sets forth no process for determining what portion of a beneficiary's tort recovery is attributable to medical expenses. Instead, North Carolina has picked an arbitrary number—one-third—and by statutory command labeled that portion of a beneficiary's tort recovery as representing payment for medical care. Pre-emption is not a matter of semantics. A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect.

A similar issue was presented last Term, in *National Meat Assn. v. Harris,* 565 U.S. ——, 132 S.Ct. 965, 181 L.Ed.2d 950 (2012). That case involved the pre-emptive scope of the Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq.* The Act prohibited States from imposing " '[r]equirements ... with respect to premises, facilities and operations' " at federally regulated slaughterhouses. *National Meat Assn.*, 565 U.S., at ——, 132 S.Ct., at 969 (quoting § 678). The State of California had enacted a law that prohibited slaughterhouses from (among other things) selling meat from nonambulatory animals for human consumption. *Id.,* at ——, 132 S.Ct., at 970 (citing Cal.Penal Code Ann. § 599f(b) (West 2010)). California sought to defend the law on the ground that it did not regulate the activities of slaughterhouses but instead restricted ***637** what type of meat could be sold in the marketplace after the animals had been butchered. 565 U.S., at —— – ——, 132 S.Ct., at 972–973.

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The Court rejected that argument. It recognized that if the argument were to prevail, "then any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved. That would make a mockery of the [Act's] preemption provision." *Id.,* at ——, 132 S.Ct., at 973. In a pre-emption case, the Court held, a proper analysis requires consideration of what the state law in fact does, not how the litigant might choose to describe it.

That reasoning controls here. North Carolina's argument, if accepted, would frustrate the Medicaid anti-lien provision in the context of tort recoveries. The argument lacks any limiting principle: If a State arbitrarily may designate one-third of any recovery as payment for medical expenses, there is no logical reason why it could not designate half, three-quarters, or all of a tort recovery in the same way. In *Ahlborn,* the State of Arkansas, under this rationale, would have succeeded in claiming the full amount it sought from the ****1399** beneficiary had it been more creative and less candid in describing the effect of its full-reimbursement law.

Here the State concedes that it would be "difficult ... to defend" a law purporting to allocate most or all of a beneficiary's tort recovery to medical expenses. Tr. of Oral Arg. 20. That is true; but, as a doctrinal matter, it is no easier to defend North Carolina's across-the-board allocation of one-third of all beneficiaries' tort recoveries to medical expenses. The problem is not that it is an unreasonable approximation in all cases. In some cases, it may well be a fair estimate. But the State provides no evidence to substantiate its claim that the one-third allocation is reasonable in the mine run of cases. Nor does the law provide a mechanism for determining whether it is a reasonable approximation in any particular case.

***638** In some instances, no estimate will be necessary or appropriate. When there has been a judicial finding or approval of an allocation between medical and nonmedical damages—in the form of either a jury verdict, court decree, or stipulation binding on all parties—that is the end of the matter. *Ahlborn* was a case of this sort. All parties (including the State of Arkansas) stipulated that approximately 6 percent of the plaintiff's settlement represented payment for medical costs. 547 U.S., at 274, 126 S.Ct. 1752. In other cases a settlement may not be reached and the judge or jury, in its findings, may make an allocation. With a stipulation or judgment under this procedure, the anti-lien provision protects from state demand the portion of a beneficiary's tort recovery that the stipulation or judgment does not attribute to medical expenses.

North Carolina's statute, however, operates to allow the State to take one-third of the total recovery, even if a proper stipulation or judgment attributes a smaller percentage to medical expenses. Consider the facts of *Ahlborn*. There, only $35,581.47 of the beneficiary's settlement "constituted reimbursement for medical payments made." *Ibid.* North Carolina's statute, had it been applied in *Ahlborn,* would have allowed the State to claim $183,333.33 (one-third of the beneficiary's $550,000 settlement). A conflict thus exists between North Carolina's law and the Medicaid anti-lien provision.

The instant case, to be sure, is not quite so clear cut; for there was no allocation of the settlement by either judicial decree or binding stipulation of the parties. But the reasoning of *Ahlborn* and the design of the federal statute contemplate that possibility. When the State and the beneficiary are unable to agree on an allocation, *Ahlborn* noted, the parties could "submi[t] the matter to a court for decision." *Id.,* at 288, 126 S.Ct. 1752.

The facts of the present case demonstrate why *Ahlborn* anticipated that a judicial or administrative proceeding ***639** would be necessary in that situation. Of the damages stemming from the injuries E.M.A. suffered at birth, it is apparent that a quite substantial share must be allocated to the skilled home care she will require for the rest of her life. See App. 112. It also may be necessary to consider how much E.M.A. and her parents could have expected to receive as compensation for their other tort claims had the suit proceeded to trial. An irrebuttable, one-size-fits-all statutory presumption is incompatible with the Medicaid Act's clear mandate that a State may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses.

B

North Carolina offers responses to this reasoning, but none is persuasive.

**1400 First, the State asserts that it is doing nothing more than what *Ahlborn* said it could do: "adop[t] special rules and procedures for allocating tort settlements." 547 U.S., at 288, n. 18, 126 S.Ct. 1752. This misreads *Ahlborn*. There the Court, citing an *amicus* brief, referred to judicial proceedings some States had established for allocating tort settlements where necessary for insurance or tax purposes. See Brief for Association of Trial Lawyers of America, O.T. 2005, No. 04–1506, pp. 20–21 (citing *Henning v. Wineman,* 306 N.W.2d 550 (Minn.1981), and *Rimes v. State Farm Mut. Auto. Ins. Co.,* 106 Wis.2d 263, 316 N.W.2d 348 (1982)). Those examples illustrated the kind of "special rules and procedures for allocating tort settlements" that *Ahlborn* considered. The decision did not endorse irrebuttable presumptions that designate some arbitrary fraction of a tort judgment to medical expenses in all cases.

Second, North Carolina contends that its law falls within the scope of a State's traditional authority to regulate tort actions, including the amount of damages that a party may recover. This argument begins from a correct premise: In our federal system, there is no question that States possess *640 the "traditional authority to provide tort remedies to their citizens" as they see fit. *Silkwood v. Kerr–McGee Corp.,* 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). But North Carolina's law is not an exercise of the State's general authority to regulate its tort system. It does not limit tort plaintiffs' ability to recover for certain types of nonmedical damages, and it does not say that medical damages are to be privileged above other damages in tort suits. All it seeks to do is to allocate the share of damages attributable to medical expenses in tort suits brought by Medicaid beneficiaries. A statute that singles out Medicaid beneficiaries in this manner cannot avoid compliance with the federal anti-lien provision merely by relying upon a connection to an area of traditional state regulation.

Third, North Carolina suggests that even though its allocation of one-third of a tort recovery to medical expenses may be arbitrary, other methods for allocating a recovery would be just as arbitrary. In the State's view there is no "ascertainable 'true value' of [a] case that should control what portion of any settlement is subject to the State's third-party recovery rights." Brief for Petitioner 26–27. As explained earlier, allocations, while to some extent perhaps not precise, need not be arbitrary. See *supra,* at 1399. In some cases a judgment or stipulation binding on all parties will allocate the plaintiff's recovery across different claims. Where no such judgment or stipulation exists, a fair allocation of such a settlement may be difficult to determine. Trial judges and trial lawyers, however, can find objective benchmarks to make projections of the damages the plaintiff likely could have proved had the case gone to trial.

In the instant case, for example, the North Carolina trial court approved the settlement only after finding that it constituted "fair and just compensation" to E.M.A. and her parents for her "severe and debilitating injuries"; for "medical and life care expenses" her condition will require; and for "severe emotional distress" from her injuries. App. 82. What portion of this lump-sum settlement constitutes "fair *641 and just compensation" for each individual claim will depend both on how likely E.M.A. and her parents would have been to prevail on the claims at trial and how much they reasonably could have expected to receive on each claim if successful, in view of damages awarded in comparable tort cases.

**1401 This relates to North Carolina's fourth argument: that it would be "wasteful, time consuming, and costly" to hold "frequent mini-trials" in order to divide a settlement between medical and nonmedical expenses. Brief for Petitioner 28. Even if that were true, it would not relieve the State of its obligation to comply with the terms of the Medicaid anti-lien provision. And it is not true as a general proposition. States have considerable latitude to design administrative and judicial procedures to ensure a prompt and fair allocation of damages. Sixteen States and the District of Columbia provide for hearings of this sort, and there is no indication that they have proved burdensome. Brief for United States as *Amicus Curiae* 28–29, and n. 7. See, *e.g.,* Cal. Welf. & Inst. Code Ann. § 14124.76(a) (West 2011); Mo.Rev.Stat. § 208.215.9–11 (2012); Tenn.Code Ann. § 71–5–117(g)–(i) (2012); *In re E.B.,* 229 W.Va. 435, ——, 729 S.E.2d 270, 297 (2012). Many of these States have established rebuttable presumptions and adjusted burdens of proof to ensure that speculative assessments of a plaintiff's likely recovery do not defeat the State's right to recover medical costs, a concern North Carolina raises. See, *e.g.,* Haw.Rev.Stat. § 346–37(h) (2011 Cum.Supp.) (rebuttable presumption of a one-third allocation); Mass. Gen. Laws, ch. 118E, § 22(c) (West 2010) (rebuttable presumption of full reimbursement);

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Okla. Stat., Tit. 63, § 5051.1(D)(1)(d) (West 2011) (rebuttable presumption of full reimbursement, "unless a more limited allocation of damages to medical expenses is shown by clear and convincing evidence"). Without holding that these rules are necessarily compliant with the federal statute, it can be concluded that they are more accurate than the procedure North Carolina has enacted.

***642** The task of dividing a tort settlement is a familiar one. In a variety of settings, state and federal courts are called upon to separate lump-sum settlements or jury awards into categories to satisfy different claims to a portion of the moneys recovered. See *supra,* at 1400. See also, *e.g., Green v. Commissioner,* 507 F.3d 857, 867–868 (C.A.5 2007) (separation of compensatory from noncompensatory damages for tax purposes); *Donnel v. United States,* 50 Fed.Cl. 375, 386–387 (2001) (separation of employee severance bonus from other payments for tax purposes); *In re Harrington,* 306 B.R. 172, 182–183 (Bkrtcy.Ct.E.D.Tex.2003) (separation of pain-and-suffering damages from other damages for purposes of bankruptcy exemption); *Colorado Compensation Ins. Auth. v. Jones,* 131 P.3d 1074, 1077–1078 (Colo.App.2005) (separation of economic from noneconomic damages for purposes of insurance subrogation); *Spangler v. North Star Drilling Co.,* 552 So.2d 673, 685 (La.App.1989) (separation of past damages from future damages for purposes of calculating prejudgment interest). Indeed, North Carolina itself uses a judicial allocation procedure to ascertain the portion of a settlement subject to subrogation in a workers' compensation suit. It instructs trial courts to

> "consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable." N.C. Gen.Stat. Ann. § 97–10.2(j) (Lexis 2011).

North Carolina would be on sounder footing had it adopted a similar procedure for allocating Medicaid beneficiaries' tort recoveries. It might also consider a different one along the lines of what other ****1402** States have done in Medicaid reimbursement cases.

***643** The State thus has ample means available to allocate Medicaid beneficiaries' tort recoveries in an efficient manner that complies with federal law. Indeed, if States are concerned that case-by-case judicial allocations will prove unwieldy, they may even be able to adopt *ex ante* administrative criteria for allocating medical and nonmedical expenses, provided that these criteria are backed by evidence suggesting that they are likely to yield reasonable results in the mine run of cases. What they cannot do is what North Carolina did here: adopt an arbitrary, one-size-fits-all allocation for all cases.

Fifth, and finally, North Carolina contends that in two documents—a July 2006 memorandum and a December 2009 letter responding to an inquiry from a member of North Carolina's congressional delegation—the federal Centers for Medicare and Medicaid Services approved of North Carolina's statutory scheme for Medicaid reimbursement. In the State's view, these agency pronouncements are entitled to deference. See Brief for Petitioner 33–36 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

The 2006 and 2009 documents, however, no longer reflect the agency's position. See Brief for United States as *Amicus Curiae* 8–34. And at any rate, the documents are opinion letters, not regulations with the force of law. We have held that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris County,* 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). These documents are " 'entitled to respect' " in proportion to their " 'power to persuade.' " *Ibid.* (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). Insofar as the 2006 and 2009 documents approve of North Carolina's statute, they lack persuasive force for the reasons discussed above.

* * *

***644** The law here at issue, N.C. Gen.Stat. Ann. § 108A–57, reflects North Carolina's effort to comply with federal law and secure reimbursement from third-party tortfeasors for medical expenses paid on behalf of the State's Medicaid beneficiaries. In some circumstances, however, the statute would permit the State to take a

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portion of a Medicaid beneficiary's tort judgment or settlement not "designated as payments for medical care." *Ahlborn,* 547 U.S., at 284, 126 S.Ct. 1752. The Medicaid anti-lien provision, 42 U.S.C. § 1396p(a)(1), bars that result.

The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

Justice BREYER, concurring.

I join the Court's opinion with one qualification: My concurrence in the Court's views rests in part upon the fact that the federal agency that administers the Medicaid statute, known as the Centers for Medicare & Medicaid Services, has reached the same conclusion.

The question before us is how to measure what share of a judgment or settlement of an accident victim's lawsuit represents payment (or reimbursement) for health care items (or services) for which a State has already paid on behalf of the victim. The statute is silent on the question. It simply says that a State may recover the amount of "payment" that the State has made on behalf of the victim "for medical assistance for health care items or ****1403** services" from funds that "any other party" has paid "for such health care items or services." 42 U.S.C. § 1396a(a)(25)(H). Moreover, the question focuses upon a comparatively minor matter of statutory detail, not a major issue of far-reaching statutory policy. It concerns everyday administration. It calls for expertise of a kind that the administering agency is more likely than a court to possess. And any of several different answers to the question would seem reasonable. Under these circumstances, ***645** normally we should find that Congress delegated to the agency authority to fill the statutory gap, and we should uphold the agency's conclusion as long as it is reasonable. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Here, however, the agency did not engage in rulemaking procedures, it did not carefully consider differing points of view of those affected, it did not set forth its views in a manual intended for widespread use, nor has it in any other way announced an interpretation that Congress would have "intended ... to carry the force of law." *United States v. Mead Corp.,* 533 U.S. 218, 221, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). Indeed, the agency does not claim that it exercised any delegated legislative power.

Neither do the documents in which the agency set forth its position (a memorandum and a letter) have much " 'power to persuade.' " *Christensen v. Harris County,* 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). Their reasoning is skimpy. And the conclusion now advanced by the agency represents a radical departure from the agency's previous position. See App. to Pet. for Cert. 129a, 141a–142a. Thus, the Solicitor General does not ask us to defer to the agency's views—and understandably so.

Nonetheless, the Administrative Procedure Act is not the tax code. And cases that seek to determine whether Congress intended courts to give weight to agency views provide rules of thumb, general principles meant to guide interpretation, not rigid rules that narrowly confine it. They seek to advance Congress' intent as embodied in particular statutory schemes by helping courts to determine whether, and how, Congress intended those courts to respect an agency's expertise when reasonably exercised in particular cases. They seek to allocate the law-interpreting function between court and agency in a way likely to work best within any particular statutory scheme. But they do not purport to do more than ***646** that. In particular, they do not set forth all-encompassing absolute rules, impervious to nuance and admitting of no exceptions. Felix Frankfurter's observation, made many years ago, remains valid today: "The problems subsumed by ... 'administrative discretion' ... must be related to ... the particular interest ... as to which 'administrative discretion' is exercised." The Task of Administrative Law, 75 U. Pa. L.Rev. 614, 619–620 (1927). That is to say, "the standard doctrines of administrative law ... should not be taken too rigidly." Jaffe, Administrative Law: Burden of Proof and Scope of

Review, 79 Harv. L.Rev. 914, 918 (1966).

Thus, even though this case does not fall directly within a case-defined category, such as "*Chevron* deference," "*Skidmore* deference," "*Beth Israel* deference," "*Seminole Rock* deference," or deference as defined by some other case, I believe the agency, in taking a position, nonetheless retains some small but special "power to persuade." *Skidmore, supra,* at 140, 65 S.Ct. 161. See generally Eskridge & ****1404** Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*, 96 Geo. L.J. 1083 (2008). And I would consequently to some degree take account of, and respect, the agency's judgment.

I cannot measure the degree of deference with the precision of a mariner measuring a degree of latitude. But it is still worth noting that the agency's determination has played some role in my own decision. That is because the agency, after looking into the matter more thoroughly (perhaps after notice-and-comment rulemaking), might change its mind. Given the nature of the question and of the agency's expertise, courts, I believe, should then give weight to that new and different agency decision. Cf. *National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 980–986, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005). In my view, today's decision does not freeze the Court's present interpretation of the statute permanently into law.

With that understanding, I join the Court's opinion.

Chief Justice ROBERTS, with whom Justice SCALIA and Justice THOMAS join, dissenting.

***647** The State of North Carolina paid for E.M.A.'s medical expenses under its Medicaid plan. E.M.A. sued those alleged to have caused her injuries, eventually settling for an amount that included, among other things, medical expenses already covered by North Carolina. The federal Medicaid statute requires North Carolina to recoup those expenses. But neither the Act nor the regulations issued under it tell States how to determine what portion of a third-party recovery should be attributed to medical expenses. The Court concludes that North Carolina's law addressing that question is nonetheless preempted by the Act.

The Court's reading of the Act, while plausible, is not compelled by the statutory text or our precedent. It has the unfortunate consequence of denying flexibility to the States—and, by necessary implication, the Secretary of Health and Human Services—in resolving a policy question with broad significance for this complicated program. In short, the result is both unnecessary and unwise. I therefore respectfully dissent.

I

Medicaid is a cooperative federal-state program designed to provide medical assistance to certain needy populations. The basic idea is simple: The statute—as interpreted by the Secretary of HHS—sets out the requirements for an eligible Medicaid program. If States decide to enroll and comply with those requirements, they get federal money. If they don't, they don't. The federal contribution is not enough to fully fund any State's program; States contribute anywhere from 17 to 50 percent of the costs. See 42 U.S.C. § 1396d(b) (2006 ed., Supp. V). The States have considerable discretion in structuring and administering their programs, subject of course to federal law and regulations.

***648** In practice, it's not always so simple. The books are thick with federal regulations that States must

interpret and reconcile. By my count, at least 39 federal-court opinions, including one of our own, have reiterated Judge Friendly's observation that Medicaid law is "almost unintelligible to the uninitiated." See *Schweiker v. Gray Panthers,* 453 U.S. 34, 43, 101 S.Ct. 2633, 69 L.Ed.2d 460 (1981) (quoting *Friedman v. Berger,* 547 F.2d 724, 727, n. 7 (C.A.2 1976)); see also 453 U.S., at 43, n. 14, 101 S.Ct. 2633 (quoting the District Court's description of Medicaid in ****1405** *Friedman* as "an aggravated assault on the English language, resistant to attempts to understand it"). "Perhaps appreciating the complexity of what it had wrought, Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act." *Schweiker, supra,* at 43, 101 S.Ct. 2633. But where the law and the Secretary are silent on a specific question, it is up to the States—sometimes informally advised by the federal Centers for Medicare and Medicaid Services—to make sense of it all in running their programs.

The relevant provisions here require that North Carolina (1) pay for certain people's medical care, (2) make reasonable efforts to recoup from liable third parties (such as tortfeasors and insurers) any medical expenses it paid, and (3) not recoup such payments by imposing a lien on the beneficiary's property. See *ante,* at 1396 – 1397; see also 42 U.S.C. § 1396a(a)(25)(B) (2006 ed.). To comply, North Carolina pays for a beneficiary's medical expenses on the condition that any such expenses the beneficiary recovers from third parties will go towards repaying the State. See N.C. Gen.Stat. Ann. § 108A–59(a) (Lexis 2011).

The difficulty, however, is that tort victims seldom seek only medical expenses. Take this case: E.M.A. and her parents sought damages not only for medical expenses, but for lost income, pain and suffering, and other things, and ended up settling all these claims for a lump sum of $2.8 million. Such a situation poses the question of how much ***649** North Carolina can recoup—indeed, under federal law, *must* recoup—from a lump sum that reflects more than just medical expenses.

This puts North Carolina in a tight spot. If it fails to recover what it must, it violates federal law. If it takes a beneficiary's property beyond medical expenses, it violates federal law. Trying to navigate between these competing requirements—with no interpretive guidance from the Secretary of HHS—North Carolina elected to resolve the problem by laying out ground rules in advance, conditioning a beneficiary's right to recover from third parties on the beneficiary's willingness to fully repay the State, or, at a minimum, define one-third of her damages as "medical expenses," whichever is less. N.C. Gen.Stat. Ann. §§ 108A–59(a); 108A–57(a); see also *Andrews v. Haygood,* 362 N.C. 599, 603–604, 669 S.E.2d 310, 313–314 (2008).

II

The Court states that "[t]he problem" with North Carolina's designation—actual expenses or one-third of the recovery, whichever is less—"is not that it is an unreasonable approximation in all cases," and acknowledges that "[i]n some cases, it may well be a fair estimate." *Ante,* at 1399. According to the Court, however, because North Carolina's law provides no "mechanism for determining whether it is a reasonable approximation in any *particular* case," *ibid.,* (emphasis added), it "directly conflict[s]" with the "clear mandate" of the federal Medicaid statute, and is therefore preempted. *Ante,* at 1399 (quoting *PLIVA, Inc. v. Mensing,* 564 U.S. ——, ——, 131 S.Ct., at 2577–2578 (2011) (internal quotation marks omitted)), 10. This reflects a basic policy judgment: that segregating medical expenses from a lump-sum recovery must be done on a case-specific, after-the-fact basis, rather than pursuant to a general rule spelled out in advance.

The problem is that the Court can point to no statutory or regulatory requirement, much less an unambiguous one, ***650** requiring such an approach. The federal statute, which provides that States must recoup ****1406** medical expenses owed by third parties, and which prevents States from placing a lien on a beneficiary's property, says nothing about how to comply with these two requirements in the event of a settlement. See *ante,* at 1402 (BREYER, J., concurring) ("The statute is silent on the question").

Nor does our case law. As the Court acknowledges, our decision in *Arkansas Dept. of Health and Human Servs. v. Ahlborn,* was an easy one. 547 U.S. 268, 126 S.Ct. 1752, 164 L.Ed.2d 459 (2006). There, the underlying tort suit settled for $550,000, and the Medicaid beneficiary and the State of Arkansas stipulated that only $35,581.47 of the settlement represented medical expenses. The State nonetheless claimed it "was entitled to a lien in the amount of $215,645.30"—*i.e.,* the total amount paid by the State for the beneficiary's health care. *Id.,* at 274, 126 S.Ct. 1752. The question was whether the State could demand this money in light of its stipulation that only $35,581.47 reflected medical expenses. The answer, of course, was no. The State is only entitled to recover medical expenses; nothing else. So when Arkansas contended that it was entitled to money the beneficiary had received for something other than medical expenses, we had no trouble rejecting that argument. That proposition—that States may not take money that is unrelated to medical expenses—does not help answer the question here: May a State condition Medicaid benefits on a beneficiary agreeing to define one-third of a tort recovery as reflecting "medical expenses"?

The Court recognizes that *Ahlborn* "had no occasion to resolve" the question "how to determine what portion of a settlement represents payment for medical care," *ante,* at 1393, but then promptly proceeds as if *Ahlborn* had done just that. The Court quotes *Ahlborn* for the proposition that a State may not claim any portion of a tort recovery "not 'designated as payments for medical care,' " and then faults North Carolina's law because it "sets forth no process for determining ***651** what portion" is "attributable to medical expenses." *Ante,* at 1397, 1398 (quoting 547 U.S., at 284, 126 S.Ct. 1752), 1398. *Ahlborn* spoke of "designated" amounts because, as noted, there was a stipulated designation in that case. What to do when there is no such stipulation—when it's not clear "what portion of a settlement represents payment for medical care"—is a different question. The Court assumes the answer must be the same: that the settlement must be parsed in every case, so that there is an actual, after-the-fact designation in every case. If the parties do not agree on one, as they did in *Ahlborn,* there must be a process in place for reaching a case-specific attribution.

The nature of the "process" contemplated by the majority is unclear, but it must involve an effort to determine what claims would have succeeded had there been a trial, what the damages would have been for the separate claims, and so on—the very sort of inquiries settlement is intended to obviate. The Court talks of addressing these concerns through "rebuttable presumptions and adjusted burdens of proof to ensure that speculative assessments of a plaintiff's likely recovery do not defeat the State's right to recover medical costs," but ominously declines to give any assurance "that these rules are necessarily compliant with the federal statute." *Ante,* at 1401.

Nothing in *Ahlborn* requires all this, and North Carolina has taken a different approach. It has adjusted its tort law to account for its obligations under federal Medicaid law by requiring that beneficiaries pay the State back in full or designate one-third of any recovery as "medical expenses," whichever is less. This approach ****1407** allows beneficiaries to obtain settlements, "meet[s] concerns about settlement manipulation," *Ahlborn, supra,* at 288, n. 18, 126 S.Ct. 1752, complies with the statutory obligation that States make reasonable efforts to recover medical expenses from liable third parties, and guarantees that the beneficiary will never have to give back more than she has already received from the State.

***652** There's nothing unusual about such an approach. States define the contours of their own tort law all the time, setting rules about who may recover in particular circumstances, what claims may be alleged, which parties are liable, what defenses may be asserted, what damages are recoverable, and so on. Doing so does not amount to imposing a lien on any property to which an individual has a vested right under state tort law. The Court says North Carolina cannot rely on its "traditional authority to regulate tort actions" because its rule in this case is not an exercise of its "general authority." *Ante,* at 1400. The Court cites no support for this vague new limitation on a State's power to define tort remedies under state law, and I am aware of none.

In fact, federal law says nothing about how States must define the recovery available to a Medicaid beneficiary suing a third party. That silence is a good indication that Congress did not mean to strip States of their traditional authority to regulate torts. See *Wyeth v. Levine,* 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) ("[I]n all pre-emption cases, and particularly in those in which Congress has legislated in a field which

the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (internal quotation marks and ellipses omitted)). The closest the Medicaid Act gets to this topic is its requirement that States have "in effect laws under which ... the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services." See 42 U.S.C. § 1396(a)(25)(H). That Congress has said nothing else about what recovery a State must allow, though clearly aware of the traditional power of States to regulate recoveries under private law, should be worth something. Cf. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 166–167, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989) ("The case for federal pre-emption is particularly weak where Congress has indicated its awareness of ***653** the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them" (internal quotation marks omitted)).

The majority nonetheless dismisses North Carolina's solution as an arbitrary "one-size-fits-all" approach, *ante,* at 1399, that has no "logical" endpoint; one that, if accepted, could permit States to "designate half, three-quarters, or all of a tort recovery in the same way." *Ante,* at 1398, 1399. This is an age-old objection to any line-drawing, to which Justice Holmes provided a familiar response: "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law." *Irwin v. Gavit,* 268 U.S. 161, 168, 45 S.Ct. 475, 69 L.Ed. 897 (1925). Whatever the case "as a doctrinal matter," it is *in fact* "easier to defend North Carolina's" one-third designation than the Court's hypothetical where a State allocates all of a recovery to medical expenses. *Ante,* at 1399. In addition, the majority's hobgoblin is less frightening when we remember that North Carolina never takes back more than what it paid for such expenses.

****1408** The reasons for drawing a bright line, as North Carolina has, are obvious and familiar. See generally Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L.Rev. 1175 (1989). Bright lines provide clear notice; here that means beneficiaries know exactly where they stand with respect to reimbursing the State as they negotiate settlements with third parties. Such clear rules are easy, cheap, and administrable—laudable qualities in the context of a vast and intricate program. The Court's approach, on the other end, requires the time of lawyers and judges, and that time costs money—money better spent on providing health care to the needy. Or so the State, responsible for administering its program, could conclude, and nothing in the statute, regulations, or our precedent says otherwise.

The majority points out that nearly one-third of the States conduct hearings of the sort it contemplates. *Ante,* at 1401. ***654** Good for them. The whole point of our federal system is that different States may reach different judgments about how to run their own different programs. Such flexibility is particularly important in this context, where Medicaid spending is the largest component of most state budgets. The Court also notes that, in other areas, courts have undertaken the work of "separat[ing] lump-sum settlements or jury awards into categories to satisfy different claims." *Ibid.* My point is not that the work required by the Court cannot be done—just that it has not been required by Congress or the Secretary.

On that note, it's bad enough that the Court finds the State's reasonable effort to reconcile its competing obligations preempted. What is doubly unfortunate is that the Court's analysis necessarily implies that the Secretary's hands are also tied. The Medicaid Act is Spending Clause legislation, and such legislation is binding on States only insofar as it is "unambiguous." See *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). In addition, the anti-lien provision only precludes North Carolina's law if, as the Court acknowledges, there is a "direct conflict" between the two. *Ante,* at 1398 (quoting *PLIVA, Inc.,* 564 U.S., at ——, 131 S.Ct., at 2577–2578 (internal quotation marks omitted)). The Court says—wrongly, I believe—that there is. *Ante,* at 1399 ("An irrebuttable, one-size-fits-all statutory presumption is incompatible with the Medicaid Act's *clear mandate* that a State may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses" (emphasis added)). But if North Carolina's approach directly conflicts with an unambiguous, clear mandate in the Act—such that any presumption against preemption is overcome, see *Wyeth, supra,* at 565, n. 3, 129 S.Ct. 1187—it's hard to see how the Secretary could adopt a similar approach. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, ***655** must give effect to the

unambiguously expressed intent of Congress").

The concurrence wishes this were not so, see *ante,* at 1404 ("today's decision does not freeze the Court's present interpretation of the statute permanently into law"), but fails to acknowledge the express rationale of the Court's opinion. There is no other way to read the majority opinion than as foreclosing what the concurrence would like to leave open.

Or is there? In exactly two sentences, the Court seems to falter and lose the courage of its conviction that a State must have a process in place for an individual ****1409** allocation of medical expenses in every case. The Court views the problem with North Carolina's law as being that "the State provides no evidence to substantiate its claim that the one-third allocation is reasonable in the mine run of cases." *Ante,* at 1399. That thought does not resurface until five pages later—and only then—when the Court says that States "may even be able to adopt *ex ante* administrative criteria for allocating medical and nonmedical expenses, provided these criteria are backed by evidence suggesting that they are likely to yield reasonable results in the mine run of cases." *Ante,* at 1402.

I am not sure whether this is a concession that individualized hearings may not be required after all, but if it is, it is flatly contrary to the rest of the opinion. It is also quite odd to suggest that the problem with North Carolina's law would go away if only the State provided some sort of study substantiating the idea that one-third was a good approximation in most cases. North Carolina is not a federal agency, whose actions are subject to review under the Administrative Procedure Act's "substantial evidence" test. See 5 U.S.C. § 706(2)(E). We have never before, in a preemption case, put the burden on the State to compile an evidentiary record supporting its legislative determination. The burden is, of course, on those challenging the law. See ***656** *Pharmaceutical Research and Mfrs. of America v. Walsh,* 538 U.S. 644, 661–662, 123 S.Ct. 1855, 155 L.Ed.2d 889 (2003) (plurality opinion) ("We start ... with a presumption that the state statute is valid, and ask whether petitioner has shouldered the burden of overcoming that presumption" (citation omitted)). We have said that, as a general matter, "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, 213, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (internal quotation marks omitted). Sovereign States should be accorded no less deference.

Keep in mind that the basis for all this is a federal law that prohibits liens for medical assistance, but says *nothing* about how medical and nonmedical expenses are to be allocated. It is hard enough to figure out what the Medicaid Act means by what it *says* ; we should not read so much into its silence.

Ultimately, it is a basic policy judgment whether the Medicaid program is best served in this instance by post hoc individualized determinations, or whether the issue may be addressed in advance, through a general rule, as North Carolina has done here. See *ante,* at 1402 (BREYER, J., concurring) ("any of several different answers to the question would seem reasonable"). The Court can point to nothing that delegates to it the prerogative to make that judgment. Rather, States and the Secretary—working together—should be afforded the leeway to make their joint venture a workable one.

Because North Carolina's law does not conflict with federal law, I would let it be. I respectfully dissent.

All Citations

568 U.S. 627, 133 S.Ct. 1391, 185 L.Ed.2d 471, 81 USLW 4198, Med & Med GD (CCH) P 304,381, 13 Cal. Daily Op. Serv. 3058, 2013 Daily Journal D.A.R. 3643, 24 Fla. L. Weekly Fed. S 103

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

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Checklist for Self-Settled Special Needs Trust

Document or Action *(cross out those not needed)*	**Responsible Team Member**	**Due Date**	**Completed Date (initials)**
TYPE OF TRUST			
Established by:			
Beneficiary			( )
Court with Petition			( )
Parent/Grandparent/Guardian			( )
Include Trust Protector provisions			( )
Join Pooled Trust			( )
TRUSTEE AND ADVISOR			
Identify Trustee(s)			( )
Obtain Contact Information for Trustee(s)			( )
Obtain bond from bonding company			( )
MISCELLANEOUS ISSUES			
Confirm Medicaid Lien is paid			( )
Obtain court docs from PI attorney			( )
Determine whether MSA is required			( )
Obtain confirmation of benefits			( )
Identify interested parties			( )
Service on interested parties			( )
OTHER DOCUMENTS			
Consent of Trustee			( )
Trustee Fee Declaration			( )
Court Petition			( )
Notice of Hearing			( )
Proposed Order			( )
Bond			( )
Trust Certification			( )
Continued Care Plan/Contract			( )

STEPS TO BE TAKEN ONCE PETITION HAS BEEN SUBMITTED TO COURT			
Serve Notice, Petition, and supporting documents on all parties			( )
Confirm GAL has been appointed			( )
Contact GAL to review trust			( )
Obtain bond from bonding company			( )
Confirm receipt of Medicaid letter re review of trust			( )
Review Tentative Ruling			( )
POST ESTABLISHMENT			
Obtain trust signatures			( )
Obtain Tax ID Number			( )
Trustee Instruction Letter			( )
Distribution Memo			( )
Confirm funding of trust			( )
SSA Notification Letter			( )
Disengagement Letter			( )
Trustee Representation Agreement			( )
Identify Professionals (CPA, financial advisor, care manager, etc.)			( )
Schedule regular meetings with Trustee			( )
Schedule regular meetings with Professionals and Trustee			( )

MSA = Medicare Set-Aside
GAL = Guardian Ad Litem
CPA = Certified Public Accountant



Personal Injury Settlements & Special Needs Trusts

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3

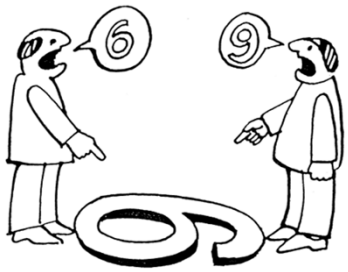
We Will Cover…

- Perspectives
- Types of Special Needs Trusts
- Timing
- Discussion - Real Life Concerns

Disclaimer: This presentation is merely informational and not legal advice.

4

Perspectives



5

Personal Injury / Medical Malpractice Attorney

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6

Special Needs Planning Attorney

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7

Types of Special Needs Trusts

- First Party Special Needs Trusts
- Third Party SNTs
- Pooled Trusts

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8

First Party
Special Needs Trust

- Established by the disabled individual, parent, grandparent, legal guardian or court
- For the sole benefit of a disabled person under age 65
- Funded with his/her own assets
- With a payback to Medicaid

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Third Party
Special Needs Trust

- Established for the benefit of a person with special needs
- Funded with the assets of the third party
- No payback to Medicaid
- Settlor controls disposition of the trust assets upon demise of the beneficiary

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10

Pooled Special Needs Trusts

- Management
- First Party Pooled SNT
  - Funding source
  - Remainder
  - Age and disability
- Third Party Pooled SNT
  - Funding Source
  - Remainder

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11

Timing is Everything

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12

Before the case is settled

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13

After the case is settled

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Real Life Concerns

Age of Majority

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Real Life Concerns

Control of Money

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Real Life Concerns

Payback

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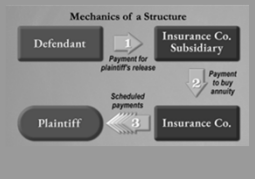
17

Real Life Concerns



Structured Settlements

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Real Life Concerns

Flexibility within the SNT

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19

Real Life Concerns

Family vs. Professionals

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Real Life Concerns

Cancellation of Trust

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QUESTIONS?

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22


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The How-Tos of Integrated Special Needs Legal and Financial Planning

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THE HOW-TO'S OF INTEGRATED SPECIAL NEEDS LEGAL AND FINANCIAL PLANNING

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I. INTRODUCTION

Estate planning for families who have loved ones with special needs requires the scrivener to have knowledge of public benefits that may be available to the individual with disabilities, as well as the tools and resources that may be utilized to improve that individual's quality of life without adversely impacting those public benefits. This paper will address the various tools and techniques available as well as funding options. The use of a special needs trust ("SNT') or supplemental benefits trust ("SBT")[1] can accomplish the dual goal of preserving a disabled person's eligibility for public benefit programs such as Medicaid and Supplemental Security Income ("SSI") and providing a vehicle to hold additional funds from that person or funds contributed by a third party to supplement those government benefits. A special needs trust ("SNT") can be funded with the assets of the disabled beneficiary, such as proceeds of a personal injury action on behalf of the beneficiary or inheritances or gifts received by the beneficiary before the creation of the trust. An SNT is authorized by, and must comply with, federal law. *See* 42 *U.S.C.* § 1396p(d)(4)(A). Depending on the circumstances, the SSI provisions of 42 U.S.C. § 1382b(e)(5) and relevant portions of the Social Security Administration's Program Operations Manual System (POMs), and state law must also be considered.[2]

An SBT can be established and funded with the assets of someone other than the disabled beneficiary (*e.g.*, parents who have created a SBT funded with gifts effected during lifetime by them or others for the

[1] Special needs trusts are also known as "supplemental benefits trusts" and "supplemental needs trusts." Many scriveners use "special needs trusts," "OBRA '93 trusts," "self-settled trusts," "first party special needs trusts" or d(4)(A) trusts to refer to trusts funded with the assets of the individual with disabilities and "supplemental benefits trusts," "supplemental needs trusts," or "third party special needs trusts" to refer to trusts funded with assets that do not belong to the individual with disabilities. This paper will refer to trusts funded with the assets of the individual with special needs as special needs trusts or SNTs and will refer to trusts funded with the assets of individuals other than the individual with disabilities as supplemental benefits trusts or SBTs.

[2] A state's adoption of the Uniform Trust Code may include provisions pertaining to SNTs. See, e.g, N.J.S.A. 3B:31-37. In addition, some states, such as New Jersey and New York may have statutes which apply to the creation of first and third-party special needs trusts. See, eg., N.J.S.A. 3B:11-36 and 37; NY EST. POWERS & TRUSTS LAW § 7-1.12.

benefit of a disabled child who receives some type of public assistance, or a testamentary trust created by a parent, spouse, domestic partner or other third party).

An injured party receiving money as a result of a tort action settlement or award may be disabled and receiving public benefits. In some instances, the settlement may consist of a structured settlement as well as a special needs trust. A structured settlement commonly involves the purchase of an annuity by the tortfeasor's insurance carrier that is calculated to pay a sum certain at regularly scheduled intervals in the future. Insurance carriers representing defendants in a personal injury case often favor structured settlements because they can settle the case for less money up front than the actual value of the case. The structured settlement may also be advantageous to the plaintiff because of the availability of large sums of money to the trustee of a special needs trust. Inasmuch as the structured settlement payments often provide a fixed stream of income, they usually will not be subject to unfavorable economic conditions such s recessions or inflation. Structured settlement payments may be made directly to a special needs trust to avoid compromising any public benefits for which the injured party may be eligible.

In either instance, to avoid the beneficiary being disqualified from public benefits, the trustee's discretion to use trust assets for that beneficiary must be sufficiently limited. Equally important, the trustee must not use trust assets to purchase too many "countable resources" or provide too much "income" as defined by applicable government benefits programs.

II. TRUSTS FOR THE BENEFIT OF A DISABLED BENEFICIARY

A special needs or supplemental benefits trust is a special type of trust that is intended to allow the beneficiary to continue to qualify for certain needs-based government benefit programs, even though the beneficiary may have thousands (or hundreds of thousands) of dollars in trust for his or her benefit. Generally speaking, a special needs trust is simply a discretionary spendthrift trust. The types of special needs trusts can be categorized broadly as follows:

A. Special Needs Trust: A Special Needs Trust is funded with the assets of the disabled beneficiary, such as proceeds of a personal injury action on behalf of the beneficiary or inheritances or gifts received by the beneficiary before the creation of the trust. A Special Needs Trust is authorized by, and must comply with, federal law. *See* 42 *U.S.C*. § 1396p(d)(4)(A).

B. Supplemental Benefits Trust: A Supplemental Benefits Trust is funded with the assets of someone other than the beneficiary (*e.g.*, parents who have created a Supplemental Benefits Trust funded with gifts effected during lifetime by them or others for the benefit of a disabled child who receives some type of public assistance, or a testamentary trust created by a parent, spouse, domestic partner or other third party).

C. General Trust Requirements: The laws and regulations governing the applicable benefit programs affect special needs and supplemental benefits trusts in two unique ways:

1. Supplement, not supplant, government benefits: Regardless of who creates the trust, the beneficiary will be disqualified from government benefits if the trust assets are used to purchase too many "countable resources" or provide the beneficiary with too much "income" or "in-kind income."

(a) Definition of “special need” or “supplemental benefit”: There is no definitive explanation of a "special need" or “supplemental benefit.” Special Needs Trusts are typically required to state that the purpose of the trust is to use trust assets to supplement, not supplant, impair or diminish, any benefits or assistance of any federal, state or other governmental entity.

It is probably easier to determine what is not a "special need" or "supplemental benefit." The term does not include the basic necessities of life, such as food, shelter and utilities. Nor can it include incidental spending money (which will be considered unearned income), gifts to friends or relatives (which will not benefit the beneficiary, and will adversely affect a state's right to repayment upon termination (if applicable)), or insurance on the life of the beneficiary (which will be a countable resource, will not benefit the beneficiary and which will adversely affect New Jersey's right to repayment upon termination (if applicable)).

Likewise, special needs or supplemental benefits should not include items or services that are available from the government benefit programs, since the purpose of the trust is to maintain eligibility for those programs.

2. Medicaid Reimbursement: Special Needs Trusts must contain certain provisions requiring repayment of certain government benefits (in particular, Medicaid), upon termination.

III. SUPPLEMENTAL BENEFITS TRUST ESTABLISHED WITH ASSETS OF PARENTS, SPOUSE, DOMESTIC PARTNER OR OTHER THIRD PARTY

A. A parent, spouse, domestic partner or other third party who leaves a disabled individual his or her assets outright by Will or living trust may jeopardize the disabled individual's eligibility to receive public benefits. To avoid that outcome, the Will or living trust of a parent, spouse, domestic partner or other third party can provide that

the assets, including the home, if desired, be put into a supplemental benefits trust for the disabled individual's benefit.

B. Under the terms of a properly drafted supplemental benefits trust, the disabled individual has no control or access to the trust funds. Therefore, the funds are not considered a resource available to the disabled individual for purposes of Medicaid or SSI eligibility.

C. Rather than permit the trustee of the supplemental benefits trust to make cash distributions to the disabled individual or pay for the disabled individual's primary needs, the trustee should have the discretion only to pay for supplemental goods and services that are not covered by public benefits. For example, the trustee should have the discretion to use trust funds to maintain the disabled person's home as well as for travel and entertainment. If the individual has physical disabilities, the trustee could use the funds to pay for a specially equipped van or home to accommodate his or her physical needs.

D. The spouse or domestic partner of a disabled individual also may wish to leave some or all of his or her estate in a testamentary supplemental benefits trust for the benefit of the public benefits recipient spouse or domestic partner. The scrivener, however, must keep in mind the elective share statutes in his or her state.

E. Specific dispositive provisions should be included for final disposition of the assets of the supplemental benefits trust. Generally, government agencies will not need to be repaid. State regulations may require that notice be given to the state Medicaid agency of the death of the Medicaid beneficiary. It is prudent when any supplemental benefits

trust terminates, therefore, to ascertain whether the state Medicaid agency (or any other creditor) has an enforceable claim against the trust assets.

F. Estate Recovery: State regulations may provide that a right of recovery may apply to the assets held in a testamentary trust established by a third party, including a community spouse or domestic partner for the benefit of the surviving beneficiary spouse or domestic partner, to the extent that the assets in the predeceased third party's individual name at death, used to fund such trust, had been transferred to him or her from the disabled beneficiary within a certain time period prior to the disabled beneficiary's Medicaid eligibility.

G. Qualified Disability Trust: Election may be taken to treat a complex third party supplemental benefits trust as a Qualified Disability Trust ("QDT") under I.R.C. §642(b)(2)(C) if:

(a) The trust is irrevocable;

(b) The trust is established solely for the benefit of a disabled individual under the age of 65 and

(c) The beneficiary of the trust is disabled pursuant to the Social Security Act.

Qualified Disability Trusts are allowed a deduction of $4,150 in 2019 under I.R.C. §151.

H. SECURE ACT

On December 20, 2019 President Trump signed the Setting Every Community Up for Retirement Enhancement Act of 2019, now commonly referred to as the "SECURE Act." Among other things, the SECURE Act, makes significant changes to how IRAs and certain qualified retirement benefits including 401(k) plans must be treated at the death of the IRA owner or 401(k) plan participant. The most discussed

change is the elimination of the "stretch" required minimum distribution from an IRA account or 401(k) plan that is inherited by a beneficiary.

Prior to the SECURE Act, many individuals utilized the "stretch" as a common planning technique. The stretch permitted a beneficiary of an inherited IRA or 401(k) to receive minimum distributions based upon the beneficiary's life expectancy. Accordingly, when IRAs or 401(k)s pass to beneficiaries younger than the IRA owner or plan participant (e.g. to a grandchild), the distributions could be paid out over the life expectancy of the beneficiary. Historically, this would defer income taxation on distributions and maximize continued tax-deferred growth on IRA or 401(k) account balances during the "stretch" period.

Now, most beneficiaries of inherited IRAs or 401(k)s will no longer be able to stretch distributions over their life expectancy and will be required to withdraw the entire account balance within 10 years of the death of the IRA owner or 401(k) participant. However, certain "eligible designated beneficiaries" will be exempt from this 10-year distribution rule including (i) surviving spouses, (ii) chronically ill heirs, (iii) disabled heirs, and (iv) minor children [until reaching the age of majority, whereupon the account balance must be distributed over the succeeding 10 years]. These eligible designated beneficiaries, together with any beneficiary that inherited an IRA or 401(k) prior to January 1, will retain the right to have required minimum distributions paid over life expectancy. Funding a properly drafted SBT with qualified savings while leaving other family members non-qualified assets can benefit all of the beneficiaries.

I. Life Insurance: Many families fund SBTs with life insurance. A term insurance policy covers a policyholder for an express period of time. The policy pays when the policy holder dies. The cost of a term policy usually increases substantially when the defined term period ends. A permanent life insurance policy covers the policyholder during lifetime and has a cash value and death benefits. There are different kinds of permanent life insurance, including whole, universal and variable life. The premiums are often very expensive. Survivorship life insurance, also known as "second to die" insurance is often an attractive option

for funding an SBT. Survivorship policies insure two lives and pays when the second policyholder dies. It generally is less expensive than insuring each policyholder separately. Survivorship policies are usually whole life or universal life insurance policies.

J. Beneficiary Designations: It is important to ensure that beneficiary designations for life insurance policies, qualified savings accounts and payable on death accounts are consistent with the clients' estate plan.

Summary: A supplemental benefits trust can allow the individual with disabilities to live with greater dignity by covering supplemental needs not met through government, charitable or other benefits. Preparing a trust that is appropriate for a particular client requires that the elder and disability law practitioner understand the differences between the various special needs and supplemental benefits trusts available and the tax and government benefits planning ramifications of each. Only with such knowledge can the elder and disability law practitioner draft the documents required to meet the needs of his or her clients.

IV. SPECIAL NEEDS TRUST -- ESTABLISHED WITH THE ASSETS OF THE DISABLED INDIVIDUAL

A. Overview

Special needs trusts, funded by assets of the disabled individual, are authorized under the Omnibus Budget Reconciliation Act of 1993 ("OBRA 93"), and codified at 42 *U.S.C.* § 1396p(d)(4)(A).

1. A special needs trust is an attractive option for individuals disabled as a result of medical malpractice or other types of personal injury or who are disabled and otherwise have assets. Settlement or jury award proceeds are treated as assets owned by the disabled individual but can be placed in the trust without disqualifying the individual for Medicaid or SSI benefits. Under federal law,

such a trust is authorized to be established by a competent adult with disabilities or by the individual's parent, grandparent, legal guardian or a court if the individual is disabled and under age 65 at the time the trust is created. 42 *U.S.C*. § 1396p(d)(4)(A).

2. The definition of disability for such a trust is the same as that contained in the Social Security Act which is used to determine eligibility for SSI or Social Security Disability ("SSD") benefits. *See* 42 *U.S.C*. § 1382c(a)(3)(A). "An individual shall be considered to be disabled for purposes of this subchapter if he 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 which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity)." *Id.*

3. Unlike a trust created and funded with the assets of a parent or third party for the benefit of a disabled individual, a special needs trust created under these statutory provisions is called a "payback trust" or "OBRA '93 trust" since, upon the death of the disabled individual, any state which paid medical assistance on behalf of the individual (*i.e.*, under a Medicaid program), must be reimbursed, in accordance with Medicaid and SSI requirements, from any funds remaining in the payback/OBRA '93 trust. The state is entitled to

reimbursement up to an amount equal to the total medical assistance paid by that state. 42 *U.S.C.* § 1396p(d)(4)(A).

B. Federal Drafting Requirements

1. Federal law requires that the following three conditions be met in order for the trust to be considered an excluded resource:

(a) The beneficiary must be under age 65 when the trust is established and funded. (Turning 65 thereafter does not affect the validity of the trust.)

(b) The beneficiary must be disabled.

(c) Both Medicaid and SSI rules require that the trust contain a provision that upon the death of the beneficiary or earlier termination of the trust, any state agency that has provided Medicaid benefits must be repaid out of the trust up to the amount of the benefits provided during the existence of the trust. *See* 42 *U.S.C.* §§ 1396p(d)(4)(A), 1382b(e)(5) and 1382b(c)(1)(C)(ii).

C. **Government Benefits**: There are a number of government benefits programs which must be considered in effecting a proper tort recovery settlement or award and a special needs trust, or otherwise protecting a disabled individual's assets in this regard. These programs include SSI, Medicaid, SSD, Medicare and Federally-Assisted and DDD Housing.

1. SSI. A federal welfare program found at Title XVI of the Social Security Act, 42 *U.S.C.* §§ 1381, 1381a. SSI provides the recipient with a cash benefit to cover the basics of living which are food, and shelter. SSI is a means-tested program. SSI benefits are reduced dollar-for-dollar for "countable income."

An SSI recipient may not have more than $2,000 of countable resources. Resources not countable include the principal residence of the SSI recipient, household goods, and cash or cash equivalents not exceeding $2,000 (20 *C.F.R.* § 416.1216(a)-1216(b)), an automobile of any value if it is used for the transportation of a disabled person or a member of his or her household (20 *C.F.R*. § 416.1218(b)(1)). A special needs trust for a tort victim should be structured to limit the income to the recipient so that SSI benefits are not reduced or lost, and so that trust assets in excess of $2,000 remain "unavailable" to the recipient.

2. Medicaid. A federal and state program which covers a very broad spectrum of medical services including hospital stays, physician services, community-based health care and nursing services. There are no deductibles, co-payments or coverage limits. The federal statute governing Medicaid is 42 U.S.C. § 1396 *et seq*.

3. SSD. A federal cash benefit program administered by the Social Security Administration. Unlike SSI, it is not a means-tested program. SSD is an insurance program based on the Social Security earning records of the SSD recipient. However, if a child becomes disabled prior to attaining the age of 22, his eligibility can be based upon the earnings record of a retired or deceased parent. The amount of the recipient's monthly check is dependent on the amount paid into the system.

4. Medicare. The Medicare law is found at Title XVIII of the Social Security Act and is found at 42 *U.S.C.* § 1395. Medicare is a federal medical insurance

program available to persons over 65 and disabled persons. The test for disability is found at 42 *U.S.C.* § 1382c(a)3A. The program is not means-tested.

5. Federally-Assisted Housing. Programs providing for subsidized housing are found under 42 *U.S.C.* §§ 1437-1440, including Section 8 rental assistance for low income families. Governing regulations are found at 42 *C.F.R.* §§ 813.101-813.110.

D. Structured Settlements and Special Needs Trusts

1. In some instances, the settlement may consist of a structured settlement as well as a special needs trust. A structured settlement commonly involves the purchase, by the defendant's insurance carrier, of an annuity calculated to pay certain sums at regularly scheduled intervals in the future. Insurance carriers representing defendants in a personal injury case often favor a structured settlement because they can settle the case for less money up front than the actual value of the case. In addition, the structured settlement is sometimes favored by plaintiff's counsel, who may be concerned about the availability of large sums of money to the guardian or trustee of a special needs trust.

2. Structured settlement payments made directly to the injured party may render the beneficiary ineligible to receive government benefits. A judgment involving both a structured settlement and a special needs trust should direct the periodic payments from a structured settlement to "pour over" into the special needs trust.

CHECKLIST FOR SPECIAL NEEDS TRUSTS
(SUCH AS WITH THE PROCEEDS FROM THE SETTLEMENT OF LITIGATION)

1. Check for compliance with the federal law.
   - A. Is the beneficiary under age 65?
   - B. Is the beneficiary "disabled?"
   - C. Is the trust created by a competent adult beneficiary or by the beneficiary's parent, grandparent, guardian or by the court?
   - D. Does the trust contain a provision requiring repayment of the state Medicaid program upon termination of the trust?
2. Check for compliance with state requirements.
3. Verify that the statutory liens have been paid prior to the funding of the trust.

V. ABLE ACCOUNT

A. Created for an eligible individual under a program established and maintained by a State that allows funds to grow tax free, like a 529 college savings account, but can be used to pay qualified disability benefits for the beneficiary.

1. Eligibility

(a) Individual must be blind or disabled, according to the Social Security Administration definition, or the individual must file a disability certification with the Secretary of Health and Human Services satisfying the Secretary that the individual has a medical impairment resulting in marked and severe functional limitations that will either result in death or will last for a continuous period of at least 12 months.

(b) The beneficiary must be disabled at the time the account is established and when contributions and distributions are made.

(c) The disability must be determined to have begun before the beneficiary reaches age 26.

(d) ABLE accounts will be disregarded when determining the beneficiary's eligibility for means-tested federal benefits available to individuals with disabilities. See SSA POMS-SI 01110.6003.4.

(e) Qualified disability expenses (QDEs) include, *inter alia*, education, housing, transportation, employment training, assistive technology, and personal support service that are related to the beneficiary's disability or blindness. Further, the proposed IRS regulations discussed below, provide that the term qualified disability expenses should be broadly construed to permit the inclusion of basic living expenses and should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the disabled individual.

(f) Many states may allow for income tax deductions for contributions made to the ABLE account.

2. Restrictions

(a) Unlike 529 accounts, ABLE account beneficiaries are restricted to only one ABLE account.

(b) Funds in a 529 account can be moved into an ABLE account without incurring tax or penalties if both accounts have the same beneficiary or a qualifying member of the beneficiary's family. The rollover amount must be within the

annual ABLE contribution limit ($18,000 in 2024) and must occur by December 31, 2025. There are direct rollovers where the two programs transfer assets directly from one to the other. And there are indirect rollovers in which the account owner of the 529 plan would take possession of funds before they are transferred. The transfer must occur within 60 days of withdrawal.

(c) If the eligible individual (whether a minor or adult) is unable to establish their own ABLE account, the account may be established on behalf of them by the following, and in the order listed:

2) The power of attorney of the eligible individual with a disability, or
3) a conservator or legal guardian, or
4) spouse, parent, sibling, grandparent, or
5) a representative payee appointed for the eligible individual by the Social Security Administration (SSA)

(d) Aggregate annual contributions from all contributors to an ABLE account cannot exceed the annual exclusion amount, currently $18,000 in 2024. If the beneficiary is employed and does not participate in their employer's defined contribution plan (such as a 401(k)), profit-sharing plan, 403(b), or 457(b) plan, they may make an additional annual contribution up to the lesser of the beneficiaries' compensation from their employer for the tax year or the United States 2024 poverty limit amount from the previous calendar year's amounts - $14,580 in U.S. states, except $16,770 in Hawaii and $18,210 in Alaska.

(e) There is a $100,000 limit on the amount disregarded for SSI benefit eligibility. SSI payments will be suspended until the account value is below $100,000.

(f) Upon the death of the account beneficiary or if he or she is no longer disabled, the balance of the account must be used to "payback" any state Medicaid plan up to the value of the Medicaid services provided. Currently 13 states do not require a Medicaid payback. If a "successor account owner" was assigned by the beneficiary on the ABLE account, upon the beneficiary's death, the successor account owner would take ownership of the original account after the beneficiary passes away. The successor account owner must meet certain criteria of the ABLE plan as noted in the plan disclosure booklet. The successor account owner must qualify as an ABLE-eligible individual as of the date of the designation, as well as at the death of the beneficiary. The successor must be a sibling, a stepsibling, or a half-sibling of the beneficiary, whether related by blood or by adoption. Only one successor account owner per account may be designated; and the successor account owner must be a United States citizen or resident alien.

3. Beneficiaries

(a) An ABLE account is deemed owned by the beneficiary, not the contributor.

(b) Only one ABLE account may be established for a beneficiary.

4. Tax Penalty: There is a 10% penalty on amounts distributed that are not for qualified disability expenses. Additionally, under the proposed IRS regulations discussed below, there is a 6% excise tax on the amount of any excess annual contribution that is not returned within a yet to be determined safe harbor period.

VI. Financial Planning for Families with Special Needs

A. It is important to find a financial professional who has received advanced training and information in estate and tax planning concepts, special needs trusts, government programs (SSI, SSDI, Medicare, Medicaid, etc.), planning for the current and future needs of both caregivers and individuals with disabilities. A top designation for financial professionals who do special needs planning is the Chartered Special Needs Consultant® (ChSNC®) designation from The American College or MassMutual planners known as Special Care Planners[3]. To receive the ChSNC® designation, you must:

1. Successfully complete the three required courses, i.e. HS 375 Introduction to Disability and Lifetime Planning, HS 376 Legal and Financial Issues for Special Needs Families, and HS 377 Financial Planning for Families Caring for Those with Special Needs
2. Agree to comply with The American College Code of Ethics and Procedures
3. Have at least five years of professional experience in financial services or the practice of law (with a focus on income tax and/or estate planning), OR
4. Have four years of relevant professional financial services experience and an undergraduate\degree from a regionally accredited institution

Participation in the annual Professional Recertification Program is required to maintain the designation. For more information, visit

[3] The Special Care Planner title is used by financial professionals with Massachusetts Mutual Life Insurance Company (MassMutual) who have received advanced training and information in estate and tax planning concepts, special needs trusts, government programs, and the emotional dynamics of working with people with disabilities and other special needs.

https://www.theamericancollege.edu/learn/professional-designations-certifications/chsnc

B. A financial professional can help to understand, identify and quantify the financial needs of an individual with special needs and how the social, medical, and legal needs impact their future life care plan. They can also assist in coordinating financial strategies with the special needs attorney and other professionals. There are four focus areas:

1. Family Assets and Planning: Balancing needs of all family members, Coordinating Resources, Care-giving planning (residential, social, etc.)
2. Employer Benefits: Life, health and welfare, Retirement plans, Deferred compensation/stock
3. Government Benefits: Means-tested benefits (Supplemental Security Income, Medicaid), Entitlements (Social Security Disability Insurance, Medicare)
4. Legal Planning: Wills, Advanced Medical Directives, Special Needs Trusts and types, Titling – ownership and beneficiaries

C. A financial professional can complete a financial needs analysis and offer financial strategies and options that make the most sense based on individual circumstances. Financial strategies and solutions should be integrated with legal planning to make sure titling, beneficiaries, TOD (transfer on death) and POD (payable on death) are all appropriately handled. Considerations include Life Insurance, Long Term Care,

Investments, Retirement Planning and Employee Benefits.

D. Review Entitlement Benefits:

1. Social Security Retirement Income
2. Social Security Disability Insurance (SSDI)
3. Family Benefits
4. Spouse and Survivor Benefits
5. Children's Disability Benefit
6. Medicare

E. Review Public Assistance:

1. Supplemental Security Income (SSI)
2. Medicaid
3. Public Supports:
4. Supplemental Nutrition Assistance Program (SNAP)
5. Temporary Assistance for Needy Families (TANF)
6. Children's Health Insurance Program (CHIP)

F. Planning Steps / Considerations for Special Needs Planning:

1. Address Primary Issues
2. Create Life Care Plan Vision
3. Guardianship / Alternatives to Guardianship
4. Identify Financial Resources

5. Prepare Life Care Plan Costs

6. Prepare Letter of Intent

7. Prepared Legal Instruments

8. Review need for Special Needs Trust/ABLE Account

9. Hold Family Meeting

10. Review Life Care Plan Annually

G. Ideally integrating the financial and legal should begin as soon as possible so that efforts are not duplicated. Intake Forms are a good way to capture the current legal and financial professionals or discern the need for one if not being utilized. A plan cannot be fully completed or integrated without the legal and financial components. Successful collaborating between an attorney and financial professional is very important.

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November 22, 2024

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2024 Supplemental Security Income (SSI) Program Update

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National Conference on Special Needs Planning and Special Needs Trusts

2024 Supplemental Security Income (SSI) Program Update

Presented by Ken Brown

October 18, 2024

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2024 Supplemental Security Income (SSI) Program Update

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The Impact of Changes to In-kind Support and Maintenance Policy in the Supplemental Security Income Program

INTRODUCTION

In-kind support and maintenance (ISM) is unearned income received by or given to an individual in the form of food (until September 30, 2024) or shelter, or both. It is considered income because someone else, either within or outside of the individual's household is paying for it. The Social Security Act (the Act) considers ISM, along with other forms of unearned income, when determining supplemental security income (SSI) eligibility and payment amounts.

In-kind support and maintenance matters in the SSI program because SSI, as a program of last resort, is intended to help pay for the basic costs of living. If someone else is helping to pay for these things, then it stands to reason that the SSI benefit would be reduced. If too much ISM is received and other forms of income are received, it may even cause a person to be ineligible for SSI benefits. For people who are determined to be eligible for SSI, in-kind support and maintenance can cause the benefit payment to be reduced. In-kind support and maintenance may be charged to an SSI eligible individual or an SSI eligible couple.

SSA is now making what I consider the biggest changes in ISM policy in 40 years.
On February 15, 2023, SSA published a Notice of Proposed Rulemaking (NPRM) titled *"Omitting Food from In-Kind Support and Maintenance Calculations,"* (88 FR 9779). The summary states, "[w]e propose to update our regulations to remove food from the calculation of In-Kind Support and Maintenance (ISM). We also propose to add conforming language to our definition of income, excluding food from the ISM calculation…." The public comment period on the first NPRM closed on April 17, 2023. SSA published a final rule on March 27, 2024, which was effective September 30, 2024.

On August 24, 2023, SSA published an NPRM titled "*Expansion of the Rental Subsidy Policy for Supplemental Security Income (SSI) Applicants and Recipients,"* (88 FR 57910). The summary states, "We propose to revise our regulations by applying nationwide the In-Kind Support and Maintenance (ISM) rental subsidy exception that is currently in place for SSI applicants and recipients residing in seven States. The exception recognizes that a "business arrangement" exists when the amount of required monthly rent for a property equals or exceeds the presumed maximum value...." The comment period on the second NPRM closed on October 23, 2023. SSA published a final rule on April 11, 2024, which was effective September 30, 2024.

On September 29, 2023, SSA published an NPRM titled "*Expand the Definition of a Public-Assistance (PA) Household*" (88 FR 67148). The summary states, "We propose to expand the definition of a public assistance (PA) household for purposes of our programs, particularly the Supplemental Security Income (SSI) program, to include the Supplemental Nutrition Assistance Program (SNAP) as an additional means-tested public income maintenance (PIM) program. In addition, we seek public comment on expanding the definition to include

households in which *any other* (as opposed to *every other*) member receives public assistance. We expect that the proposed rule would decrease the number of SSI applicants and recipients charged with in-kind support and maintenance (ISM). In addition, we expect that this proposal would decrease the amount of income we would deem to SSI applicants or recipients because we would no longer deem income from ineligible spouses and parents who receive SNAP benefits and live in the same household. These policy changes would reduce administrative burden for low-income households and SSA." The comment period on the third NPRM closed on November 28, 2023. SSA published a final rule on April 19, 2024, which was effective September 30, 2024.

SSA could have chosen an effective date 30 days after publication of the final regulations, however, I think SSA chose a delayed implementation date for two reasons. First, to allow time to make systems changes to the SSI system and second, to allow time to rewrite the Program Operations Manual System (POMS) instructions dealing with ISM.

THE LEGAL BASIS FOR ISM

Statutory Law – The Social Security Act

The State programs that preceded SSI often undertook detailed analysis of the household budget to establish an applicant's level of financial need. There was much debate about how to develop and value ISM. One of the founding principles of SSI is that, as a program that is national in scope, it should be based on a "flat grant" approach that does not involve program administrators in the detailed household budgets of millions of recipients. The task of gathering information and developing about all food and shelter that a recipient received each month is a formidable task. The law creating the SSI program included the one-third reduction provision so that SSA would not have to determine the actual value of room and board when a recipient lived with a friend or relative. A congressional committee report indicated that the reduction would apply regardless of whether the individual made any payment toward household expenses (*Report of the Committee on Finance*, United States Senate, to accompany H.R. 1, September 26, 1972).

The Social Security Act at §1612(a)(2)(A) (42 U.S.C. 1382a(a)(2)(A) provides:

> (a) For purposes of this title, income means both earned income and unearned income; and—
> 2) unearned income means all other income, including—
>
> (A) support and maintenance furnished in cash or kind; except that (i) in the case of any individual (and his eligible spouse, if any) living in another person's household and receiving support and maintenance in kind from such person, the dollar amounts otherwise applicable to such individual (and spouse) as specified in subsections (a) and (b) of section 1611 shall be reduced by 33 1/3 percent in lieu of including such support and maintenance in the unearned income of such individual (and spouse) as otherwise

> required by this subparagraph, (ii) in the case of any individual or his eligible spouse who resides in a nonprofit retirement home or similar nonprofit institution, support and maintenance shall not be included to the extent that it is furnished to such individual or such spouse without such institution receiving payment therefor (unless such institution has expressly undertaken an obligation to furnish full support and maintenance to such individual or spouse without any current or future payment therefor) or payment therefor is made by another nonprofit organization, and (iii) support and maintenance shall not be included and the provisions of clause (i) shall not be applicable in the case of any individual (and his eligible spouse, if any) for the period which begins with the month in which such individual (or such individual and his eligible spouse) began to receive support and maintenance while living in a residential facility (including a private household) maintained by another person and ends with the close of the month in which such individual (or such individual and his eligible spouse) ceases to receive support and maintenance while living in such a residential facility (or, if earlier, with the close of the seventeenth month following the month in which such period began), if, not more than 30 days prior to the date on which such individual (or such individual and his eligible spouse) began to receive support and maintenance while living in such a residential facility, (I) such individual (or such individual and his eligible spouse) were residing in a household maintained by such individual (or by such individual and others) as his or their own home, (II) there occurred within the area in which such household is located (and while such individual, or such individual and his spouse, were residing in the household referred to in subclause (I)) a catastrophe on account of which the President declared a major disaster to exist therein for purposes of the Disaster Relief and Emergency Assistance Act, and (III) such individual declares that he (or he and his eligible spouse) ceased to continue living in the household referred to in subclause (II) because of such catastrophe;

Thus, the statute provides the basis for counting ISM and several exceptions to ISM-counting. However, the statute does not define support and maintenance. Additionally, the only enumerated method for treating ISM is for an individual living in another person's household and receiving support and maintenance in kind from such person. As part of program implementation, SSA determined that additional rules were necessary to provide needed definitions and to cover other situations where an individual received in-kind support. These situations were covered in the regulations.

Code of Federal Regulations

Regulations covering ISM are found at 20 CFR 416.1130 through 20 CFR 416.1157.

The SSI program became law on October 30, 1972 and was to take effect on January 1974. The 14 months between presidential signature and effective date of the new law left scant time for SSA to prepare, vet, and publish regulations, to build a systems infrastructure, to

design policy and procedure, to train employees, and to notify the public and the approximately 4 million people who would be shifted from the old state programs to the new federal program. Congress may have intended the federal program to be simpler than the state-run programs. However, the new federal program was complex enough to motivate SSA to convene its first workgroup to address simplification shortly after SSI's first anniversary.

Although the provision was intended to be simple to administer, it did not adequately define many concepts or address differences in living arrangements among SSI recipients. During implementation of the legislation, the agency determined that the value of the one-third reduction (VTR) provision was extremely narrow and that another rule should be developed to cover other in-kind support provided that did not fit under the VTR rule, such as support from outside of the household. SSA created the PMV rule and the pro rata-share concept through regulations in an attempt to better address equity among recipients. However, these regulations compromised the simplification objective of the "flat grant" approach. Regulations on ISM were completely rewritten in 1980 (45 FR 65547, Oct. 3, 1980) to simplify and clarify what had become a confusing problem. However, "[o]ver the life of the program, those policies have become increasingly complex as a result of new legislation, court decisions, and SSA's own efforts to achieve benefit equity for all recipients" (Government Accountability Office. 2002. *Supplemental Security Income: Progress made in detecting and recovering overpayments, but management attention should continue*. Report No. GAO-02-849 (September 16, 2002.)).

Support and maintenance is not defined in the Social Security Act. SSA currently defines it at 20 CFR 416.1121 as "shelter furnished to you that we value depending on your living arrangement. (Food is not included in the calculations of in-kind support and maintenance.)." Prior to September 30, 2024, it was defined at 20 CFR 416.1130(b) as "any food or shelter that is given to you or that you receive because someone else pays for it." Prior to March 9, 2005, support and maintenance included the receipt of clothing. SSA published regulations changing that definition on that date (see, 70 FR 6340 (2005)).

Program Operations Manual System (POMS)

While the statute includes one paragraph on ISM and the regulations have 14 short sections, there are approximately 250 pages of instructions in the POMS dealing with ISM. These sections are found at POMS SI 00835.000 through SI 00835.901. There will be an extensive rewrite of the ISM POMS because of these new regulations. See Appendix E for a list of impacted POMS sections and Appendix D and E for interim instructions.

DETERMINING THE VALUE OF IN-KIND SUPPORT AND MAINTENANCE

SSA has two rules that apply to determining the value of ISM. The rules are mutually exclusive in that when one rule applies, the other does not. These two rules are the Value of the One-Third Reduction (VTR) Rule and the Presumed Maximum Value (PMV) Rule.

When it applies, the VTR is a statutory one-third reduction in the SSI payment rate. On the other hand, the PMV is a regulatory maximum cap on the amount of ISM that can be charged.

The Current Status of ISM*

Total number of SSI recipients			**7,341,000**
Number of SSI recipients with ISM-related payment reductions			793,000 (~10%)
	VTR	PMV – maximum reduction	PMV – less than maximum reduction
Affected recipients (number)	358,000	227,000	207,000
Affected recipients (% of ISM recipients)	45%	29%	26%
Mean SSI reduction	$280.33	$300.33	$112.00

* As of January 2022 (FBR = $841)

The Relationship Between Living Arrangements and ISM

The POMS definition of "Permanent Living Arrangement" refers you to the definition of "Residence." A residence is, for living arrangement/ISM purposes, the location of abode or dwelling place. A residence is also a place where a person makes his/her home. "Residence" is synonymous with the term "permanent living arrangement." Thus, a person's living arrangement (LA) is where they live, if they live alone or with someone else, or if they live in an institution, such as a nursing home.

Because living arrangements are a factor in determining how much SSI you can get, where a person lives can affect their SSI benefit. For example, benefits can vary depending whether they live:

- in their own place such as a house, apartment, or mobile home; or
- in someone else's household; or
- in a group care or board and care facility; or
- in an institution such as a hospital or a nursing home.

A living arrangement also depends on who pays for food and shelter. If a person lives alone SSA needs to know who pays for shelter, and utilities. If a person lives with someone else, SSA needs to know who pays for food, shelter, and utilities.

An individual currently may get a reduced SSI payment if they:

- live in another person's house, apartment, or mobile home, and they pay less than their fair share of food or housing costs;
- live in their own house, apartment, or mobile home, and someone else pays for all or part of their rent, mortgage, or other things like electricity and heating fuel;
- are in a hospital or nursing home for the whole month and Medicaid pays for over one-half of the cost of their care; or
- are a minor child in a hospital or nursing home for the whole month and private insurance and/or Medicaid together pay over one-half their cost of care; or
- are in a public or private medical treatment facility and Medicaid is paying for more than half the cost of their care. If they are in the facility for the whole month, the SSI benefit is limited to $30 (plus any supplementary State payment).

Living arrangement development focuses primarily on shelter anyway, so not considering food as ISM should have minor impact on LA development.

Federal Living Arrangement Categories			
Category	**Definition**	**Payment Rate**	**Percentage of Recipients**
FLA A	An adult, noninstitutionalized individual living in his or her own household.	Full FBR	81%
FLA B	Recipient lives in the household of another and receives both food and shelter from other members of the household.	Subject to VTR	5%
FLA C	Eligible child younger than age 18 who lives with a parent.	Full FBR	12%
FLA D	Eligible person living in a public or private medical institution, with Medicaid paying more than 50 percent of the cost of his or her care.	$30 Payment Limit	2%

Value of the One-third Reduction (VTR) Rule

If none of the Living Arrangement situations (which are really exceptions to the application of the VTR) apply to the individual, any ISM received from the household is subject to the VTR.

SSA will reduce the applicable Federal benefit rate (FBR) by one-third when an individual or couple:

- Lives throughout a month in another person's household; and
- Receives both food and shelter from others living in that household.

The following policies apply to the VTR:

- In 2024, the VTR is equal to $314.33 for an individual and $471.66 for a couple based on an FBR of $943.00 and $1,415.00, respectively.
- When the VTR applies, it applies in full or not at all. The amount of the VTR cannot be rebutted.
- When the VTR applies, no additional ISM is countable, even if it is received from outside of the household.
- When the VTR applies, no income exclusions apply to the VTR (including the $20 general income exclusion). The VTR is a reduction in the payment rate and not a charge of unearned income.
- The VTR may apply even if the individual receives part of his or her food and shelter from inside the household and part from outside. It is not necessary that an individual receive food and shelter from inside the household on each day of the month to apply the VTR.
- The VTR (couple rate) can continue to apply to both members of an eligible couple in the month that they separate. For example, when an eligible couple subject to the VTR separates, the VTR continues to apply to the member who leaves the household, moves into the household of another, and does not contribute toward the household operating expenses. For ISM purposes, SSA treats the members of an eligible couple as individuals in the month following the separation month. For example, if a married couple separates in May, for ISM purpose, they are two eligible individuals beginning in June.
- An individual is not subject to the VTR unless he or she lives throughout the entire calendar month in the household of another.

  NOTE: If temporarily absent from the household, an individual who is not physically present in the household throughout the month may still meet the throughout a month requirement (see SI 00835.040). In addition, an individual may reside in more than one household where the VTR applies and meet the throughout a month requirement.

Under the new regulations, the VTR will continue to be calculated based on the individual receiving both food and shelter from within the household.

Presumed Maximum Value (PMV) Rule

When a beneficiary or couple receives ISM, is eligible for payment and the VTR does not apply, SSA uses the PMV rule to determine the value of ISM received.

The VTR may not apply because:

- The individual does not live in a household, e.g., they are transient, homeless or are residents of an institution.
- They do not live in the household of another, e.g., they live alone, are in non-institutional care, have an ownership interest in the home they live in, have rental liability for the residence, or are a member of a public assistance household.
- They do not receive both food and shelter from inside the household because they are separately consuming food, separately purchasing their food, earmarking their contributions for food or shelter, they are paying their pro rata share, or the household expenses do not include either food or shelter.
- They did not live throughout an entire month in the household of another.

The amount of the PMV is equal to one-third of the Federal benefit rate for an individual or couple, plus $20. In 2024 the PMV is equal to $334.33 for an individual and $$491.66 for an eligible couple, based on an FBR of $943.00 and $1,415.00, respectively.

The PMV is a regulatory cap on the amount of ISM that can be charged. The PMV is a rebuttable presumption, i.e., the regulation presumes that the value of ISM is worth one-third of the FBR plus $20. If the individual or couple successfully presents evidence that the food or shelter has a lower value or cost (rebuts the PMV), SSA values the ISM at the current market value (CMV) or the actual value (AV), whichever is less.

While the VTR is a reduced payment level, the PMV is actually considered a type of unearned income and is charged as such. The PMV amount is equal to one-third of the FBR plus $20 because, in application, the $20 is equal to the $20 general income exclusion, which when applied means that the maximum amount of the VTR and the PMV are the same.

Under the new regulations, individuals subject the PMV will only have ISM reductions calculated based on the receipt of shelter.

THE PROBLEM OF ISM

Although less than 10 percent of SSI recipients are ultimately charged with ISM, a living arrangement determination must be made for all individuals and an ISM determination must be considered any time there is a change in an individual's living arrangement, whether it be a change of address, someone moves in or out of the household, if there is change in any utility bills, the amount of a household members contribution toward expenses, if someone outside of the household makes a contribution of food or pays a bill. After SSA gathers information such as utility bills and leases, interviews the SSI applicant/recipient, and, when appropriate, the person's representative payee, legal guardian, housemates, or landlord about how the applicant/recipient lives and how the household functions, there may be no change at all in the payment amount.

Additionally, ISM is a leading cause of SSI overpayments and underpayments, according to the Government Accountability Office (GAO) and SSA's Inspector General. ISM has been identified as one of the leading causes of overpayments in the SSI program every year since at least 2002. (General Accounting Office, "Supplemental Security Income: Status of Efforts to Improve Overpayment Detection and Recovery," Testimony Before the Subcommittee on Human Resources, Committee on Ways and Means, House of Representatives" July 25, 2002, http://www.gao.gov/products/GAO-02-962T). ISM and living arrangements have also been a leading cause of SSI underpayments for over a decade. ISM has traditionally accounted for about one-third of all improper payments.

As the Social Security Advisory Board has stated:

> Congress needs to decide whether the agency time spent on case management and oversight is a job function that should rest with SSA field office staff. Collecting and verifying information to determine whether there is in-kind support at the application stage is time- consuming and having to continue to make that assessment is burdensome, both for the agency and the SSI recipient who must maintain constant communication with the agency. A cost analysis needs to be done to determine whether the savings in ISM reductions is worth the cost of managing the improper payments that result and the cost of maintaining policies and procedures to determine ISM reductions.

Social Security Advisory Board "Statement on The Supplemental Security Income Program: The Complexity of In-Kind Support and Maintenance," 2015, https://www.ssab.gov/wp-content/uploads/2021/03/2015_-SSI_In-Kind_Support___Maintenance.pdf.

THE FUTURE OF ISM - REGULATIONS

SSA's own regulatory actions have complicated ISM development, but the agency has also used regulations to simplify policy. Prior to September 30, 2024, support and maintenance included receipt of food and prior to March 9, 2005, it included the receipt of clothing. SSA published regulations changing the definition effective on those dates.

Omitting Food from In-Kind Support and Maintenance Calculations

On February 15, 2023, SSA published a Notice of Proposed Rulemaking (NPRM) titled *"Omitting Food from In-Kind Support and Maintenance Calculations,"* (88 FR 9779). The summary stated, "[w]e propose to update our regulations to remove food from the calculation of In-Kind Support and Maintenance (ISM). We also propose to add conforming language to our definition of income, excluding food from the ISM calculation…."

The public comment period closed on April 17, 2023. SSA received 4,386 comments with more than 95% of them favorable. SSA published a final rule on March 27, 2024, which was effective September 30, 2024. See Appendix A for a copy of the NPRM and final regulations.

Justification for Change

SSA justified the removal of food from ISM counting for several reasons. First, it simplifies policy:

- Reduces the amount of program rules an applicant or recipient needs to understand;
- Reduces the amount of information that applicants or recipients must report, both during the application process and in post-award reporting (fluctuating income/averaging);
- Simplifies and shortens processing; and
- Leads to fewer benefit recalculations (and therefore, for example, possibly fewer ISM-related overpayments).

Secondly, it promotes equity:

- Provides increased financial security to affected beneficiaries;
- Provides consistent treatment of food support regardless of source;
- Reduces reporting requirements and the effects of reporting on applicants and recipients; and
- Facilitates improved food security among certain beneficiaries.

Impacts of the Change

As a result of the new regulations excluding food, there are several policy impacts.

- SSA will include only shelter costs in ISM calculations.
- Additionally, there will be changes to which ISM counting rule will apply and there is the potential to increase payments.
- Trusts (or anyone) can now pay for food. Payments must still be third-party payments and not cash to the beneficiary.
- No longer have to launder payments for food through an ABLE account (but you still can use this method).
- SSI recipients can focus their contributions on shelter expenses to minimize benefit reductions.
- Debit/credit cards no longer have to be restricted for food.

When computing household operating (shelter) expenses, only the following 9 items will be used:

- Mortgage (including property insurance required by the mortgage holder)
- Real property taxes (less any tax rebate/credit)
- Rent
- Heating fuel
- Gas
- Electricity
- Water
- Sewer
- Garbage removal

NOTE: Condominium fees in themselves are not household costs. However, condominium fees may include charges, which are household costs (e.g., garbage removal). To the extent that such charges are identifiable, use them in the computation of inside and outside ISM.

Although SSA eliminated food expenses from ISM calculations, they will still consider food expenses to determine whether to use the VTR rule or the PMV rule in certain circumstances, but not include those expenses in the actual income calculation.
In the NPRM, SSA proposed that they would continue to ask applicants and recipients the following questions about food:

(1) Do you buy food separately from the household?
(2) Do you eat all meals out? and
(3) Do you receive Supplemental Nutrition Assistance Program (SNAP) benefits?

If applicants or recipients answered "yes" to any of these questions, even if the applicant or recipient lives in another person's household, SSA would evaluate their ISM using the PMV rule.

Based on NPRM comments and further analysis, SSA modified the final regulation to only require one additional question to be asked about food:

Do others within your household pay for or provide you with all of your meals?

The change was made because the original 3 questions would not have identified all of the circumstance in which the PMV rule could have applied (e.g., other public food assistance programs, people outside of the household paying for food, earmarking).

SSA conducted an analysis of the impact of the change on current ISM recipients (assuming no change in situation). Interestingly, 19% of current recipients would be expected to have a change in the way their ISM would be counted (VTR versus PMV, versus no ISM). However, 85% of current recipients would see no change in their SSI payment, while 11% would see an increased payment (up to $166) and 3% would see a payment reduction ($20). The payment reduction would impact individuals whose ISM would change from being counted under the VTR to PMV and who have other income so that the $20 general income exclusion would not be available to offset the additional $20 of charged income under the PMV (one-third of the FBR plus $20) versus the VTR (one-third of the FBR).

Current Rules	Proposed Rules	Impact	Percentage Of Current ISM Recipients	Average Change In Monthly Payments (2023)
PMV	PMV	No change In payment	48	0
PMV	PMV	Increase in payment	2	$105
PMV	No ISM	Increase in payment	3	$81
VTR	VTR	No change In payment	30	0
VTR	PMV	Increase in payment	6	$166
VTR	PMV	No change In payment	7	0
VTR	PMV	Reduction in payment	3	($20)

Fiscal Impact

SSA estimates that this regulatory change will result in an increase in Federal SSI payments of a total of about $1.6 billion over the period of fiscal years 2024 through 2033. This represents an increase in Federal SSI payments of 0.2%.

SSA estimates that this proposal will result in net administrative savings to the agency of $26 million for the 10-year period from FY 2024 to FY 2033. These savings are partially offset by implementation costs.

Other Related Changes

The regulation contains two other changes related to income:

- Current regulations at 20 CFR 416.1131(a) state the VTR applies if the recipient is receiving food and shelter from the person in whose household they are living. In practice, SSA also considers food and shelter received from others living in the household. New regulations reflect this practice.
- 20 CFR 416.1102 is revised to clarify that income includes things received constructively as well as actually (i.e., under your control versus in your hands).

Expansion of the Rental Subsidy Policy for Supplemental Security Income (SSI) Applicants and Recipients

On August 24, 2023, SSA published an NPRM titled "*Expansion of the Rental Subsidy Policy for Supplemental Security Income (SSI) Applicants and Recipients,*" (88 FR 57910). The summary states, "We propose to revise our regulations by applying nationwide the In-Kind Support and Maintenance (ISM) rental subsidy exception that is currently in place for SSI applicants and recipients residing in seven States. The exception recognizes that a "business arrangement" exists when the amount of required monthly rent for a property equals or exceeds the presumed maximum value..."

The public comment period closed on October 23, 2023. SSA received 179 comments, 170 of which supported the regulatory change. SSA published a final rule on April 11, 2024, which was effective September 30, 2024. See Appendix B for a copy of the NPRM and final regulations.

A POMS rewrite of SI 00835.380, Rental Subsidies, was issued 09/24/24. POMS SI 00835.380, Rental Subsidies.

Prior Regulations

The regulation at 20 CFR 416.1130(b) stated that an individual is not receiving ISM in the form of room or rent if they are paying the required monthly rent charged under a "business arrangement."

Under the prior regulatory definition, a "business arrangement" existed when the amount of monthly rent required to be paid equals the current monthly rental value (CMRV)—that is, the price of the rent on the open market in the individual's locality.

Rental Subsidy Policy

Prior policy held that if an individual was charged rent at a level less than the CMRV, they were receiving a rental subsidy**.** An individual receives in-kind support and maintenance (ISM) in the form of a rental subsidy when the rent required by the landlord (including a flat fee payment) is less than the amount charged under a business arrangement.

A landlord is a party who provides living quarters in return for rent. A landlord and his or her tenant(s) cannot be members of the same household. Someone in the household has rental liability so the PMV applies. According to POMS, SSA develops subsidy when someone in the household is related as parent or child to the landlord or spouse. However, there were circumstances when rental subsidy was improperly developed in other than familial relationships.

The Basis for Change – Court Cases

In the 1980's and 1990's SSA lost a series of court cases that resulted in divergent treatment of rental subsidy depending on where the recipient lived.

Based on the ruling in *Jackson* v. *Schweiker,* 683 F.2d 1076 (7th Cir. 1982), in the States in the Seventh Circuit (Illinois, Indiana, and Wisconsin), a business arrangement exists when the amount of monthly rent required to be paid equals or exceeds the Presumed Maximum Value (PMV). In those States, if the required amount of rent is less than the PMV, we will impute as in-kind support and maintenance, the difference between the required amount of rent and either the PMV or the current market value, whichever is less.

In response to *Ruppert* v. *Bowen,* 871 F.2d 1172 (2d Cir. 1989), SSA issued Acquiescence Ruling (AR) 90–2(2) for the States of Connecticut, New York and Vermont.
The Court directed that a determination be made as to whether an applicant or recipient received an "actual economic benefit" from a rental subsidy, before charging the applicant or recipient with in-kind support and maintenance.
SSA determined it will apply the same rule as *Jackson*.

In a settlement of the class action case *Diaz* v. *Chater,* No. 3:95–cv–01817–X (N.D. Tex. Apr. 17, 1996), SSA agreed to revise its rental subsidy policy as it is applied to residents of the State of Texas. In the settlement agreement, SSA agreed not to charge a rental subsidy whenever the required rent equals or exceeds the presumed maximum value (PMV).

The rationale of the courts that resulted in the situation currently in place in seven states, in particular in *Jackson* and in *Ruppert,* also supports extending this policy to the other states. In *Jackson,* the Seventh Circuit reasoned that it is not enough for a claimant to be provided shelter at a rate below market value for that difference to be counted as "income" for SSI purposes; rather, to be counted as "income," the difference between the market value and the actual rental payment must result in increased purchasing power to meet the claimant's basic needs.

The Seventh Circuit explained that "purchasing power grows if in-kind contributions of shelter either make cash available to purchase necessities of life other than shelter or if, and to the extent, the quality of shelter itself is enhanced to meet basic needs."

Similarly, in *Ruppert,* the Second Circuit found that the difference between the CMRV and the required monthly rent does not always constitute an actual economic benefit which should be counted as "income" for SSI purposes.

Justification for the Change

- Change promotes a uniform national policy and thus equality.
- Ensures the economic benefit to all recipients regardless of State of residence.
- Fosters efficiency in administration due to consistency.
- Reduces time for calculations of ISM.

- Implements external stakeholder suggestions.
- Rent payments will be compared to a national standard, the PMV, instead of fluctuating geographical/market differences.
- Less intrusive questioning and fewer contacts with landlords.

Example – Current Policy

- SSI recipient living with their ineligible spouse and child.
- Renting a single-family home owned by the recipient's mother.
- The mother/landlord alleges CMRV of $1,500 per month.
- Required rent is only $350 per month.

Equation	Application to Example
CMRV – Required rent = Household (HH) ISM	$1,500 - $350 = $1,150
Household ISM/Number in HH = ISM to SSI recipient	$1,150/3 (people in HH) = $383.33
Compare to PMV (cap)	$383.33 > $334.33
SSI payment = FBR - PMV	SSI payment = $943 - $314.33* = $628.67

Example – Proposed Policy (Same factual situation)

Equation/Process	Application to Example
Compare CMRV to PMV, PMV < CMRV	$334.33 < $1,500
Required rent > PMV	$350 > $334.33
No ISM charged to SSI recipient	SSI payment = $943

Fiscal Impact

SSA estimates that implementation of this rule would result in a total increase in Federal SSI payments of $837 million over fiscal years 2024 through 2033. These estimates reflect:

- approximately 41,000 individuals who would be eligible under current rules will have their Federal SSI payment increased by an average of $132 per month.
- an additional 14,000 individuals who are not eligible under current rules who would be newly eligible and would apply for benefits under the proposed rule.

SSA estimates that this proposal will result in net administrative savings of $10 million for the 10-year period from FY 2024 to FY 2033.

Expand the Definition of a Public-Assistance (PA) Household

On September 29, 2023, SSA published an NPRM titled "*Expand the Definition of a Public-Assistance (PA) Household*" (88 FR 67148). The summary states, "We propose to expand the definition of a public assistance (PA) household for purposes of our programs, particularly the Supplemental Security Income (SSI) program, to include the Supplemental Nutrition Assistance Program (SNAP) as an additional means-tested public income maintenance (PIM) program. In addition, we seek public comment on expanding the definition to include households in which *any other* (as opposed to *every other*) member receives public assistance. We expect that the proposed rule would decrease the number of SSI applicants and recipients charged with in-kind support and maintenance (ISM). In addition, we expect that this proposal would decrease the amount of income we would deem to SSI applicants or recipients because we would no longer deem income from ineligible spouses and parents who receive SNAP benefits and live in the same household. These policy changes would reduce administrative burden for low-income households and SSA."

The public comment period closed November 28, 2023. SSA received 221 comments, 95% supported the proposals. SSA published a final rule on April 19, 2024, which was effective September 30, 2024. See Appendix C for a copy of the NPRM and final regulations.

A rewrite of POMS SI 00835.130, Public Assistance Households, was issued on 09/24/24. POMS SI 00835.130 - Public Assistance Households.

Prior Policy

Under prior policy, SSA published in regulations the definition of a public assistance (PA) household. A public assistance household is one in which every member receives some kind of public income-maintenance (PIM) payments. These are payments made under:

- Title IV-A of the Social Security Act —Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF)
- Title XVI of the Social Security Act (SSI, including federally administered State supplements and State administered mandatory supplements);
- The Refugee Act of 1980 (those payments based on need)
- The Disaster Relief and Emergency Assistance Act
- General assistance programs of the Bureau of Indian Affairs;
- State or local government assistance programs based on need (tax credits or refunds are not assistance based on need); or
- Department of Veterans Affairs programs (those payments based on need).

If an SSI applicant or recipient lives in a PA household, SSA does not consider them to be receiving ISM from other people within the household (*i.e.,* "inside ISM") (No VTR). This policy is based on the idea that if the other individuals in the household are receiving a PIM

payment, they need their income (and resources) for their own needs and therefore cannot support the SSI applicant or recipient.

Final Regulation

In the final regulation, SSA adopted 3 changes in 20 CFR 416.1142(a):

- Revising the definition of "public assistance household" to clarify that this is a term of art and only applies to SSA programs.
- Adding SNAP to the list of PIM programs.
- Changing the definition of a PA household to one which has both an SSI recipient or applicant and at least one other household member receiving a listed PIM payment.

Justification for the Change

Since the creation of the SSI program in 1972 and establishment of the PA household policy in 1980, the landscape of means-tested public benefit programs has changed significantly.

- Aid to Families with Dependent Children (AFDC) (entitlement) replaced by Temporary Assistance to Needy Families (TANF) (block grant) in 1997.
- Between 1980 and 2022 there was an 82% decrease in AFDC/TANF recipients.
- There was an 81% decrease in VA needs-based pensions over the same period.

Between 1980 and 2022, there had been no change in public assistance household policy despite:

- 100% increase in Supplemental Nutrition Assistance Program (SNAP) recipients.
- 70% increase in Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) recipients.
- 75% increase in Medicaid recipients.
- 65% increase in HUD housing assistance recipients.
- Low Income Home Energy Assistance Program (LIHEAP) recipients fluctuates, but generally up.

For comparison, there was a 50% increase in SSI recipients for the comparable period.

Adding SNAP (and considering other, more inherently in-kind benefits like Medicaid) reflects the shift in public participation for in-need individuals from using income supports that are purely cash assistance programs (such as those under our current regulations) toward voucher-based or in-kind support programs.

Additionally, SNAP eligibility and receipt has relatively low State variability. SNAP is a nationwide program with relatively uniform eligibility standards. This will contribute to a more straightforward operational and systems rollout of the new policy, and greater consistency in recipients' experiences across States.

SNAP participation overlaps to a great extent with participation in other means-tested programs. Expanding the definition of a PA household to include SNAP would capture about 67 percent of SSI recipients who are also living in households currently participating in Medicaid, HUD public housing and voucher programs, or LIHEAP. SNAP, as an entitlement program, does not have a cap on enrollment as does the TANF program. SNAP recipient eligibility is also certified for relatively longer time periods, resulting is lower workload. These changes will reduce administrative burdens for SSI applications and recipients, as well as for SSA.

Added Impact – Deeming

In the SSI program, Deeming is the process of considering a portion of another person's income to be the income of an SSI applicant or recipient. This is the cases with eligible and ineligible spouses, eligible children and ineligible parents and eligible aliens and ineligible alien sponsors.

SSA's current policy excludes from deeming the amount of any public income-maintenance (PIM) payments an ineligible parent or spouse receives under the programs listed in the PA household definition, any income that those programs counted or excluded in determining the amount of the PIM payments they received, and any income of the ineligible spouse or parent that is used by a PIM program to determine the amount of that program's benefit to someone else.

Adding SNAP to the list of PIM payments will decrease the amount of income that is deemed to SSI recipients from an SSI-ineligible spouse or parent who is receiving SNAP benefits, any income that was counted or excluded in figuring the amount of the SNAP benefits would not be deemed to the SSI applicant or recipient.

A rewrite of POMS SI 01320.141, Deeming: Public Income Maintenance Payments, was issued September 26, 2024. POMS SI 01320.141.

Fiscal Impact

SSA estimates that implementation of this proposed rule would result in a total increase in Federal SSI payments of $15 billion over fiscal years 2024 through 2033.

In FY 2033 roughly 277,000 Federal SSI recipients (4 percent of all SSI recipients) will have an increase in monthly payments compared to current rules, and an additional 109,000 individuals (1 percent increase) will receive Federal SSI payments who would not have been eligible under current rules. However, some individuals may have a decrease in SNAP benefits due to increased SSI payments.

Future Change – Adding Other PIM Programs

SSA sought public comment on adding other programs to the PA Household list. In addition to SNAP, they considered:

- Medicaid (80% of SSI households)
- the Low Income Home Energy Assistance Program (LIHEAP) (17% of SSI households)
- the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)
- the Housing Choice Voucher Program, Project Based Rental Assistance, and Public Housing (23% of SSI households)

At this time, they decided not to add any additional programs to the list, but will consider additional changes in the future.

Shift From "Every" to "Any" Other Member of the Household

In the NPRM, SSA proposed to consider an SSI applicant or recipient to be residing in a PA household if the SSI applicant or recipient and *any other* (as opposed to *every*) additional household member receives public assistance. This proposal is adopted in the final regulation. This allows SSA to rely on other agencies who already make household determinations. The current rule is detrimental when household members are ineligible due to reasons other than need (citizenship, time limits, immigration status, etc.). SSA also found it reasonable to infer that when 2 members of household qualify for PIM payments, all members of the household are low-income.

Where to From Here?

It will be interesting to see in the future if these simplification efforts actually result in fewer improper payments and produce some administrative savings, or if they simply increase program costs due to fewer ISM reductions and increased eligibility. Some of the variables that cause improper payments, fluctuating household expenses, changing household composition, variable payments and contribution rates and failure to report changes will still be present under the new regulations. However, fluctuating food costs will be removed from the equation.

THE FUTURE OF ISM – IMPLEMENTATION OF CHANGES

As previously stated, to implement the three regulatory changes, SSA will undertake an extensive rewrite of the ISM and related POMS sections. Several of these were published prior to implementation on September 30, 2024, but as a stopgap measure, SSA issued two Emergency Messages (EMs) prior to September 30. These EMs, EM-24047, "SSI Living Arrangements Regulatory Changes - Technician Instructions for Identifying and Processing Affected Cases," issued September 20 (See Appendix D), and EM-24048, "Omitting Food from In-Kind Support and Maintenance Calculations," issued September 26 (See Appendix E), provide processing instructions until the full list of rewrites has been issued. See EM-24048 Section F for a list of POMS sections to be updated.

As a basic outline for development, any cases with income Type H (ISM under the PMV) or Type J (VTR) will require development of a new Living Arrangement effective 09/30/24. SSA created a new systems page titled Household Living with Others to capture the regulatory changes. On that page, SSA will develop if anyone else in the household is receiving Public Assistance (PA), including SNAP. If no one receives PA and the recipient does not live alone, SSA will ask if "Others in the household pay for or provide all of your meals?" If the answer is yes, SSA will develop following the VTR path including development of pro rata share of shelter items. If the answer is no, the individual will be placed in FLA-A and SSA will develop for outside ISM, including pro rata share of shelter.

SSA has developed several new edits to make sure rental subsidy is developed and up to date in States other than New York, Connecticut, Indiana, Illinois, Wisconsin, Vermont, or Texas. Additionally, new LA development must take place at the beginning of each new year as the Cost of Living Adjustment (COLA) will change the amount of the PMV reduction amount, so rental subsidy must be refigured based on the new PMV amount.

Additionally, all deeming cases must be reviewed to determine of the exclusion of income from parents and ineligible spouses receiving SNAP payments is identified and considered.

THE FUTURE OF ISM - LEGISLATION

Most legislative options that have been considered are typically cost neutral, meaning that some SSI recipients would be better off, and others would be worse off than under current law. The President's fiscal year 2020 and 2021 budgets proposed one such option — it would have replaced ISM with a flat-rate (SSA has traditionally estimated 7 percent) benefit reduction for adult SSI recipients who are living with other adults, otherwise called benefit restructuring. The 7 percent figure generally provides revenue neutrality for program costs.

> Simplify Administration of the SSI Program. Currently, SSI recipients can receive lower benefits if they are earning, or otherwise receiving, income. Income includes non-cash income, such as assistance by a roommate or family member in paying the recipient's share of the household expenses, such as food and shelter. This type of income is called in-kind support and maintenance (ISM) and is difficult to accurately value because it can fluctuate each month as household expenses and composition and the type of assistance provided may change. This proposal would replace ISM with a flat-rate benefit reduction for adults living with other adults.

SSA website at https://www.ssa.gov/legislation/other.html

The reason that benefit restructuring has received so much attention is that elimination of ISM outright is very expensive. In 2008, it was estimated that eliminating ISM counting altogether would cost SSA $1.2 billion annually. Today, annual inflation adjusted costs could approach $3 billion. This is weighed against administrative savings of approximately

$70 million. (Richard Balkus, James Sears, Susan Wilschke, and Bernard Wixon, "Simplifying the Supplemental Security Income Program: Options for Eliminating the Counting of In-kind Support and Maintenance," Social Security Bulletin, Vol. 68, no. 4, 2008, 15- 39: https://www.ssa.gov/policy/docs/ssb/v68n4/v68n4p15.html.)

It is interesting to note that the unadjusted annual program cost of the three recent final regulations for the period 2024 – 2033 is $1.7 billion, more than half way to the cost of total elimination of ISM. Annual administrative costs for the same period are estimated to increase by $4.7 million.

Omit food	$26 million savings*
Rental subsidy	$10 million savings*
Expand PA HH	$83 million cost
Net cost	$47 million cost (2024-2033)

Another legislative approach would be to eliminate ISM altogether. No other Federal benefit programs consider in-kind support and maintenance. Both the SSI Restoration Act (The SSI Restoration Act, H.R. 3824 and S. 2065, was introduced by Rep. Raúl Grijalva in the House and by Sen. Sherrod Brown in the Senate) in 2021 and President Biden's campaign plan (The Biden Plan for Full Participation and Equality for People with Disabilities) would eliminate ISM counting. This would simplify the program, reduce administrative costs, and allow recipients to accept help from friends and family without penalty, but at a significant increase in program costs. Neither proposal got far enough to have a hearing.

Now that SSA has gone about as far as it can go and taken a significant action regarding ISM policy, it will be interesting to see if Congress takes a wait and see approach before considering any changes. What, if anything, additional happens appears to depend on Congress.

SMART USE OF ISM PAYMENTS FROM A TRUST

Just because payment for shelter by a trust may result in counting the shelter received as income for SSI purposes, you should not be afraid to allow for discretionary payment for shelter (or food) by the trust if it may result in a better life situation for the trust beneficiary.

The first inclination may be to prohibit any distributions for shelter because it will reduce the amount of the SSI check. And by no means should the trust state that the trust will pay for shelter needs and risk the trust being considered a support trust.

However, there may be distinct benefits to allowing a trustee to make discretionary payments for shelter, as the situation may require. In fact, the way the rules function, it could be malpractice to impose too restrictive rules on a trustee.

The following chart gives four examples of how a trust may or may not pay for food and/or shelter expenses and the resulting impact on benefit amount, the SSI recipient's lifestyle and the resulting amount of discretionary funds the recipient may have to pay for other necessary items and expenses. (See key below the chart for descriptions of the trusts.)

	Trust A	**Trust B**	**Trust C**	**Trust D**
Beneficiary's monthly payment from SSI check				
Shelter	$600	$0	$335	$0
Food	$300	$0	$0	$0
Monthly trust payments				
Shelter	$0	$1000	$0	$1000
Food	$0	$500	$500	$500
Reduction in the beneficiary's monthly SSI check due to trust disbursements				
Federal Benefit Rate	$943	$943	$943	$943
Reduction due to ISM counting under the PMV rule	$0	($334.33)	$0	$0
Net SSI benefit to beneficiary	$943	$628.67	$943	$943
Beneficiary's available lifestyle				
From trust	$0	$1500	$500	$1500
From SSI	$943	$628.67	$943	$943
Total lifestyle	$943	$2128.67	$1443	$2443
Available discretionary funds	$43	$628.67	$608	$943

Trust A – Prohibits any payments for food or shelter.
Trust B – Permits payments for food and shelter. Recipient makes no contribution and is subject to PMV reduction.
Trust C – Permits payments for food and shelter. Required reduced rent no longer subject to subsidy reduction. No ISM reduction.
Trust D – Permits payments for food and shelter. Distributions are made through an ABLE account. No ISM reduction.

What are some of the things that a trustee must consider in determining whether to make distributions for shelter and how much to distribute?

- First, does the trust permit distributions for food and shelter? Revision of trusts that did not permit distributions for food may be problematic.

- Second, the trustee should be sure to maintain SSI and Medicaid eligibility, even the receipt of one SSI dollar. Circumstances such as eligibility for SSDI benefits or the receipt of other earned or unearned income valued at or above the PMV would make trust disbursements for shelter and the resultant reduction in benefits due to ISM inadvisable.
- Third, the trustee must consider the amount available in the trust, the beneficiary's life expectancy and the period of time that the trust is expected to provide for.

Note: The PMV is rebuttable, in other words, if the value of the shelter received is worth less than the PMV, the individual will be charged with the actual value of the shelter. Therefore, a reduction in the amount of the trust distribution may still permit a distribution to be made while maintaining eligibility for benefits.

CHANGES IN OVERPAYMENT RECOVERY POLICY

The Overpayment Process

An overpayment occurs when you receive more money than you should have been paid. Overpayments can occur for many reasons, like when someone does not timely report work or other changes that can affect benefits or when an individual chooses to continue receiving payments during an appeal. Each person's situation is unique, and overpayments are handled on a case-by-case basis. Social Security is required by law to adjust benefits or recover debts when people receive payments they weren't entitled to.

If an overpayment happens, SSA will notify you and your representative payee, if you have one, by mail. Overpayment notices explain why you've been overpaid, your overpayment amount, your repayment options, and your appeal and waiver rights.

Appeal and Waiver Rights

If you don't agree that you've been overpaid, or believe the amount is incorrect, you can file an appeal using form SSA-561 Request for Reconsideration. Your appeal must be in writing and explain why you think you have not been overpaid, or why you think the amount is incorrect. You can get the form online or by calling SSA. To file an appeal online, visit secure.ssa.gov/iApplNMD/start.

You have 60 days from the date you received the original overpayment notice to file an appeal. SSA will assume you received this notice 5 days after the date on it, unless you show SSA that you didn't get it within the 5-day period. You must have a good reason for waiting more than 60 days to ask for an appeal.

If you believe you shouldn't have to pay the money back, you can request that SSA waive collection of the overpayment. You must submit form SSA-632 Request for Waiver of Overpayment Recovery, which you can get online or by calling SSA.

Note: If you think you are not at fault and your overpayment is $2,000 or less, you can request a waiver by calling Social Security. They may be able to quickly process your request by phone.

There's no time limit for filing a waiver as long as you prove that both:
- The overpayment wasn't your fault.
- Paying it back would cause you financial hardship or would be unfair for some other reason.

SSA may ask you to give them proof of your income and expenses. They will stop collection of the overpayment until they make a decision on your request for an appeal or waiver.

Options for Repaying

If you agree that the overpayment occurred and that the overpayment amount is correct, you have options for repayment.

If you're receiving Social Security benefits, SSA will withhold 10% of your benefit each month or $10, whichever is more. If you're receiving Supplemental Security Income (SSI), generally they will withhold 10% of the maximum federal benefit rate each month. SSA will begin withholding your Social Security benefits or SSI payments approximately 60 days after they notify you of the overpayment.
If you can't afford this, you may ask them to take less from your benefit each month, but no less than $10. You also have the option of paying back the overpayment at a rate greater than 10%.

SSA may recover an overpayment of Social Security benefits from your monthly SSI payment if you are no longer receiving Social Security benefits; or they may recover an SSI overpayment from your monthly Social Security benefits if you are no longer receiving SSI payments. If you aren't receiving benefits, you should do one of the following:

- Visit www.pay.gov and search for "Social Security" to pay by credit card, debit card, or bank account.
- Using your bank's online bill pay feature, to make a payment to "Social Security Administration."
- Send SSA a check for the entire amount of the overpayment within 30 days.
- Contact them to set up a plan to pay back the amount in monthly installments.

If you are not receiving benefits or become delinquent in your repayment agreement, SSA can recover the overpayment from your federal income tax refund or from your wages if you're working. Be aware that they will also report the delinquency to credit bureaus. Also, they can recover overpayments from future Social Security benefits or SSI payments.

RECENT CHANGES IN OVERPAYMENT RECOVERY POLICY

In October 2023, SSA launched a review of its overpayment policies and procedures. As a result, it recently issued a number of changes:

- Reduction in default recovery withholding rate;
- Shifting burden of proof as to whether claimant was at fault;
- Extension of time for repayment plans; and
- Enhanced overpayment waiver process.

Default Overpayment Recovery Rate

On March 25, 2024, SSA issued Emergency Message (EM) 24011 (See Appendix F).

Effective on that date, SSA decreased the default Title II overpayment recovery withholding rate from 100 percent of the monthly Social Security benefit to 10 percent of the benefit or $10, whichever is greater.

> **NOTE**: Section 1631(b)(1)(B) of the Act generally provides that the rate of adjustment of payment to recover SSI overpayments will be the lesser of:
>
> - Ten percent of the recipient's total monthly income (countable income plus SSI and State supplementary payment) (usually equal to the FBR); or
> - The recipient's entire monthly benefit.

When SSA determine that an individual receiving Title II benefits is overpaid, they send them a notice requesting a full and immediate refund, and inform them of their right to request a waiver of recovery or request a reconsideration of the overpayment.

If the overpaid individual does not:

- repay,
- request a waiver, or
- request a reconsideration

prior to the end of the 60-day due process period, SSA will, in most cases, automatically recover the overpayment by withholding 10 percent of their Title II monthly benefit credited amount, or $10 per month, whichever is more. They will recover the overpayment by withholding until the overpayment is fully recovered.

Request for a Lower Rate

If a beneficiary requests a repayment plan with a rate lower than 10%, a representative will approve the request if it allows recovery of the overpayment within 60 months – a recent 2-year increase from the previous policy of only 36 months. If the beneficiary's

proposed rate would extend recovery of the overpayment beyond 60 months, the Social Security representative will gather a verbal income, resource, and expense summary from the beneficiary to make a determination.
(SSI recipients don't have to provide a summary.)

EM-24011 E. states in the NOTE that:

The request for a 10 percent overpayment recovery rate will take priority over the recent change to procedure requiring the collection of overpayments within 60 months (GN 02210.030). Individuals will default to 10 percent withholding even if the amount collected will not facilitate recovery within 60 months.

Individuals currently repaying an overpayment with a recovery rate greater than 10 percent can request to have the rate adjusted to 10 percent or $10, whichever is greater. SSA will send a one-time notice to all overpaid individuals who have a repayment rate greater than 10 percent.

Certain recovery payments are not eligible for the 10 percent rate, e.g., situations of fraud or similar fault, misuse of benefits, and penalties.

Increase in Title II Administrative Waiver Tolerance

POMS GN 02250.350, TN 56 (05-24) increased the administrative waiver tolerance from $1,000 to $2,000.

When a liable person requests waiver and the total amount of that person's liability is $2,000 or less, recovery will be waived because it would impede the efficient administration of the Act, unless there is some indication that the person may be at fault.

- Original total must be $2,000 or less

  - Not each overpayment

  - Not if reduced by repayment to $2,000

Increase in SSI Administrative Waiver Tolerance

POMS SI 02260.030 TN 47 (05-24) updated the administrative waiver tolerance to $2,000 for SSI.

- Effective May 13, 2024, we may administratively waive recovery or adjustment, i.e., administratively discontinue waiver development, on an overpayment if the original amount (not the balance) is $2,000.00 or less.
- We do not use administrative waiver development discontinuance policy unless the recipient (or representative) makes a specific written or oral request for waiver or reconsideration.

- We administratively discontinue waiver development unless we believe there is an indication of fault on the part of the overpaid recipient. In such a case, we will conduct full waiver or reconsideration development.

The SSI waiver tolerance had been $1,000 for many years. As the Federal Benefit Rate approached $1,000, the need to increase the waiver tolerance became apparent. An additional problem results from the fact that many overpayments are not identified for many months after they occur, thus increasing the chance that they will exceed the tolerance.

Revised Waiver Process

In September 2023, SSA introduced a revised form (SSA-632) to help streamline the waiver process. In September 2024, SSA published TN 59 GN 02250.301, which consolidated the Title II and SSI overpayment waiver instructions.

They also indicated that they would be publishing proposed regulatory changes this Fall to streamline processes and reduce burden so eligible individuals can more easily seek debt relief.

> We propose to simplify our rules for how an individual can demonstrate eligibility for waiver of recovery of an overpayment debt they have incurred. Our goal is to ensure that overpayment recovery does not unduly burden those in underserved, vulnerable, or marginalized communities.

APPENDICES

Appendices A, B and C are hyperlinked to the Notice of Proposed Rulemaking (NPRM) and Final Rule on the Federal Register website (www.federalregister.gov). If the hyperlink does not work, the Federal Register document citation is also provided.

APPENDIX A

Omitting Food from In-Kind Support and Maintenance Calculations

Notice of Proposed Rulemaking, Omitting Food From In-Kind Support and Maintenance Calculations (February 15, 2023).

https://www.federalregister.gov/documents/2023/02/15/2023-02731/omitting-food-from-in-kind-support-and-maintenance-calculations

CITATION: 88 FR 9779 (9779-9796, 18 pages)

Summary: We propose to update our regulations to remove food from the calculation of In-Kind Support and Maintenance (ISM). We also propose to add conforming language to our definition of income, excluding food from the ISM calculation. Accordingly, Supplemental Security Income (SSI) applicants and recipients would no longer need to provide information about their food expenses for us to consider in our ISM calculations. We expect that these changes will simplify our rules, making them less cumbersome to administer and easier for the public to understand and follow. These simplifications would make it easier for SSI applicants and recipients to comply with our program requirements, which would save time for both them and us, and improve the equitable treatment of food assistance within the SSI program. The proposed rule also includes other, minor revisions to the regulations related to income, including clarifying our longstanding position that income may be received "constructively."

Final Rule, Omitting Food from In-Kind Support and Maintenance Calculations (March 27, 2024)

https://www.federalregister.gov/documents/2024/03/27/2024-06464/omitting-food-from-in-kind-support-and-maintenance-calculations

CITATION: 89 FR 21199 (21199-21211, 13 pages)

Summary: We are updating our Supplemental Security Income (SSI) regulations to remove food from the calculations of In-Kind Support and Maintenance (ISM). We are also adding conforming language to our definition of income. These changes simplify our rules by making them less cumbersome to administer and easier for the public to understand and follow, and they improve the equitable treatment of food assistance within the SSI program. This final rule also includes other minor revisions to our regulations related to income, including clarifying our longstanding position that income may be received "constructively."

APPENDIX B

Expansion of the Rental Subsidy Policy for Supplemental Security Income (SSI) Applicants and Recipients

Notice of Proposed Rulemaking, Expansion of the Rental Subsidy Policy for Supplemental Security Income (SSI) Applicants and Recipients (August 24, 2023).

https://www.federalregister.gov/documents/2023/08/24/2023-18213/expansion-of-the-rental-subsidy-policy-for-supplemental-security-income-ssi-applicants-and

CITATION: 88 FR 57910 (57910-57915, 6 pages)

Summary: We propose to revise our regulations by applying nationwide the In-Kind Support and Maintenance (ISM) rental subsidy exception that is currently in place for SSI applicants and recipients residing in seven States. The exception recognizes that a

"business arrangement" exists when the amount of required monthly rent for a property equals or exceeds the presumed maximum value. This proposed rule would improve nationwide program uniformity, and, we expect, improve equality in the application of the rental subsidy policy.

Final Rule, Expansion of the Rental Subsidy Policy for Supplemental Security Income (SSI) Applicants and Recipients (April 11, 2024)

https://www.federalregister.gov/documents/2024/04/11/2024-07675/expansion-of-the-rental-subsidy-policy-for-supplemental-security-income-ssi-applicants-and

CITATION: 89 FR 25507 (25507-25514, 8 pages)

Summary: We are finalizing our proposed regulation to apply nationwide the In- Kind Support and Maintenance (ISM) rental subsidy exception that has until now been available only for SSI applicants and recipients residing in seven States. This final rule provides that a "business arrangement" exists, such that the SSI applicant or recipient is not considered to be receiving ISM in the form of room or rent, when the amount of monthly required rent for the property equals or exceeds the presumed maximum value (PMV).

APPENDIX C

Expand the Definition of a Public Assistance Household

Notice of Proposed Rulemaking, Expand the Definition of a Public Assistance Household (September 29, 2023)

https://www.federalregister.gov/documents/2023/09/29/2023-21550/expand-the-definition-of-a-public-assistance-household

CITATION: 88 FR 67148 (67148-67157, 10 pages)

Summary: We propose to expand the definition of a public assistance (PA) household for purposes of our programs, particularly the Supplemental Security Income (SSI) program, to include the Supplemental Nutrition Assistance Program (SNAP) as an additional means-tested public income maintenance (PIM) program. In addition, we seek public comment on expanding the definition to include households in which *any other* (as opposed to *every other*) member receives public assistance. We expect that the proposed rule would decrease the number of SSI applicants and recipients charged with in-kind support and maintenance (ISM). In addition, we expect that this proposal would decrease the amount of income we would deem to SSI applicants or recipients because we would no longer deem income from ineligible spouses and parents who receive SNAP benefits and live in the same household. These policy changes would reduce administrative burden for low-income households and SSA.

Final Rule, Expand the Definition of a Public Assistance Household ((April 19, 2024)

https://www.federalregister.gov/documents/2024/04/19/2024-08364/expand-the-definition-of-a-public-assistance-household

CITATION: 89 FR 28608 (28608-28622, 15 pages)

Summary: We are finalizing our proposed rule to expand the definition of a public assistance (PA) household for purposes of our programs, particularly the Supplemental Security Income (SSI) program, to include the Supplemental Nutrition Assistance Program (SNAP) as an additional means-tested public income-maintenance (PIM) program. We are also revising the definition of a PA household from a household in which every member receives some kind of PIM payment to a household that has both an SSI applicant or recipient, and at least one other household member who receives one or more of the listed PIM payments (the *any other* definition). If determined to be living in a PA household, inside in-kind support and maintenance (ISM) would no longer need to be developed. The final rule will decrease the number of SSI applicants and recipients charged with ISM from others within their household. In addition, we expect this rule to decrease the amount of income we would deem to SSI applicants and recipients because we will no longer deem as income from ineligible spouses and parents who live in the same household: the value of the SNAP benefits that they receive; any income that was counted or excluded in figuring the amount of that payment; or any income that was used to determine the amount of SNAP benefits to someone else. These policy changes reduce administrative burden for low-income households and SSA.

APPENDIX D

Emergency Message Identification Number: EM-24047 **Effective Dates:** 09/20/2024 - Present
Intended Audience: All RCs/ARCs/ADs/FOs/WSUs
Originating Office: DCO OPSOS
Title: SSI Living Arrangements Regulatory Changes - Technician Instructions for Identifying and Processing Affected Cases
Type: EM - Emergency Messages
Program: Title XVI (SSI)
Link To Reference: See References at the end of this EM

Retention Date: 03/20/2025

A. Purpose

The purpose of this message is to notify Regional and Field Office staff of three Supplemental Security Income (SSI) regulatory changes taking effect September 30, 2024, and how to address cases potentially impacted. These changes may affect the determination of the living arrangement (LA), in-kind support and maintenance (ISM), deeming, and rental subsidy.

B. Background

1. **Omitting Food from ISM**

Effective September 30, 2024, food is no longer part of the ISM calculations in determining when the claimant's contribution equals or exceeds their share of the household expenses. We will determine a claimant's pro rata share and if ISM applies, by only calculating shelter expenses.

NOTE: Food will remain in the definition of income, SI 00810.005; however, it will now include the exception that food is no longer used to calculate ISM.

2. **Expanding the Definition of a Public Assistance (PA) Household and Adding Supplemental Nutrition Assistance Payments (SNAP) (formerly known as Food Stamps) to PA and Public Income Maintenance (PIM) Payment Types**

Living Arrangement
This regulation expands the definition of a PA household to include any situation in which the SSI claimant or recipient resides with at least one other person who receives a PIM payment. Prior to September 30, 2024, every member of the household had to receive public assistance to be considered a PA household. For more on PA households, refer to SI 00835.130.

EXAMPLE: Mike and Sarah are married and live with their friend Carl in a household together. Mike files for SSI payments based on disability and meets the non-disability criteria. Carl receives SNAP from the State. Consider the household a PA household, as Mike, the SSI claimant, lives with Carl (one other person) who receives a PIM payment. Upon verification of Carl's SNAP benefits, development of inside ISM is no longer needed.

Deeming
In addition, SNAP benefits will be added to the list of acceptable types of PA and PIM payments. The addition of SNAP as a PIM payment will impact deeming situations where a deemor receives SNAP and has other income that may affect payment. Exclude from deemed income any PIM payment and any income used to compute such payment. This exclusion only applies to the income of an ineligible spouse or parent. For the ineligible spouse or parent who receives SNAP benefits, type F income will post to the Supplemental Security Record (SSR) with an amount of zero. This will occur unless there is another type F income amount present for the same month and that type F income is used to exclude the deemor's income. For more information on PIM payments and when the exclusion applies in other situations, refer to SI 01320.141.

EXAMPLE: Mike and Sarah are married. Mike files for SSI payments based on disability and meets the non-disability criteria. Sarah receives SNAP and has income from part-time employment. Upon verification of Sarah's SNAP benefits, Sarah's income from employment does not affect Mike's SSI payment or eligibility. The technician codes the new Non-Cash Public Assistance income page in the SSI Claims system for Sarah with the months of eligibility for SNAP. The system will exclude Sarah's income from deeming.

3. **Rental Subsidy**

Effective September 30, 2024, in rental subsidy situations where someone in the household is

related to the landlord as parent or child, we consider a business arrangement exists when the verified required rent or flat fee equals or exceeds the lessor of the applicable presumed maximum value (PMV) or current market rental value (CMRV). If the required rent or flat fee equals or exceeds either the PMV or CMRV, no further development is needed, and no rental subsidy applies. If the required rent or flat fee is less than both the PMV and CMRV, complete development to determine if ISM applies following instructions in SI 00835.380.

This process currently exists in the Second and Seventh circuit states and Texas but is now being expanded nationwide. Current states include Connecticut, New York, and Vermont (Second Circuit); Illinois, Indiana, and Wisconsin (Seventh Circuit); and Texas.

EXAMPLE: Billie receives SSI and pays their mother, who is also their landlord, $350 in monthly rent. The rent exceeds the 2024 PMV of $334.33; therefore, no rental subsidy is charged even though the CMRV is $500 per month. No other development is needed.

EXAMPLE: Kelly, an SSI claimant is paying rent of $200 monthly to their father for a basement apartment. The rent is less than the 2024 PMV of $334.33; therefore, the technician must develop the CMRV to determine if ISM will apply. If the CMRV is $500 per month, the technician will use the difference between the PMV and the monthly rent to determine the countable ISM ($134.33), and not the higher CMRV amount.

Every year the system will generate a new diary, the **E2** diary in the cost-of-living adjustment (COLA) run for cases involving rental subsidy to alert technicians of the need to review the rental subsidy information. Because the cost of living typically increases annually, the PMV limit increases as well. An increase in the PMV could affect the amount of ISM being charged.

Therefore, when the claimant's rental payment amount is over, but close to the PMV amount, inform the claimant of the impact of COLA on the PMV after the first of each year and the subsequent potential impact on payment and ISM. Refer to instructions in C.5. below for steps on processing E2 diaries.

EXAMPLE: If the claimant is currently paying rent of $350 monthly and the rent exceeded the 2024 PMV of $334.33, no rental subsidy could be charged, even if the CMRV was $500 per month. However, if the PMV increases to $380 in January 2025 (estimate), there may be a rental subsidy chargeable as ISM beginning in January if the recipient's required rent did not increase to equal to or exceeding the new PMV.

C. Processing Instructions

Be alert to situations where H type income (ISM) or J type income (value of the one-third reduction for LA "B") is shown as continuing on the SSR in the Unearned Income Data (UMIH) segment, and the new regulations will either reduce or eliminate ISM.

1. Omitting Food from ISM

New LA development will be needed for cases where the ISM determination includes food. Refer to the chart below for processing instructions.

NOTE: For cases involving trusts, food expenses will no longer be included within ISM calculations effective September 30, 2024. For example, prior to September 30, 2024, if a trust (that is not a resource) disburses funds to pay a credit card bill for the trust beneficiary and the bill includes restaurant and shelter charges, then payment of those charges results in ISM, and they are counted in the calculation of ISM. In the same scenario on or after September 30, 2024, only the shelter charges would be used in the calculation of ISM and the restaurant charges for food would not be counted in the calculation.

2. **Expanding the Definition of a PA Household**

New LA development will be needed when a claimant lives with others. Refer to chart #1 below for processing instructions.

3. **Rental Subsidy**

New LA development will be needed when an individual's ongoing LA period involves rental subsidy, and the individual does not live in New York, Connecticut, Indiana, Illinois, Wisconsin, Vermont, or Texas. You must insert a new LA period effective September 30, 2024, to ensure proper payment due to the regulatory change period with a change date of September 29, 2024.

Refer to chart #2 below for processing instructions.

For cases that set an **E2** diary in the 2025 COLA run, you must develop the LA back to September 30, 2024, to ensure proper payment effective with the date of the regulatory change if you have not already done so.

E2 Diary Instructions

Due to the COLA which affects the PMV amount each year, the change in the PMV may affect the amount of ISM charged on cases with rental subsidy.

For these cases, the system will generate an **E2** diary with an associated limited issue or RZ for the technician to review and resolve.

The system sets the **E2** diary when:

- the rental subsidy amount is greater than zero for the most recent LA period, and
- the current payment status on the SSR is C01, M02, or N01.

To develop rental subsidy when you have an **E2** diary:

- Attempt to contact the claimant to obtain information regarding the amount they pay for rent effective January 1st of the current year, and CMRV if applicable.
- If you are unable to reach the claimant via phone or in person, obtain a signed Letter to Landlord Requesting Rental Information (SSA-L5061) to verify the rental amount and CMRV effective January 1st of the year in question.
- If there are no other changes to the LA after the rental amount and CMRV is verified, create a new LA effective January 1st of the year in question (12/31/CCYY) and update the rental amount and CMRV if necessary.

If you are unable to obtain the information from the claimant after two attempts and 30 days have passed, document all attempts on a Report of Contact and clear the diary via the UDIA screen in the Direct SSR update prior to closing the LI/RZ.

If a claimant contacts SSA about any change in payment after clearing the diary, update the record based on the information provided at the time of contact, back to the date of their rental amount change if applicable, considering administrative finality.

4. **Systems Updates - Systems Edit**

a. PA Household Edits

There are two new PA edits.

The system will generate an edit on the Living Arrangements Edit page when there is an LA period where:

- · the LA start date is prior to 9/30/2024, and
- · the LA end date is later than 9/29/2024 or continuing, and
- · the PA household question appears in the path and the response is “Yes,” “No,” or “Unknown.”

Edit Text: ***New LA period required for ISM regulation changes. Living arrangement period with a change date of 9/29/2024 is required***.

The system will generate an edit on the Edit and Alert Messages page when:

- · CLOSE EVENT= Y on the Build SSR page and the technician submits the page, and
- · there is an LA period where:
  - · the LA start date is prior to 09/30/2024, and
  - · the LA end date is later than 09/29/2024 or continuing, and
  - · the PA household question appears in the path and the response is “Yes,” “No,” or “Unknown.”

Edit Text: ***Cannot close event. Missing 09/30/24 living arrangement period for ISM changes.***

Technicians must resolve these edits before closing an event.

NOTE: The PA question only appears in the path when the claimant lives with others.

NOTE: Beginning with LA periods with an effective date of 9/30/2024 or later, the Household of Another and Household Expenses and Contributions pages no longer come into the path. These pages are consolidated into the new Household Living with Others page.

Chart #1 How to Update the LA When PA HH Edit Appears in the Path	
Step	**Action**
1	If you receive either of the following edits during an initial claim, redeterminations (RZ), or post-eligibility event: · New LA period required for ISM regulation changes. Living arrangement period with a change date of 9/29/2024 is required.

	· Cannot close event. Missing 09/30/24 living arrangement period for ISM changes. Take the following steps: **If there is ongoing Type H or Type J type income on the SSR**, you must contact the claimant to create a new LA effective 9/30/2024 (**input with a change date of 9/29/2024**). Go to step 2. If there are undocumented LAs prior to 9/30/2024, develop and document under prior rules considering separate consumption. If there is no ongoing Type H or Type J type income, and no reason to suspect a change in household composition or residence, no re-contact is needed. Copy the prior LA and enter through the subsequent LA pages to resolve the edit.
2	Once you reach the new Household Living with Others page, if anyone who lives in the household is receiving PA (other than the SSI applicant/recipient), including SNAP, answer "**Yes"** to "The household has both the SSI claimant and one other household member who receives a public assistance benefit." For the claimant, select the option for "Receives SSI" or "Filing for SSI," whichever applies. From the drop down, select the other household member who receives PA, and then select their assistance type and verify receipt. Note: Development of inside ISM is not required; however, development of outside ISM is required. If no one in the household receives PA and the claimant does not live alone, you will continue with the Household Living with Others page. The following question will be presented: "Others within the household pay for or provide all of your meals" If they answer yes, go to step 3. If they answer no, go to step 4. Note: If the individual receives *some* meals from the household, or if they receive SNAP, the answer will be "**No**" because they are not receiving ALL meals from within the household. This will cover current earmark sharing cases.
3	The individual is now in the VTR path for ISM development. Evaluate their shelter contribution to determine if ISM applies. If the claimant is not contributing their pro rata share to shelter items, they are placed in a FLA/B LA and charged ISM under the VTR rules. STOP.

	If the claimant contributes their pro rate share to shelter items, go to step 4.
4	The claimant is placed in a FLA/A LA with the possibility of ISM calculated under PMV rules. Develop the shelter items to determine if the claimant is contributing their pro rata share. If yes, no inside ISM will be applied. NOTE: Development of outside ISM is needed.

NOTE: Please refer to SI 00835.005 for a flowchart illustrating the process in determining LA and ISM.

b. Rental Subsidy Edits

There are two new rental subsidy edits and one revised rental subsidy edit.

The first new rental subsidy edit is to ensure the technician creates a new LA as of the regulation effective date for rental subsidy situations. The system will generate this edit on the Living Arrangement Change page when:

- the LA Change on the Living Arrangement Change page is “No,” and
- there is an LA period where:
  - the LA start date is earlier than 09/30/2024, and
  - the LA end date is later than 9/29/2024 or continuing, and
  - the address state on the Residence Address and Jurisdiction page is not NY, CT, IN, IL, TX, WI or VT, and
  - the rental subsidy amount on the Home Ownership and Rental Liability page is greater than $0.00.

Edit Text: ***Review rental subsidy. Living arrangement period with a change date of 09/29/2024 is required.***

There is a revised edit to ensure the technician creates a new LA each January for rental subsidy situations. The system will generate this edit on the Living Arrangement Change page when:

- the LA change on the Living Arrangement Change page is “No,” and
- there is an LA period where:
  - the LA start date is less than or equal to 24 months prior to the current date, and
  - the address state on the Residence Address and Jurisdiction page is New York, Connecticut, Indiana, Illinois, Wisconsin, Vermont, Texas (eff. 5/96), or any of the remaining states, District of Columbia, or Northern Mariana Islands (eff. 09/30/2024), and
  - the rental subsidy amount on the Home Ownership and Rental Liability page is greater than $0.00, and
- a COLA change occurred and there is no change date equal to 01/01/<CCYY> where CCYY is the LA start date year plus 1.

Edit Text: ***New living arrangement period required for January <CCYY> for COLA update***.

The second new rental subsidy edit is a close event edit and is to ensure the technician creates a new LA as of the regulation effective date for rental subsidy situations. The system will generate an edit on the Edit and Alert Messages page when:

· CLOSE EVENT= Y on the Build SSR page and the technician submits the page, and
· there is an LA period where:
    · the LA start date earlier than 09/30/2024, and
    · the LA end date is later than 09/29/2024 or continuing, and
    · the address state on the Residence Address and Jurisdiction page is not equal to *New York, Connecticut, Indiana, Illinois, Wisconsin, Vermont, Texas*, and
    · the rental subsidy amount on the Home Ownership and Rental Liability page is greater than $0.00.

Edit Text: ***Cannot close event. Missing 09/30/24 living arrangement period for rental subsidy rule change.***

Technicians must resolve these edits before closing an event.

Chart #2 How to Update the Living Arrangement When You Receive a Rental Subsidy Edit

Step	Action
1	During all initial claims, RZs, and post-eligibility events if you receive either of the following edits: · Review Rental Subsidy. Living arrangement period with a change date of 09/29/2024 is required. · Cannot close event. Missing 09/30/24 living arrangement period for rental subsidy rule change. Take the following steps: You must contact the claimant to create a new living arrangement effective 9/30/2024 (**using a change date of 9/29/2024**). Verify the rental amount and CMRV and update as needed. The system will compute the rental subsidy using both the PMV and CMRV and will revise the rental subsidy amount as needed.
2	During all initial claims, RZs, and post-eligibility events if you receive the following edit: New living arrangement period required for January <CCYY> for COLA update. Take the following steps: You must contact the claimant to create a new living arrangement effective 01/01/CCYY (using a change date of 12/31/CCYY). Verify the rental amount and CMRV and update as needed.

	The system will compute the rental subsidy using both the PMV and CMRV and will revise the rental subsidy amount as needed.

5. **Impact on Deeming**

The addition of SNAP to the list of PA and PIM payments may affect the deeming computation. There is a new income type available for selection within the SSI claims path called “Non-Cash Public Assistance.” If an ineligible spouse or parent (and ineligible children, if any) receives SNAP benefits, you must select “Yes” to this question on the Income Menu page.

Within the Non-Cash Public Assistance page, key in the source of the assistance, the address, and the months of eligibility. You must verify receipt of the PIM payment; however, you do not need to verify the amount.

NOTE: If available, use any existing data exchanges with your local SNAP agency to verify receipt of SNAP.

SSI PIF.pdf

Direct all program-related and technical questions to your Regional Office (RO) support staff using vHelp or Program Service Center (PSC) Operations Analysis (OA) staff. RO support staff or PSC OA staff may refer questions, concerns, or problems to their Central Office contacts.

D. References

SI 00810.005 What is Income
SI 00835.130 Public Assistance Households
SI 00835.160 Sharing
SI 00835.340 Computation of In-Kind Support and Maintenance from Within a Household
SI 00835.380 Rental Subsidies
SI 01320.141 Deeming: Public Income Maintenance Payments

APPENDIX E

Emergency Message **Effective Dates: 09/26/2024 - Present**

Identification Number:	EM-24048
Intended Audience:	All RCs/ARCs/ADs/FOs/TSCs/PSCs/OCO/ODARHQ
Originating Office:	ORDP OISP
Title:	Omitting Food from In-Kind Support and Maintenance Calculations
Type:	EM - Emergency Messages
Program:	Title XVI (SSI)
Link To Reference:	See References at the end of this EM

Retention Date: 3/26/2025

A. **Purpose**

This emergency message (EM) is to inform Regional and Field Office staff that we are omitting food from our calculations of in-kind support and maintenance (ISM) as of 09/30/2024. This means that food is no longer part of the pro rata share calculation on the household contribution screen located within the SSI Claims System path. We will determine ISM and a claimant's pro rata share by only calculating a claimant's shelter expenses and contributions. The definition of in-kind income now notes the exception that we are eliminating food from our calculations of ISM.

B. **Calculation of In-Kind Support and Maintenance beginning 09/30/2024**

Under our new rule, we will no longer include food in our calculations of ISM.

The following changes apply to the SSI program as of 09/30/2024:

1. Calculations of in-kind support and maintenance only include shelter.
2. Food is removed from both the inside and outside ISM calculations. This includes removing food from the household operating expenses on the *Household Expenses and Contribution* page within the SSI Claims System.
3. We are removing "food" from the ISM calculation, and we will remove the following food questions from the SSI Claims Systems path for living arrangements effective 09/30/2024:
    - Eat all meals out?
    - Buys food separately from household?

    After the new rule is implemented and to avoid disadvantaging claimants who are currently in a Federal Living Arrangement (FLA)/A based on paying for their own food, the following food question will be added within the SSI Claim System:

    - Do others within the household pay for or provide you with all your meals?

4. For periods after implementation of the regulatory change, food will no longer be part of the ISM calculation. This will eliminate the need for questions regarding Earmark Sharing and Token Contribution within the SSI Claims System path. The food questions will still appear in the path for living arrangements input prior to this change.
Workaround: The Token Contribution question has not yet been removed from the SSI Claims System path: "CLAIMANT MAKES TOKEN CONTRIBUTION Y/N". Do not ask the applicant or recipient this question. If it appears in the claims path, answer 'NO' to bypass.
5. Outside ISM development will be needed. However, as of 09/30/2024 food will no longer be included in outside ISM calculations.

6. Updates to applicable POMS, publications, notices, and forms will follow the release of this EM.

C. **Processing Instructions**

How to Update Cases with H Type Income to Omit Food from ISM Calculation	
Step	**Action**
1	During all initial claims, RZs, and post-eligibility events, if there is H type income on the SSR and the claimant has not had a change to their residence address, create a new living arrangement effective 09/30/2024 and go to step 2. If there are undocumented living arrangements prior to 09/30/2024, develop and document under prior rules considering separate consumption. If there is **no** ongoing H type income, no further development is needed. **If there is ongoing H type income**, create a new living arrangement effective 09/30/2024 go to step 2.
2	Once you reach the Household of Another screen within the living arrangement effective 09/30/2024, the following question will be presented: “Do others within the household pay for or provide you with all your meals?” If they answer yes, go to step 3. If they answer no, go to step 4. **NOTE:** If they receive SNAP benefits (formerly known as food stamps), the answer will be no because they are not receiving **ALL** meals from within the household.
3	The individual is now in the VTR path for ISM development. Evaluate their shelter contribution to determine if ISM applies. If the claimant is not contributing their pro rata share to shelter items, they are placed in a FLA/B living arrangement and charged ISM under the VTR rules. If the claimant contributes their pro rata share to shelter items, go to step 4.
4	The claimant is placed in a FLA/A living arrangement with the possibility of ISM calculated under PMV rules. Develop the shelter items to determine if the claimant is contributing their pro rata share. If yes, no inside ISM will be applied. **NOTE:** Development of outside ISM is needed.

NOTE: For non-MSSICS cases with H type income, document the household expenses and contributions using the following forms prior to 09/30/2024, SSA-8011-F3, *Statement of Household Expenses and Contributions*; or on or after 09/30/2024 use the SSA-8012, *Statement of Household Expenses and Contributions.* Forms will be available shortly after release.

E. Definition of in-kind income beginning 09/30/2024

In-kind income is not cash but is something else that the individual can use to meet the individual's needs for food or shelter.

EXCEPTION: Food is not included in the calculations of ISM, which is a type of unearned income that we have special rules for valuing.

Direct all program-related and technical questions to your Regional Office (RO) support staff using vHelp or Program Service Center (PSC) Operations Analysis (OA) staff. RO support staff or PSC OA staff may refer questions, concerns, or problems to their Central Office contacts.

F. Impacted POMS sections

This EM impacts the following POMS sections. These sections will be updated based on the regulatory change of omitting food from ISM calculations:

SI 01120.200 Information on Trusts, Including Trusts Established Prior to January 01, 2000, Trusts Established with the Assets of Third Parties, and Trusts Not Subject to Section 1613(e) of the Social Security Act
SI 01120.201 Trusts Established with the Assets of an Individual on or after 01/01/00
SI 00810.005 What is Income
SI 00810.020 Forms and Amounts of Income
SI 00810.410 Infrequent or Irregular Income Exclusion
SI 00810.700 Income of Members of Religious Orders – General
SI 00815.050 Medical and Social Services, Related Cash, and In-Kind Items
SI 00815.350 Proceeds of a Loan
SI 00815.400 Bills Paid by a Third Party
SI 00815.550 Receipt of Certain Noncash Items
SI 00820.010 In-Kind Items Provided as Remuneration for Employment
SI 00820.545 Work Expenses – Interaction with Other Policies
SI 00830.099 Guide to Unearned Income Exclusions
SI 00830.420 Child Support Payments
SI 00830.455 Grants, Scholarships, Fellowships, and Gifts
SI 00830.536 Job Corps
SI 00830.537 AmeriCorps and National Civilian Community Corps (NCCC) Payments
SI 00830.605 Home Energy Assistance and Support and Maintenance Assistance (HEA/SMA)
SI 00835.001: Introduction to Living Arrangements and In-Kind Support and Maintenance
SI 00835.005: Flowchart for Sequential Development of Living Arrangement (LA) and In-Kind Support and Maintenance (ISM)
SI 00835.020: Definitions of Terms Used in Living Arrangements (LA) and In-Kind Support and Maintenance (ISM) Instructions

SI 00835.120: Rental Liability as LA Basis
SI 00835.140: Separate Consumption
SI 00835.150: Separate Purchase of Food
SI 00835.160: Sharing
SI 00835.170: Earmarked Sharing

SI 00835.200: The One-Third Reduction Provision
SI 00835.300: Presumed Maximum Value (PMV) Rule
SI 00835.310: Distinguishing Between In-Kind Support and Maintenance (ISM) and Other Unearned In-Kind Income
SI 00835.320: Rebuttal Procedures and Presumed Maximum Value (PMV) Rule
SI 00835.331: Treatment of Home Energy Assistance (HEA) and Support and Maintenance Assistance (SMA) in Determinations of Inside In-kind Support and Maintenance (ISM) and Cash from Within a Household
SI 00835.340: Computation of In-Kind Support and Maintenance from Within a Household
SI 00835.350: Computation of In-Kind Support and Maintenance (ISM) from Outside a Household (Including Vendor Payments by a Third Party Outside the Household)
SI 00835.382: Form SSA-L5061 (Letter to Landlord
SI 00835.390: Food, or Shelter That is Remuneration for Work But is not Wages
SI 00835.400: In-Kind Support and Maintenance (ISM) only to the Claimant
SI 00835.450: Cash Income from Within and from Outside Households
SI 00835.465: ISM and Households - Household Costs
SI 00835.470: ISM and Households - Conversions
SI 00835.473: Conversions — Arrearages
SI 00835.474: Conversions — Converting to Monthly Amounts
SI 00835.475: Averaging
SI 00835.480: Contributions Toward Household Operating Expenses
SI 00835.481: Policy Effective Dates for Loans of Food and Shelter
SI 00835.482: Loans of In-Kind Support and Maintenance
SI 00835.485: Household Composition
SI 00835.500: First-of-the-Month (FOM) Residence and ISM Determinations
SI 00835.510: Breakpoints
SI 00835.515: Gradual Changes in ISM
SI 00835.520: Redetermination Guidelines for LA and ISM
SI 00835.600: SSA-8006-F4 — Statement of Living Arrangements, In-Kind Support and Maintenance
SI 00835.625: SSA-8011 — Statement of Household Expenses and Contributions
SI 00835.630: Use of Form SSA-8008, Living Arrangements/In-Kind Support and Maintenance Development Guide and Summary
SI 00835.640: Exhibit of Form SSA-8008
SI 00835.704: In-Kind Support and Maintenance Provided Residents of Institutions
SI 00835.706: In-Kind Support and Maintenance Provided Residents of Institutions
SI 00835.707: Procedures For Determining ISM Provided To Residents of Institutions
SI 00835.708: In-Kind Support and Maintenance Provided Residents of Private For-Profit Residential Care Institutions
SI 00835.710: In-Kind Support and Maintenance Provided Residents of Private Nonprofit Residential Care Institutions
SI 00835.712: Exclusion of In-Kind Support and Maintenance for Residents in Private Nonprofit Residential Care Institutions
SI 00835.713: Determining In-Kind Support and Maintenance for a Member of a Religious Order Who Moves into a Private Nonprofit Residential Care Institution
SI 00835.714: In-Kind Support and Maintenance Provided Residents of Educational or Vocational Training Institutions
SI 00835.716: In-Kind Support and Maintenance Provided Residents of Public

APPENDIX F

EM - Emergency Message **Effective Date**: 03/25/2024

Identification Number:	**EM-24011 SEN**
Intended Audience:	All RCs/ARCs/ADs/FOs/TSCs/PSCs/OCO/OCO-CSTs
Originating Office:	ORDP OISP
Title:	**Change in Title II Overpayment Default Rate of Benefit Withholding**
Type:	EM - Emergency Messages
Program:	Title II (RSI)
Link To Reference:	See References at the end of this EM.

SENSITIVE – NOT TO BE SHARED WITH THE PUBLIC

Retention Date: October 25, 2024

A. Purpose

The purpose of this Emergency Message (EM) is to provide interim guidance and inform technicians that we are changing the existing policy and procedure for recovering a Title II overpayment. Policy has been to default to full benefit withholding to recover a Title II overpayment. Effective March 25, 2024, we will apply a default 10 percent withholding rate, or $10.00 per month, whichever is more, to an overpaid individual's monthly benefit amount. This policy change only applies to legally defined overpayments and does not apply to individuals who have been convicted of fraud or who have a similar fault determination.

B. Background

This update to SSA policy will reduce the financial hardship experienced by overpaid individuals, who are in full benefit withholding (i.e., LAF D) or repaying at a rate of greater than 10 percent, as well as individuals who will need to repay an overpayment created on or after April 15, 2024.

C. New Procedure

When we determine that an individual receiving Title II benefits is overpaid, we will still send them a notice requesting a full and immediate refund, and inform them of their right to request a waiver of recovery or request a reconsideration of the overpayment. If the

overpaid individual does not repay, request a waiver, or request a reconsideration prior to the end of the 60-day due process period, we will, in most cases, automatically recover the overpayment by withholding 10 percent of their Title II monthly benefit credited (MBC) amount, or $10 per month, whichever is more. We will recover the overpayment by withholding until the overpayment is fully recovered.

In most situations, technicians will not need to take manual action on new overpayments that are created on or after April 15, 2024. Most of the newly posted Title II overpayments will default to the 10 percent benefit withholding for recovery, on the first day of the July Current Operating Month (COM), which is June 26, 2024.

We will issue a one-time notice to all overpaid individuals, who are currently repaying an overpayment at a rate greater than 10 percent, giving them the option to request a lower rate of recovery. For manual overpayment notices requiring fill-ins, we will make corresponding updates to paragraphs in the Manual Adjustment, Credit, and Award Process (MADCAP) system, AURORA, and the Document Processing System (DPS). Technicians should use the applicable paragraphs for all new manual overpayment notices.

NOTE: All new overpayments will have a due process recovery date of COM plus three months, which replaces the existing policy of COM plus two months. Extending the due process recovery date will help SSA ensure that overpaid individuals are afforded the 60-day due process period, as well as provide Systems time to implement the actions required to align with the new policy. The change in due process recovery date of COM plus three months will apply to all future overpayments.

IMPORTANT: This policy change only applies to legally defined overpayments, as described in GN 02201.001, and does not apply to certain records or overpayments (see Section F.).

D. Guidance for New Overpayments Created on or After April 15, 2024

For most situations, technicians will not need to take manual action on new overpayments that are created on or after April 15, 2024.
The required $10.00 minimum withholding rate will remain in effect for most individuals. For examples on how the automatic 10 percent and $10.00 minimum withholding will be applied to new overpayments, see below:

- If the overpaid individual’s total monthly benefit credited (MBC) is $1,200.00, and they do not have any Medicare involved, we will withhold $120.00 per month, which is 10 percent of their total monthly benefit.

- If the overpaid individual’s total monthly benefit credited (MBC) is $50.00, and they do not have any Medicare involved, we will withhold $10.00 per month.

In some situations, technicians may need to complete manual inputs for withholding in the Debt Management System (DMS). For an example of when the 10 percent and $10.00 minimum withholding will not be applied automatically to a new overpayment, see below:

- If the overpaid individual’s total monthly benefit credited (MBC) is $180.70, and

they are paying a monthly SMI premium of $174.70, we must prioritize the beneficiary's Medicare premiums (i.e., Parts B, C, and D as explained in GN 02602.025C.3.). For this example, technicians will only input a recovery amount of $6.00 per month. In situations such as these, the $10.00 minimum will not apply since there is not enough money left to meet the minimum withholding requirement after deducting SMI.

There may be some situations, involving Medicare, where we are unable to input any overpayment recovery. See the below example:

- If the overpaid individual's total monthly benefit credited (MBC) is $50.70, and they are responsible to pay a monthly SMI premium of $174.70 (LESSDO cases), we will continue to prioritize the beneficiary's Medicare premiums (i.e., Parts B, C, and D as explained in GN 02602.025C.3.). Their full MBC of $50.70 will be applied towards the monthly SMI premium. In situations such as these, we will be unable to recover the overpayment.

If an overpaid individual contacts SSA requesting an overpayment recovery rate greater than 10 percent, accept the request and complete the input in DMS. Use the following remarks to annotate the request in DMS:

> "BIC XX requested benefit withholding reduction to <enter amount> on MM/DD/YY"

******** (Redacted Section)

E. Guidance for Existing Overpayments with a Recovery Rate Greater than 10 Percent

Overpaid individuals, who are repaying an overpayment with a recovery rate greater than 10 percent, will be given the option to request that we reduce their recovery amount to 10 percent, or $10.00 per month, whichever is more. Requests to reduce overpayment recovery amounts for ***existing*** overpayments will require manual inputs in DMS.

Overpaid individuals may request that we reduce their existing overpayment recovery rate by contacting the 800# or their local field office for assistance. Unless an exclusion applies (see Section F.), technicians should accept the request and annotate the MBR with a Special Message (SPMSG) using the below language. For guidance on creating a Special Message (SPMSG), please refer to MS 05206.026.

> "BIC XX requested benefit withholding reduction to default 10% on MM/DD/YY"

Technicians will manually calculate the 10 percent withholding amount that will be deducted from the overpaid individual's benefit.

*****(Redacted Section)

NOTE: The request for a 10 percent overpayment recovery rate will take priority over the recent change to procedure requiring the collection of overpayments within 60 months

(GN 02210.030). In other words, individuals will default to 10 percent withholding even if the amount collected will not facilitate recovery within 60 months.

*****(Redacted Section)

NOTE: If the individual has a settlement agreement with the Office of the Inspector General (OIG) or the United States Attorneys' Office (USAO) and the overpaid individual, consult GN 02201.055 and GN 02230.055B.

Direct all program related and technical questions to your Regional Office (RO) support staff or Program Service Center (PSC) Operations Analysis (OA) staff. RO support staff or PSC OA staff may refer questions or problems to their Central Office contacts.

Reference:

- GN 02201.001 - What is a Title Overpayment
- GN 02201.009 – Notification of a Title II Overpayment
- GN 02201.050 – Overpayment Fraud Referral
- GN 02201.055 – Overpayment Recovery after Fraud Conviction
- GN 02210.001 – Overpayment Recovery by Benefit Adjustment
- GN 02210.030 – Request for Change in Overpayment Recovery Rate, Form SSA-634
- GN 02230.055 – Civil Monetary Penalty (CMP) – Posting
- MS 01106.015 – Establish Offset (Debtor) (DROA)
- MS 01106.016 – Establish Offset (OLP) (DROL)
- MS 05206.026 – Special Message (SPMSG)
- SM 00610.710 - Overpayment Recovery Will Continue Past 2049
- SM 00610.715 - Recovery of an Overpayment when the Overpaid Person is in Ledger Account File Status (LAF) Current Pay (C) or Deferred (D)

STETSON LAW

2024 National Conference on Special Needs Planning and Special Needs Trusts

2024 Supplemental Security Income (SSI) Program Update

Kenneth A. Brown

October 2024

STETSON LAW | Center for Elder Justice

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Outline of Today's Presentation

SSI Program Update

- In-kind Support and Maintenance Changes
  - Background
  - The Future of ISM
    - The Problem
    - Regulatory Changes
    - Legislation
  - Smart use of ISM Payments from a Trust
- Overpayment Recovery Changes

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Changes to In-kind Support and Maintenance Policy in the SSI Program

Introduction – The State of Things

SSA is now making the biggest changes in ISM policy in 40 years.

Today, after we take a brief look at prior policy and procedure, we will compare and contrast that with changes under the new regulations. We will also look at how these changes will be implemented based on instructions SSA has issued to date.

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What is ISM?

In-kind support and maintenance (ISM) is unearned income received by or given to an individual in the form of support and maintenance. It is considered income because someone else, either within or outside of the individual's household is paying for it. The Social Security Act considers ISM, along with other forms of unearned income, when determining supplemental security income (SSI) eligibility and payment amounts.

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The Legal Basis for ISM

Statutory Law – The Social Security Act

- The State programs that preceded SSI often undertook detailed analysis of the household budget to establish an applicant's level of financial need.
- One of the founding principles of SSI is that, it should be based on a "flat grant" approach that does not involve program administrators in the detailed household budgets of millions of recipients.
- The law creating the SSI program included the one-third reduction provision so that SSA would not have to determine the actual value of room and board when a recipient lived with a friend or relative.
- A congressional committee report indicated that the reduction would apply regardless of whether the individual made any payment toward household expenses

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The Social Security Act at §1612(a)(2)(A) (42 U.S.C. 1382a(a)(2)(A))

(a) For purposes of this title, income means both earned income and unearned income; and—

2) unearned income means all other income, including—

(A) support and maintenance furnished in cash or kind; except that (i) in the case of any individual (and his eligible spouse, if any) living in another person's household and receiving support and maintenance in kind from such person, the dollar amounts otherwise applicable to such individual (and spouse) as specified in subsections (a) and (b) of section 1611 shall be reduced by 33 1/3 percent in lieu of including such support and maintenance in the unearned income of such individual (and spouse) as otherwise required by this subparagraph...

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Code of Federal Regulations

Support and maintenance is not defined in the Social Security Act.

- Effective September 30, 2024, support and maintenance in-kind is defined at 20 CFR 416.1121 as "shelter furnished to you that we value depending on your living arrangement. (Food is not included in the calculations of in-kind support and maintenance.)"
- Previously, SSA defined it at 20 CFR 416.1130(b) as "any food or shelter that is given to you or that you receive because someone else pays for it."
- Prior to March 9, 2005, support and maintenance included the receipt of clothing.

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Code of Federal Regulations

Although the provision was intended to be simple to administer, it did not adequately define many concepts or address differences in living arrangements among SSI recipients.

During implementation of the legislation, the agency determined that the value of the one-third reduction (VTR) provision was extremely narrow and that another rule should be developed to cover other in-kind support provided that did not fit under the VTR rule. SSA created the PMV rule and the pro rata-share concept through regulations in an attempt to better address equity among recipients. However, these regulations compromised the simplification objective of the "flat grant" approach.

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Program Operations Manual System (POMS)

- Statute includes one paragraph on ISM
- Regulations have 14 short sections
- POMS has about 250 pages of instructions

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Determining the Value of ISM

SSA has two rules that apply to determining the value of ISM. The rules are mutually exclusive in that when one rule applies, the other does not. These two rules are:

- **the Value of the One-Third Reduction (VTR) Rule; and**
- **the Presumed Maximum Value (PMV) Rule.**

When it applies, the VTR is a statutory one-third reduction in the SSI payment rate.

The PMV is a regulatory maximum cap on the amount of ISM that can be charged.

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Value of the One-third Reduction (VTR) Rule

SSA will reduce the applicable Federal benefit rate by one-third when an individual or couple:

- Lives throughout a month in another person's household; and
- Receives both food and shelter from others living in that household.

The following policies apply to the VTR:

- In 2024, the VTR is equal to $314.33 for an individual and $471.66 for a couple based on an FBR of $943.00 and $1,415.00, respectively.
- When the VTR applies, it applies in full or not at all. The amount of the VTR cannot be rebutted.
- When the VTR applies, no additional ISM is countable, even if it is received from outside of the household.
- When the VTR applies, no income exclusions apply to the VTR (including the $20 general income exclusion). The VTR is a reduction in the payment rate and not a charge of unearned income.
- The VTR may apply even if the individual receives part of his or her food and shelter from inside the household and part from outside. It is not necessary that an individual receive food and shelter from inside the household on each day of the month to apply the VTR.

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Presumed Maximum Value (PMV) Rule

When a beneficiary or couple receives ISM, is eligible for payment and the VTR does not apply, SSA uses the PMV rule to determine the value of ISM received.

- The amount of the PMV is equal to one-third of the Federal benefit rate for an individual or couple, plus $20. In 2024 the PMV is equal to $334.33 for an individual and $491.66 for an eligible couple, based on an FBR of $943.00 and $1,415.00, respectively.
- The PMV is a regulatory cap on the amount of ISM that can be charged. The PMV is a rebuttable presumption, i.e., the regulation presumes that the value of ISM is worth one-third of the FBR plus $20. If the individual or couple successfully presents evidence that the food or shelter has a lower value or cost (rebuts the PMV), SSA values the ISM at the current market value or the actual value, whichever is less.
- While the VTR is a reduced payment level, the PMV is considered a type of unearned income. The PMV amount is equal to one-third of the FBR plus $20 because, in application, the $20 is equal to the $20 general income exclusion, which when applied means that the maximum amount of the VTR and the PMV are the same.

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The Current Status of ISM*

Total number of SSI recipients				7,341,000
Number of SSI recipients with ISM-related payment reductions				793,000 (~10%)
		VTR	PMV –maximum reduction	PMV – less than maximum reduction
Affected recipients (number)		358,000	227,000	207,000
Affected recipients (% of ISM recipients)		45%	29%	26%
Mean SSI reduction		$280.33	$300.33	$112.00

* As of January 2022. (FBR = $841)

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Federal Living Arrangement Categories

Federal Living Arrangement Categories			
Category	**Definition**	**Payment Rate**	**Percentage of Recipients**
FLA A	An adult, noninstitutionalized individual living in his or her own household.	Full FBR	81%
FLA B	Recipient lives in the household of another and receives both food and shelter from other members of the household.	Subject to VTR	5%
FLA C	Eligible child younger than age 18 who lives with a parent.	Full FBR	12%
FLA D	Eligible person living in a public or private medical institution, with Medicaid paying more than 50 percent of the cost of his or her care.	$30 Payment Limit	2%

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The Future of ISM – The Problem

Calculating ISM is labor intensive, time consuming, expensive, intrusive and highly inaccurate.

- Although about 10 percent of SSI recipients are ultimately charged with ISM, a living arrangement determination must be made for all individuals.
- An ISM determination must be considered any time there is a change in an individual's living arrangement.
- Additionally, ISM is a leading cause of SSI overpayments and underpayments, according to the Government Accountability Office (GAO) and SSA's Inspector General. ISM has been identified as one of the leading causes of overpayments in the SSI program every year since at least 2002.
- ISM and living arrangements have also been a leading cause of SSI underpayments for over a decade. ISM has traditionally accounted for about one-third of all improper payments.

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Recent SSA Regulatory Actions

On February 15, 2023, SSA published a Notice of Proposed Rulemaking titled "Omitting Food From In-Kind Support and Maintenance Calculations."

> We propose to update our regulations to remove food from the calculation of In-Kind Support and Maintenance (ISM).

- The public comment period closed on April 17, 2023.
- 4,386 comments received with more than 95% favorable.

On March 27, 2024, SSA published the final rule, which was effective September 30, 2024.

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Justification for Excluding Food

Simplifies policy:

- Reduce the amount of program rules an applicant or recipient needs to understand;
- Reduce the amount of information that applicants or recipients must report, both during the application process and in post-award reporting (fluctuating income/averaging);
- Simplify and shorten processing; and
- Lead to fewer benefit recalculations (and therefore, for example, possibly fewer ISM-related overpayments).

Promotes Equity:

- Providing increased financial security to affected beneficiaries;
- Providing consistent treatment of food support regardless of source;
- Reducing reporting requirements and the effects of reporting on applicants and recipients; and
- Facilitating improved food security among certain beneficiaries.

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Impact of Excluding Food

- Include only shelter costs in ISM calculations
- Changes in which ISM rule applies
- Potential to increase payments

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What are Shelter Costs and Expenses

When computing household operating expenses, only the following 9 items will be used:

- Mortgage (including property insurance required by the mortgage holder)
- Real property taxes (less any tax rebate/credit)
- Rent
- Heating fuel
- Gas
- Electricity
- Water
- Sewer
- Garbage removal

NOTE: Condominium fees in themselves are not household costs. However, condominium fees may include charges, which are household costs (e.g., garbage removal). To the extent that such charges are identifiable, use them in the computation of inside and outside ISM.

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Retention of a Food-Related Question

Although SSA eliminated food expenses from ISM calculations, they will still consider food expenses to determine whether to use the VTR rule or the PMV rule in certain circumstances, but not include those expenses in the actual income calculation.

In the NPRM, SSA proposed that they would continue to ask applicants and recipients the following questions about food:

(1) Do you buy food separately from the household?

(2) Do you eat all meals out? and

(3) Do you receive Supplemental Nutrition Assistance Program (SNAP) benefits?

If applicants or recipients answer "yes" to any of these questions, even if the applicant or recipient lives in another person's household, SSA would evaluate their ISM using the PMV rule.

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Retention of a Food-Related Question

Based on comments and further analysis, SSA modified the final regulation to only require one additional question to be asked about food:

Do others within your household pay for or provide you with all of your meals?

The change was made because the original 3 questions would not have identified all of the circumstance in which the PMV rule could have applied (e.g., other public food assistance programs, people outside of the household paying for food, earmarking).

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Impact of the Change

SSA conducted an analysis of the impact of the change on current ISM recipients (assuming no change in situation).
85% No change in payment, 11% increase, 3% reduction

Current Rules	Proposed Rules	Impact	Percentage Of Current ISM Recipients	Average Change In Monthly Payments (2023)
PMV	PMV	No change In payment	48	0
PMV	PMV	Increase in payment	2	$105
PMV	No ISM	Increase in payment	3	$81
VTR	VTR	No change In payment	30	0
VTR	PMV	Increase in payment	6	$166
VTR	PMV	No change In payment	7	0
VTR	PMV	Reduction in payment	3	($20)

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Fiscal Impact of the Change

SSA estimates that this change will result in an increase in Federal SSI payments of a total of about $1.6 billion over the period of fiscal years 2024 through 2033. This represents an increase in Federal SSI payments of 0.2%.

SSA estimates that this proposal will result in net administrative savings to the agency of $26 million for the 10-year period from FY 2024 to FY 2033. These savings are partially offset by implementation costs.

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Other Related Changes

The regulation contains two other changes related to income:

- Current regulations at 20 CFR 416.1131(a) state the VTR applies if the recipient is receiving food and shelter from the person in whose household they are living. In practice, SSA also considers food and shelter received from others living in the household. New regulations reflect this practice.
- 20 CFR 416.1102 is revised to clarify that income includes things received constructively as well as actually (i.e., under your control versus in your hands).

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Policy Impacts of the Change

- Trusts (or anyone) can now pay for food. Payments must still be third-party payments and not cash to the beneficiary.
- No longer have to launder payments for food through an ABLE account (but you still can use this method).
- SSI recipients can focus their contributions on shelter expenses to minimize benefit reductions.
- Debit/credit cards no longer have to be restricted for food.

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Recent SSA Regulatory Actions

On August 24, 2023, SSA published a Notice of Proposed Rulemaking titled "Expansion of the Rental Subsidy Policy for Supplemental Security Income (SSI) Applicants and Recipients."

> We propose to revise our regulations by applying nationwide the In-Kind Support and Maintenance (ISM) rental subsidy exception that is currently in place for SSI applicants and recipients residing in seven States. The exception recognizes that a "business arrangement" exists when the amount of required monthly rent for a property equals or exceeds the presumed maximum value.

- The comment period closed on October 23, 2023.
- 179 comments received, 170 supported policy change.

On April 11, 2024, SSA published a final rule, which was effective September 30, 2024.

SSA issued a POMS rewrite of SI 00835.380, Rental Subsidies on 09/24/24.

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Prior Regulatory Policy

The regulation at 20 CFR 416.1130(b) states that an individual is not receiving ISM in the form of room or rent if they are paying the required monthly rent charged under a "business arrangement."

Under the prior regulatory definition, a "business arrangement" existed when the amount of monthly rent required to be paid equals the current monthly rental value (CMRV)—that is, the price of the rent on the open market in the individual's locality.

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Rental Subsidy Policy

- **Rental subsidy -** An individual receives in-kind support and maintenance (ISM) in the form of a rental subsidy when the rent required by the landlord (including a flat fee payment) is less than the amount charged under a business arrangement.
- A **landlord** is a party who provides living quarters in return for rent. A landlord and his or her tenant(s) cannot be members of the same household.
- Someone in the household has rental liability so the PMV applies.
- According to POMS, SSA develops subsidy when someone in the household is related as parent or child to the landlord or spouse.

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Foundation for Change - First Exception to Prior Policy

Based on the ruling in *Jackson* v. *Schweiker,* 683 F.2d 1076 (7th Cir. 1982), in the States in the Seventh Circuit (Illinois, Indiana, and Wisconsin), a business arrangement exists when the amount of monthly rent required to be paid equals or exceeds the Presumed Maximum Value (PMV).

In those States, if the required amount of rent is less than the PMV, SSA will impute as in-kind support and maintenance, the difference between the required amount of rent and either the PMV or the current market value, whichever is less.

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Foundation for Change – Second Exception to Prior Policy

In response to *Ruppert* v. *Bowen,* 871 F.2d 1172 (2d Cir. 1989), SSA issued Acquiescence Ruling (AR) 90–2(2) for the States of Connecticut, New York and Vermont.

The Court directed that a determination be made as to whether an applicant or recipient received an "actual economic benefit" from a rental subsidy, before charging the applicant or recipient with in-kind support and maintenance.

SSA determined it will apply the same rule as *Jackson*.

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Foundation for Change – Third Exception to Current Policy

In a settlement of the class action case *Diaz* v. *Chater,* No. 3:95–cv–01817–X (N.D. Tex. Apr. 17, 1996), SSA agreed to revise its rental subsidy policy as it is applied to residents of the State of Texas. In the settlement agreement, SSA agreed not to charge a rental subsidy whenever the required rent equals or exceeds the presumed maximum value (PMV).

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Final Regulation

In the final regulation, SSA revised 20 CFR 416.1130 to modify the definition of when a "business arrangement" exists from one where the amount of monthly required rent equals or exceeds the current market rental value to one where the amount of monthly required rent equals or exceeds the Presumed Maximum Value (PMV).

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Justification for the Policy Change

The rationale of the courts that resulted in the situation previously in place in seven states, in particular in *Jackson* and in *Ruppert,* also supports extending this policy to the other states.

- Change promotes a uniform national policy and thus equality.
- Ensures the economic benefit to all recipients regardless of State of residence.
- Fosters efficiency in administration due to consistency.
- Reduces time for calculations of ISM.
- Implements external stakeholder suggestions.
- Rent payments will be compared to a national standard, the PMV, instead of fluctuating geographical/market differences.
- Less intrusive questioning and fewer contacts with landlords.

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Example – Prior Policy

- SSI recipient living with their ineligible spouse and child.
- Renting a single-family home owned by the recipient's mother.
- The mother/landlord alleges CMRV of $1,500 per month.
- Required rent is only $350 per month.

Equation	Application to Example
CMRV – Required rent = Household (HH) ISM	$1,500 - $350 = $1,150
Household ISM/Number in HH = ISM to SSI recipient	$1,150/3 (people in HH) = $383.33
Compare to PMV (cap)	$383.33 > $334.33
SSI payment = FBR - PMV	SSI payment = $943 - $314.33* = $628.67

* PMV ($334.33) – GIE ($20) - $314.33

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Example – New Policy

Same facts as previous example

Equation/Process	Application to Example
Compare CMRV to PMV, PMV < CMRV	$334.33 < $1,500
Required rent > PMV	$350 > $334.33
No ISM charged to SSI recipient	SSI payment = $943

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Fiscal Impact of the Change

- SSA estimates that implementation of this rule would result in a total increase in Federal SSI payments of $837 million over fiscal years 2024 through 2033.
- These estimates reflect:
  - approximately 41,000 individuals who would be eligible under current rules will have their Federal SSI payment increased by an average of $132 per month.
  - an additional 14,000 individuals who are not eligible under current rules who would be newly eligible and would apply for benefits under the proposed rule.
- SSA estimates that this proposal will result in net administrative savings of $10 million for the 10-year period from FY 2024 to FY 2033.

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Recent SSA Regulatory Actions

On September 29, 2023, SSA issued an NPRM titled "*Expand the Definition of a Public-Assistance (PA) Household*."

"We propose to expand the definition of a public assistance (PA) household for purposes of our programs, particularly the Supplemental Security Income (SSI) program, to include the Supplemental Nutrition Assistance Program (SNAP) as an additional means-tested public income maintenance (PIM) program. In addition, we seek public comment on expanding the definition to include households in which *any other* (as opposed to *every other*) member receives public assistance. We expect that the proposed rule would decrease the number of SSI applicants and recipients charged with in-kind support and maintenance (ISM)."

- The public comment period closed November 28, 2023.
- 221 comments received, 95% supported the proposals

On April 19, 2024, SSA published a final rule, which was effective September 30, 2024.

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Prior Policy

Public Assistance (PA) Household Defined

A public assistance household is one in which every member receives some kind of public income-maintenance (PIM) payments. These are payments made under:

- Title IV-A of the Social Security Act —Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF)
- Title XVI of the Social Security Act (SSI, including federally administered State supplements and State administered mandatory supplements);
- The Refugee Act of 1980 (those payments based on need)
- The Disaster Relief and Emergency Assistance Act
- General assistance programs of the Bureau of Indian Affairs;
- State or local government assistance programs based on need (tax credits or refunds are not assistance based on need); or
- Department of Veterans Affairs programs (those payments based on need).

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Public Assistance Household Policy

- If an SSI applicant or recipient lives in a PA household, SSA does not consider them to be receiving ISM from other people within the household (*i.e.,* "inside ISM") (No VTR).
- This policy is based on the idea that if the other individuals in the household are receiving a PIM payment, they need their income (and resources) for their own needs and therefore cannot support the SSI applicant or recipient.

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Final Regulation

In the final regulation, SSA adopted 3 changes in 20 CFR 416.1142(a):

- Revising the definition of "public assistance household" to clarify that this is a term of art and only applies to SSA programs.
- Adding the Supplemental Nutrition Assistance Program (SNAP) to the list of PIM programs.
- Changing the definition of a PA household to one which has both an SSI recipient or applicant and at least one other household member receiving a listed PIM payment.

A rewrite of POMS SI 00835.130 Public Assistance Households was issued on 09/24/24.

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Justification for the Policy Change

Since the creation of the SSI program in 1972 and establishment of the PA household policy in 1980, the landscape of means-tested public benefit programs has changed significantly.

- Aid to Families with Dependent Children (AFDC) (entitlement) replaced by Temporary Assistance to Needy Families (TANF) (block grant) in 1997.
- Between 1980 and 2022 there was an 82% decrease in AFDC/TANF recipients.
- There was an 81% decrease in VA needs-based pensions over the same period.

- 100% increase in Supplemental Nutrition Assistance Program (SNAP) recipients.
- 70% increase in Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) recipients.
- 75% increase in Medicaid recipients.
- 65% increase in HUD housing assistance recipients.
- Low Income Home Energy Assistance Program (LIHEAP) recipients fluctuates, but generally up.
- For comparison - 50% increase in SSI recipients.

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Justification for the Policy Change

- SNAP participation overlaps to a great extent with participation in other means-tested programs. Expanding the definition of a PA household to include SNAP would capture about 67 percent of SSI recipients who are also living in households currently participating in Medicaid, HUD public housing and voucher programs, or LIHEAP.
- SNAP does not have a cap on enrollment.
- SNAP certified for relatively longer time periods.
- These changes will reduce administrative burdens for SSI applications and recipients, as well as for SSA.

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Bonus Time - Deeming

- "Deeming" is the process of considering a portion of another person's income to be the income of an SSI applicant or recipient.
- SSA's current policy excludes from deeming the amount of any public income-maintenance (PIM) payments an ineligible parent or spouse receives under the programs listed in the PA household definition, any income that those programs counted or excluded in determining the amount of the PIM payments they received, and any income of the ineligible spouse or parent that is used by a PIM program to determine the amount of that program's benefit to someone else.
- Adding SNAP to the list of PIM payments will decrease the amount of income that is deemed to SSI recipients from an SSI-ineligible spouse or parent who is receiving SNAP benefits, any income that was counted or excluded in figuring the amount of the SNAP benefits would not be deemed to the SSI applicant or recipient.

09/26/24 – POMS SI 01320.141 Deeming: Public Income Maintenance Payments

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Fiscal Impact of the Change

- SSA estimates that implementation of this rule would result in a total increase in Federal SSI payments of $15 billion over fiscal years 2024 through 2033.
- In FY 2033 roughly 277,000 Federal SSI recipients (4 percent of all SSI recipients) will have an increase in monthly payments compared to current rules, and an additional 109,000 individuals (1 percent increase) will receive Federal SSI payments who would not have been eligible under current rules.
- Some individuals may have a decrease in SNAP benefits due to increased SSI payments.

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Additional Policy Change—Shifting From "Every" to "Any" Member of the Household

In the NPRM, SSA proposed to consider an SSI applicant or recipient to be residing in a PA household if the SSI applicant or recipient and *any other* (as opposed to *every*) additional household member receives public assistance. This proposal is adopted in the final regulation.

- Relies on other agencies who already make household determinations.
- Current rule detrimental when HH members ineligible due to reasons other than need (citizenship, time limits, immigration status, etc.).
- Reasonable to infer when 2 members of HH qualify for PIM, all members are low-income.

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The Future Of ISM - Implementation

SSA will undertake an extensive POMS rewrite and systems changes.

- Over 60 POMS sections have to be updated.
- Only a handful released by 09/30/24.

Stop-gap measures

- EM-24047, "SSI Living Arrangements Regulatory Changes - Technician Instructions for Identifying and Processing Affected Cases," issued September 20.
- EM-24048, "Omitting Food from In-Kind Support and Maintenance Calculations," issued September 26.

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The Future Of ISM - Implementation

Redevelopment of any cases with:

- Type H income (ISM under PMV rule)
- Type J income (VTR)
- Rental subsidy
- Deeming

New systems page – Household Living with Others

- PA household development including SNAP
- New food question – "Others in the household pay for or provide all of your meals?"
  - If yes, VTR path
  - If no, FLA-A and outside ISM development.

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The Future Of ISM - Implementation

New edits and alerts for rental subsidy cases in States other than New York, Connecticut, Indiana, Illinois, Wisconsin, Vermont, or Texas.

- New living arrangement development effective 09/30/24.
- New LA development must take place at the beginning of each new year as the Cost of Living Adjustment (COLA) will change the amount of the PMV reduction amount, so rental subsidy must be refigured based on the new PMV amount.

All deeming cases must be reviewed to determine of the exclusion of income from parents and ineligible spouses receiving SNAP payments is identified and considered.

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The Future Of ISM - Legislation

Most legislative options options that have been considered are typically cost neutral, meaning that some SSI recipients would be better off, and others would be worse off than under current law.

- The President's fiscal year 2020 and 2021 budgets proposed one such option — it would have replaced ISM with a flat-rate benefit reduction (SSA has traditionally estimated 7 percent) for adult SSI recipients who are living with any other adult(s), otherwise called benefit restructuring. The 7 percent figure generally provides neutrality for program costs.
- Another approach would be to eliminate ISM altogether. No other Federal benefit programs consider in-kind support and maintenance. Both the SSI Restoration Act of 2021 (The SSI Restoration Act, H.R. 3824 and S. 2065) and President Biden's 2020 campaign plan (The Biden Plan for Full Participation and Equality for People With Disabilities) would have eliminated ISM counting.

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The Cost of Change

The reason that benefit restructuring proposals received so much attention is that elimination of ISM outright is very expensive. In 2008, it was estimated that eliminating ISM counting would cost SSA $1.2 billion annually. Today, inflation adjusted annual costs would be about $3 billion. This cost is weighed against estimated annual administrative savings of approximately $70 million.

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The Cost of Change

For the period 2024 – 2033, unadjusted annual program cost of the 3 final regulations changes is estimated at $1.7 billion.

Annual administrative costs are estimated to increase by $4.7 million.

Omit food	$26 million savings*
Rental subsidy	$10 million savings*
Expand PA HH	$83 million cost
Net cost	$47 million cost (2024-2033)

*Offset by unspecified implementation costs

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Smart Use of ISM Payments From a Trust

- Just because payment for shelter by a trust may result in counting the shelter received as income for SSI purposes, you should not be afraid to allow for discretionary payment for shelter (or food) by the trust if it may result in a better life situation for the trust beneficiary.
- The first inclination may be to prohibit any distributions for shelter because it will reduce the amount of the SSI check. And by no means should the trust state that the trust will pay for shelter needs and risk the trust being considered a support trust.
- However, there may be distinct benefits to allowing a trustee to make discretionary payments for shelter, as the situation may require. In fact, the way the rules function, it may be malpractice to impose too restrictive rules on a trustee.

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Smart Use of ISM Payments From a Trust

Trust A – Prohibits any payments for food or shelter.
Trust B – Permits payments for food and shelter. Recipient makes no contribution and is subject to PMV reduction.
Trust C – Permits payments for food and shelter. Required reduced rent no longer subject to subsidy.
Trust D – Permits payments for food and shelter. Distributions through an ABLE account.

	Trust A	Trust B	Trust C	Trust D
Beneficiary's monthly payment from SSI check				
Shelter	$600	$0	$335	$0
Food	$300	$0	$0	$0
Monthly trust payments				
Shelter	$0	$1000	$0	$1000
Food	$0	$500	$500	$500
Reduction in the beneficiary's monthly SSI check due to trust disbursements				
Federal Benefit Rate (FBR)	$943	$943	$943	$943
Reduction due to ISM counting under the PMV rule	$0	($334.33)	$0	$0
Net SSI benefit to beneficiary	$943	$628.67	$943	$943
Beneficiary's available lifestyle				
From trust	$0	$1500	$500	$1500
From SSI	$943	$628.67	$943	$943
Total lifestyle	$943	$2128.67	$1443	$2443
Available discretionary funds	$43	$628.67	$608	$943

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Smart Use of ISM Payments From a Trust

What are some of the things that a trustee must consider in determining whether to make distributions for shelter and how much to distribute?

- First, does the trust permit distributions for food and/or shelter?
- Second, the trustee should be sure to maintain SSI and Medicaid eligibility, even the receipt of one SSI dollar. Circumstances such as eligibility for SSDI benefits or the receipt of other earned or unearned income valued at or above the PMV would make trust disbursements for shelter and the resultant reduction in benefits due to ISM inadvisable.
- Third, the trustee must consider the amount available in the trust, the beneficiary's life expectancy and the period of time that the trust is expected to provide for.

Note: The PMV is rebuttable, in other words, if the value of the shelter received is worth less than the PMV, the individual will be charged with the actual value of the shelter. Therefore, a reduction in the amount of the distribution may still permit a distribution to be made while maintaining eligibility for benefits.

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Changes in Title II and XVI Overpayment Recovery

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Changes in Overpayment Recovery

In October 2023, SSA launched a review of its overpayment policies and procedures. As a result, it recently issued a number of changes:

- Reduction in default recovery withholding rate;
- Shifting burden of proof as to whether claimant was at fault;
- Extension of time for repayment plans; and
- Enhanced overpayment waiver process.

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Changes in Overpayment Recovery

When SSA determines that an individual receiving Title II benefits is overpaid, they send them a notice requesting a full and immediate refund, and inform them of their right to request a waiver of recovery or request a reconsideration of the overpayment.

If the overpaid individual does not:

- repay,
- request a waiver, or
- request a reconsideration

prior to the end of the 60-day due process period, SSA will, in most cases, automatically recover the overpayment by withholding 10 percent of their Title II monthly benefit credited amount, or $10 per month, whichever is more. They will recover the overpayment by withholding until the overpayment is fully recovered.

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Changes in Title II Overpayment Recovery

On March 25, 2024, SSA issued Emergency Message (EM) 24011.

Effective on that date, SSA decreased the default Title II overpayment recovery withholding rate from 100 percent of the monthly Social Security benefit to 10 percent of the benefit or $10, whichever is greater.

NOTE: Section 1631(b)(1)(B) of the Social Security Act generally provides that the rate of adjustment of payment to recover SSI overpayments will be the lesser of:

- Ten percent of the recipient's total monthly income (countable income plus SSI and State supplementary payment)(usually equal to the FBR); or
- The recipient's entire monthly benefit.

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Changes in Title II Overpayment Recovery

Extended Time Period

EM-24011 E. states in the NOTE that:

The request for a 10 percent overpayment recovery rate will take priority over the recent change to procedure requiring the collection of overpayments within 60 months (GN 02210.030). Individuals will default to 10 percent withholding even if the amount collected will not facilitate recovery within 60 months.

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Changes in Overpayment Recovery

Option to Request a Lower Rate

If a beneficiary requests a repayment plan with a rate lower than 10%, a representative will approve the request if it allows recovery of the overpayment within 60 months – a recent 2 year increase from the previous policy of only 36 months. If the beneficiary's proposed rate would extend recovery of the overpayment beyond 60 months, the Social Security representative will gather a verbal income, resource, and expense summary from the beneficiary to make a determination. (SSI recipients don't have to provide a summary.)

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Changes in Title II Overpayment Recovery

Rate Adjustment for Current Recipients

Individuals currently repaying an overpayment with a recovery rate greater than 10 percent can request to have the rate adjusted to 10 percent or $10, whichever is greater. SSA will send a one-time notice to all overpaid individuals who have a repayment rate greater than 10 percent.

Certain recovery payments are not eligible for the 10 percent rate, e.g., situations of fraud or similar fault, misuse of benefits, and penalties.

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Changes in Title II Overpayment Recovery

Change in Administrative Waiver Policy – Title II

POMS GN 02250.350, TN 56 (05-24) increased the administrative waiver tolerance from $1,000 to $2,000.

When a liable person requests waiver and the total amount of that person's liability is $2,000 or less, recovery will be waived because it would impede the efficient administration of the Act, unless there is some indication that the person may be at fault.

- Original total must be $2,000 or less
  - Not each overpayment
  - Not if reduced by repayment to $2,000

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Change in Title XVI Overpayment Recovery

Change in Administrative Waiver Policy - SSI

POMS SI 02260.030 TN 47 (05-24) updated the administrative waiver tolerance to $2,000 for SSI.

- Effective May 13, 2024, we may administratively waive recovery or adjustment, i.e., administratively discontinue waiver development, on an overpayment if the original amount (not the balance) is $2,000.00 or less.
- We do not use administrative waiver development discontinuance policy unless the recipient (or representative) makes a specific written or oral request for waiver or reconsideration.
- We administratively discontinue waiver development unless we believe there is an indication of fault on the part of the overpaid recipient. In such a case, we will conduct full waiver or reconsideration development.

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Changes in Overpayment Recovery

Revised Waiver Process

- In September 2023, SSA introduced a revised form (SSA-632) to help streamline the waiver process.
- They also indicated that they would be publishing proposed regulatory changes this Fall to streamline processes and reduce burden so eligible individuals can more easily seek debt relief.

We propose to simplify our rules for how an individual can demonstrate eligibility for waiver of recovery of an overpayment debt they have incurred. Our goal is to ensure that overpayment recovery does not unduly burden those in underserved, vulnerable, or marginalized communities.

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Changes in Overpayment Recovery

Take Aways – Overpayments

- Always review the overpayment and request reconsideration when appropriate.
- Request a reduced recovery rate, less than 10%, if needed.
- Always request waiver.

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2024 Supplemental Security Income (SSI) Program Update

Questions?

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National Conference on Special Needs Planning and Special Needs Trusts

November 22, 2024

Lessons Learned: When a Trust Goes Bankrupt

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Center for Elder Justice

Access and Justice For All®

The Center for Special Needs Trust Association, Inc.

CSNTA is a 501(c)(3) non-profit Florida corporation that provides comprehensive trust services for beneficiaries and their representatives related to the formation and administration of Special Needs Trusts.

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Agenda

- Introduction
- CSNTA
- Discovery of the "Loan"
- Bankruptcy Case
  - Trustee
  - Official Committee of Unsecured Creditors
  - Adversary Proceedings
  - Class Action
  - Automatic stay
- Winding Down the Center
- Litigation and what is next for the Victims

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CSNTA

- Special Needs Trusts
- Structured Settlements
- Specialty Settlement Trusts
- Trust Services
- Disability benefits

3

CSNTA

- Pooled Trusts
- Individual Standalone Trusts
- Medicare set-aside Trusts
- Trust management services

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2009 - 2011

- Between 2009 – 2011, $100,000,000 of funds from Beneficiaries (Victims) and the Debtor were loaned to Boston Financial Group, a group controlled by the Debtor's founder Leo Govoni, which loan remains outstanding in an amount of not less than $150 million ("Loan").
- Govoni personally guaranteed all amounts due under the Loan.
- Loan showed up as "Investment" on statements for various trusts where the Debtor is "trustee."

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In re The Center for Special Needs Trust Association, Inc.

Bankruptcy Case No. 8:24-bk-676

- Officers and Directors resign
- Chapter 11 Trustee – Michael Goldberg appointed
- Unsecured Creditors Committee appointed
- Chief Restructuring Officer, Bill Long appointed to run the Center, Trust Distributions proceed under Court supervision
- Goldberg files "Adversary Proceeding" under the Loan Documents
- Proof of Claim process (ongoing)
- Collection efforts

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In re The Center for Special Needs Trust Association, Inc.
Bankruptcy Case No. 8:24-bk-676

- Bankruptcy Schedules:
  - Asset: $106,709,004 (face amount of BFG Loan)
  - Liabilities: 2000+ unsecured creditors ("victims" – the trusts and their beneficiaries)
  - Other: $94 million - Assets held in actual accunts for special needs trusts (as of January 30, 2024) not including BFG loan amount
    - Funds in trust generally other people's money
    - *See* 11 U.S.C. § 541

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In re The Center for Special Needs Trust Association, Inc.
Bankruptcy Case No. 8:24-bk-676

- 11 U.S.C. § 541

(a) The commencement of a [bankruptcy case] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, **all legal or equitable interests of the debtor in property as of the commencement of the case.**

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, ...becomes property of the estate under subsection (a)(1) or (2) of this section **only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.**

8

Adversary Proceeding

8:24-ap-00139 - Goldberg, as Chapter 11 Trustee of the estate of D v. Boston Finance Group, LLC et al

- **This is the Trustee's first lawsuit**
  - **Defendants**: Boston Financial Group, LLC.; Leo Govoni
  - **Counts**: Breach of Contract (Loan; Guaranty) ($100,000,000 loan plus interest, fees, etc.); Accounting; Turnover of Property of the Estate

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Class Action

8:24-cv-00438 - *Chamberlin et al v. Boston Finance Group, LLC et al*

- **Defendants:** Boston Financial Group, Boston Asset Management Group, Prospect Funding Holdings, LLC, Prospect fundings Partners, LLC, Prospect Funding Holdings (NY) III, LLC, Leo Govoni, John Staunton, Jonathan Golden, American Momentum Bank
- **Counts:** Conversion, Breach of Fiduciary Duty, Negligence, Violation of Fla. Stat. 726.105 (Fraudulent Transfer), Unjust Enrichment, Alter Ego
- **Automatic Stay 11 U.S.C. § 362**

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Class Action

8:24-cv-00438 - *Chamberlin et al v. Boston Finance Group, LLC et al*

- **Automatic Stay 11 U.S.C. § 362**
- **(a)**A petition … operates as a stay, applicable to all entities, of—
  - **(1)**the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title…

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Class Action

8:24-cv-00438 - *Chamberlin et al v. Boston Finance Group, LLC et al*

- **Judge Colton:**
  - "At the heart of the Trustee's Motion is the creation of a bankruptcy estate and the automatic stay that arises to protect to protect the estate. The bankruptcy estate is created to facilitate a centralized administration of all assets of a debtor and all claims against the debtor… In this way, "[t]he bankruptcy system works to preserve a bankrupt company's limited assets and to then fairly and equitably distribute those assets among the creditors."
  - "[T]he Chamberlin Class Action Plaintiffs seek recovery of the same funds owed to Debtor under the Loan Documents, i.e., the $100 million in principal amount loaned by Debtor to BFG. And yet, the legal claims based on the Loan Documents are property of the bankruptcy estate and are to be administered by the Chapter 11 Trustee.

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Class Action

8:24-cv-00438 - *Chamberlin et al v. Boston Finance Group, LLC et al*

- **Judge Colton:**
  - "Comingled funds generally constitute property of the bankruptcy estate unless and until they can be traced."
  - "[W]hat the CCC really alleges is that Debtor breached its fiduciary duty to the Beneficiaries by making an improper loan to an insider, and that the measure of damages is in large part the amount represented by the BFG Loan. In this respect, the claims against the defendants in the CCC are so intertwined with the claims that the Beneficiaries have against Debtor that they are effectively claims against Debtor."
  - "Moreover, the CCC seeks to recover those funds by impugning the validity of the Loan Documents, as the CCC's claims are necessarily based on the premise that the BFG Loan and the Loan Documents are a sham....Accordingly, the Court agrees with the Trustee and concludes that the Class Actions, as currently pled, violate the automatic stay."

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Winddown Efforts:
Trusts by State (the $94 million)

As of August 2024:

- 2028 Trusts:
  - 1,261 pooled trusts,
  - 755 individual stand-alone trusts,
  - 12 other non-pooled trusts

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Winddown Efforts:
Trusts by State (the $94 million)

AK	1	IL	16	NM	1
AL	7	IN	16	NV	19
AR	1	KS	3	NY	493
AZ	12	KY	96	OH	67
CA	88	LA	14	Ohio	2
CO	4	MA	17	OK	4
CT	10	MD	7	OR	6
DC	1	ME	1	PA	15
DE	2	MI	21	SC	28
FL	543	MN	17	TN	46
FL.	4	MO	8	TX	92
Fla	1	MO.	1	UT	5
GA	41	MS	7	VA	21
GA.	2	MT	1	VA.	1
HI	1	NC	151	VI	1
Honduras	1	NC.	1	WA	4
IA	16	NE	29	WI	19
ID	2	NH	2	WV	11
		NJ	26	WY	3

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Winddown Efforts

- Motion to Wind Down Center
- By December 31, 2024
- CPT Institute
  - Opt out options

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What is Next for Victims?

- New Trustee and Trust Administration for Victims (personal choice)
- Plan of Liquidation
  - Pro rata accounting
- Goldberg Litigation / Recovery efforts
- Distributions after Recovery

17

Special Needs Trust – Lessons Learned

Trustee Selection / Underwriting

- Transparency
- Reporting
- Navigation Medicare and Social Security
- Familiarity with State Rules and Regulations
- Oversight – Trust protector, removal
- Ethical violations / lawsuits
- Licensure and regulation
- Bonding & insurance

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Special Needs Trust – Lessons Learned

Special Needs Trust Requirements

- Eligibility: not over 65 for 42 U.S.C. 1396p(D)(4)(A) trusts and many (D)(4)(C) trusts
- Funding: from beneficiary assets (or third party assets)
- Repayment of remaining funds to state if beneficiary received assistance during lifetime
- Trust responsibilities: Fiduciary duties, distributions, investment management
- Res use: For beneficiary needs only!
- Irrevocable: cannot be revocable to the beneficiary

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Special Needs Trust – Regulatory Changes

- Current status: No regulatory rules after funding:
- 42 U.S.C. 1396p(D)(4)(a) – First Party SNT (assets which belong to beneficiary, self settled)
- 42 U.S.C. 1396p(D)(4)(c) – Pooled first party SNT
- Little oversight after funding
- Go to your local lawmakers

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Thank you

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National Conference on Special Needs Planning and Special Needs Trusts

November 22, 2024

The Update

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Special Needs Trust Update

2024 Stetson SNT Conference
October 18, 2023

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Cases

In re: Guardianship of James P. Dwyer, 2024-Ohio-2544 (Ohio Ct. App., 1st Dist., July 3, 2024). Coordinating care for a sibling with special needs can be difficult and, when disputes among family members arise related to caregiving and the management of resources, Ohio Court of Appeals held that it will consider the best interests of the protected person and the terms of the trust.

James has Down Syndrome and his parents created a third-party special needs trust (SNT) before they died. They named one of his siblings, his sister, Mary Anne, a trust advisor. James' other sister, Suzanne, was named as an alternate trust advisor. Another one of James's sisters, Maureen, was appointed Guardian for James when their parents died. She and James lived in their parents' home and she was also responsible for overseeing his STABLE account and funds in a Medicaid payback trust account for his benefit.

The siblings disagreed over James's care and management of his finances, leading to multiple court motions, settlement agreements, and removals of Maureen as guardian and from various financial roles. Among other things, the settlement agreements addressed how Maureen and Suzanne (now serving as a co-guardian for James) would coordinate his care, what information related to James' accounts she was required to share and what funds were required to be used by Maureen for James' benefit. The probate court ultimately found that Maureen had breached settlement agreements, failed to provide requested financial information, and acted against James's best interests. The court

removed her as co-guardian, from James's financial accounts, and ordered her to pay the siblings' attorney fees.

On appeal, Maureen challenged her removal from James's financial accounts and the attorney fee awards. The appeals court found that the probate court's rulings to remove Maureen as guardian and from matters related to James' financial accounts did not have any bearing on whether she could (or should) be removed as trustee of his SNT. The Court of Appeals affirmed the probate court's rulings, finding no abuse of discretion in removing Maureen from James' financial accounts given her beaches of the terms of the settlement agreements and failures to act in James' best interests. Maureen's appeal of the attorney fee awards was dismissed as moot since the fees had been paid via garnishment and Maureen had not sought a stay.

Black as Trustees of Black v. Black, ____ N.E.3d ____, 2024 IL App (1st) 221667 (Ill. App. Ct., 1st Dist., February 9, 2024). Illinois Appellate Court affirmed trial court's vacation of its own judgement once it was informed that Bernard Black and Samuel Black, as trustees of the Trust for the Benefit of the Issue of Renata Black, got the judgment without proper notice to the intervenors.

Some background facts from the numerous prior cases, to set the stage for this new one.

The Black siblings' mother died in New York in 2012. Mother's Will devised two-thirds of her estate to an SNT ("Supplemental Needs Trust") for her daughter, Joanne, who suffers from schizophrenia, and one-third to a trust ("Issue Trust") for her son ("Mr. Black") and his children. Mother's estate consisted of multiple accounts with a total value of approximately $3 million. Shortly before her death, mother designated 95% of the value of the accounts payable-on-death ("POD") directly to Joanne, and 1% POD to each of Mr. Black's five children from his first marriage.

This situation did not sit well with Mr. Black, or with Mr. Black's second wife, with whom he had two children. Mr. Black, is a tenured law professor who has written on the subject of corporate directors' fiduciary duties. His wife, Katherine Litvak, is also a tenured law professor. Mr. Black decided that the best course of action was to seek appointment as Joanne's conservator. Then, acting on Joanne's behalf, he could "disclaim" the money in the POD accounts, and the money would revert to the estate and be distributed as mother originally intended. In this way, Mr. Black could correct the "mistake" made in mother's designation of the POD accounts.

Joanne was in Denver, so Mr. Black initiated the conservatorship action there. He told the court that the assets were at risk of being "wasted and dissipated" because mother had

"inadvertently" designated the accounts as POD to Joanne, rather than routing the funds through the SNT. In 2013, the probate court appointed Mr. Black as Joanne's conservator and authorized him to disclaim Joanne's interests in the POD accounts and place the assets into the SNT. Mr. Black promptly executed the disclaimer and, notably, redistributed the assets two-thirds to the SNT and one-third to the Issue Trust.

It's a long story, but, in 2015, Joanne's court-appointed counsel filed a motion to void the disclaimer, and ultimately argued that Mr. Black's conduct amounted to civil theft. Following a hearing, the court found that Mr. Black had indeed engaged in civil theft, and the court enjoined Mr. Black from accessing any trust funds belonging to his sister and surcharged Mr. Black $1.5 million for the money he stole from Joanne. After trebling the damages under Colorado law, the court entered a $4.5 million judgment against Mr. Black. The Probate Court did not at that time void the POD disclaimers. Mr. Black appealed. The issue has gone up and down and from side to side through various Colorado courts three or four times, both state and federal, with no victories for Mr. Black.

Numerous cases in multiple jurisdictions have grown out of this original case, and many other family members and other parties have come into play. Several of the cases have arisen in Illinois, because Mr. Black and his wife live in Illinois and the trust investments are held at a bank in Illinois.

Now, as for the new case. . .

On June 17, 2021, Bernard Black and his son, Samuel Black, as trustees of the Trust for the Issue of Renata Black ("Issue Trust"), filed a complaint for declaratory judgment in Illinois naming all of the beneficiaries of the Issue Trust as defendants. The complaint stated that the point of the lawsuit was to guard against the actions "threatened" by Jeanette Goodwin, as Court-Appointed Successor Conservator for Joanne Black, and Anthony Dain, as trustee of the Supplemental Needs Trust for the Benefit of Joanne Black. These "threats" included attempts to get the Denver Probate Court to declare Bernard Black's disclaimer invalid so that Goodwin could try to claw back assets from the Issue Trust to place them under her control. The one-count complaint sought a declaratory judgment that the disclaimer executed by Bernard Black was valid and irrevocable.

On September 10, 2021, the Blacks filed both a motion to default all the defendants they had named in the case and a motion for summary judgment. The default motion stated that the 60-day period for responding to the complaint had passed for all defendants and none had appeared or responded. On October 4, 2021, the trial court entered an order granting the motion for summary judgment and stating that the disclaimer executed by Bernard Black was valid and irrevocable. The order also directed the Blacks' counsel to provide a copy of the order to all parties.

Eight months later, on May 27, 2022, Jeanette Goodwin and Anthony Dain filed petitions to intervene and to vacate, alleging that they were necessary parties and that the petition to intervene was timely filed because they first discovered the existence of the case on March 2, 2022.

During an evidentiary hearing, the lawyer for the Blacks and the lawyer for the intervenors disagreed about when the intervenors had discovered the existence of the case. The two lawyers had a phone call on November 1, 2021, where they discussed "numerous other cases related to the same subject matter" that they were both involved in. (In fact, these two lawyers e-mailed and called each other frequently regarding these many related cases.) The lawyer for the intervenors had tried searching for the "declaratory judgment case" in the court system and sent an e-mail to the Blacks' lawyer the next day when he couldn't find it. There was also an over-100-page motion filed in one of the other cases that referred to and attached the declaratory judgment as exhibit C, although it turned out there were two exhibits marked as exhibit C. All of this led to some understandable confusion. However, ultimately, the Blacks' lawyer had to admit that he had not provided notice to the intervenors or their lawyer about the June 2021 filing or the October 2021 judgement.

On October 17, 2022, the trial court issued an order granting the petitions to intervene and to vacate. The Blacks appealed.

On appeal, the appellate court found that the trial judge had not abused his discretion in finding that the intervenors' petitions were timely filed and had not erred in vacating his own prior order on the ground that necessary parties were missing.

Agency for Health Care Administration v. In re: Spence, ____ So.3d ____, No. 3D23-0552 (Fla. 3d DCA, May 22, 2024). Florida District Court of Appeal held that, even if a beneficiary no longer needs Medicaid services, the trustee must follow the payback provisions contained in a self-settled SNT to reimburse Medicaid before terminating the trust and distributing remaining assets to the beneficiary.

Ryan's mother, Kathleen, adopted him and received an adoption subsidy. When she died, Ryan's co-guardians pursued a wrongful death claim on his behalf. The Court awarded a portion of the settlement proceedings to a first-party special needs trust (SNT) for Ryan's benefit. After Ryan became an adult, the co-guardians petitioned the Court to terminate the guardianship and distribute all assets from the trust to Ryan because he was no longer disabled. AHCA, the agency responsible for Florida's Medicaid Program, filed an objection claiming that it was owed $50,281.73 for medical assistance payments made on behalf of Ryan. In response, the co-guardians argued that the Trust should not be responsible for any

payments made by the AHCA on Ryan's behalf because the original adoption agreement that Kathleen entered into contained no provision requiring repayment of benefits and as a result of the exceptional care provided by the co-guardians, Ryan was no longer disabled or receiving benefits from Medicaid. The probate court granted the petition.

On appeal, the AHCA was successful, arguing that the trust was established specifically to include a payback provision to comply with requirements necessary for Ryan to maintain his eligibility for Medicaid and the trustee was required to comply with the terms of the trust. In its ruling, the Court noted that while the adoption agreement that Kathleen entered into likely incentivized her decision to adopt Ryan, it was of little, if any, relevance in determining distribution of trust assets. The trust was established over a decade after the adoption agreement was signed and its purpose was to allow Ryan to receive settlement proceeds while continuing to qualify for Medicaid benefits.

Hegadorn v. Livingston Cty Dep't of Health & Human Servs., ____ N.W.2d ____, No. 356756 (Mich. Ct. App., October 19, 2023). Michigan Court of Appeals affirmed circuit court's decision (to award Medicaid eligibility to the estate of now-deceased institutionalized spouse) in part, reversed circuit court's decision in part, and remanded to ALJ for proper review of the terms of testamentary SNT for institutionalized spouse that would have received funds from community spouse's irrevocable trust had he died first.

Mrs. Hegadorn began receiving long-term care at a nursing home in December of 2013. In order to make Mrs. Hegadorn eligible for Michigan Medicaid, Mr. Hegadorn established and funded an irrevocable trust called the Hegadorn SBO Trust. Mr. Hegadorn was the beneficiary of this trust, neither Mr. Hegadorn nor Mrs. Hegadorn was the trustee or successor trustee of this trust, and the trust language required the trustee to distribute the trust resources at a rate calculated to use up all of the resources during Mr. Hegadorn's expected lifetime.

Mrs. Hegadorn applied for Medicaid benefits in April of 2014. The Michigan Department of Health and Human Services (MDHHS) denied the application, determining that the assets of the Hegadorn SBO Trust were countable assets that exceeded the applicable resource limit, known as the Community Spouse Resource Allowance (CSRA).

Mrs. Hegadorn appealed, and following an administrative hearing, the ALJ upheld MDHHS's decision. The ALJ explained that a person's countable assets include "the value of the trust's countable income if there is any condition under which the income could be paid to or on behalf of the person." Essentially, the ALJ concluded that a trust payment to Mr.

Hegadorn was effectively a payment for Mrs. Hegadorn's benefit because of the nature of marriage.

Mrs. Hegadorn appealed to the Livingston County Circuit Court, which reversed the ALJ's decision and ordered Medicaid benefits to begin as of the date of application. The court relied on a MDHHS memorandum showing that MDHHS's policy regarding SBO trusts had changed soon after Mr. Hegadorn had established his SBO trust, and the circuit court therefor concluded that the Hegadorn SBO Trust assets were not countable.

MDHHS appealed the decision of the circuit court. The Court of Appeals consolidated the Hegadorn case with two other cases and upheld the denial of Medicaid benefits in all three cases, reasoning that the critical issue was whether there was any condition under which the principal of the irrevocable trusts could be paid to or on behalf of the Medicaid applicant. The Michigan Supreme Court reversed, finding that both the ALJ and the Court of Appeals misread the operative statute, 42 U.S.C. 1396p(d). The case was remanded to the ALJ for further analysis to determine whether there were any circumstances under which the principal of the Hegadorn SBO Trust could be paid for Mrs. Hegadorn's benefit.

On remand, the ALJ again affirmed the denial of Mrs. Hegadorn's Medicaid application. The analysis included looking at a provision in the Hegadorn SBO Trust that stated "[a]t my death, if my Spouse is surviving, Trustee shall distribute the remaining trust property to the trustee of the Special Supplemental Care Trust for [my spouse], created by my Will dated the same day as this agreement." However, instead of relying on this provision of the SBO Trust to deny benefits, the ALJ repeated the assertion from the original appeal that a trust payment to Mr. Hegadorn was effectively a payment for Mrs. Hegadorn's benefit because of the nature of marriage.

Mrs. Hegadorn again appealed to the circuit court, which again reversed the ALJ's decision and again ordered MDHHS to approve Mrs. Hegadorn's application for Medicaid benefits. The circuit court noted that the Hegadorn SBO Trust did not provide payment to the institutionalized spouse even in the event of Mr. Hegadorn's death. Rather, the trust language provided that the residual assets would be transferred to a testamentary trust, which, the court concluded, are specifically exempted from the "any-circumstances test" under 42 U.S.C. 1396p(d)(3)(B).

On appeal, the Court of Appeals noted that "a document critical to the ALJ's analysis is not part of the record." After a lengthy analysis, the court affirmed the circuit court's decision in part and reversed the decision in part, but ultimately remanded to the ALJ for a review of the terms of the Supplemental Care Trust (the testamentary SNT that would have received the funds from the SBO Trust had Mr. Hegadorn died first).

Wiedner v. Stevenson, B323760 Unpublished (Cal. Ct. App., May 13, 2024). California Court of Appeals held that the Settlor's intent is relevant when determining whether distributions from a third-party SNT are appropriate.

Roberta established a special needs trust (SNT) for her disabled adult son, Daniel. Roberta appointed her sister, Charlyne successor trustee of the trust and also named Charlyne as a contingent remainder beneficiary of the trust. Roberta did not want her sister Patty to be involved with the trust, or benefit from the trust, so she was excluded as a contingent beneficiary. After Roberta's death, the SNT was funded with approximately $335,000.

Daniel's aunt, Patty, had not visited him in the seven years before Roberta's death. However, once Roberta died, Patty began visiting Daniel regularly. Using her own funds, Patty paid for things like Daniel's haircuts, lunch outings and clothing that she purchased for him. Patty became Daniel's conservator. As trustee, Charlyne did not have regular contact with Daniel and she did not routinely reach out to Patty or others, including the guardian ad litem regarding Daniels' needs.

Daniel's health deteriorated. He developed extensive dental problems, including a serious infection. During this time, Daniel was receiving benefits from Medi-Cal and Patty obtained estimates from various providers to privately pay for the dental care that Daniel needed. The Court was provided testimony from the medical provider who recommended Daniel undergo a full mouth reconstruction with dental implants, which would cost $65,000.

As Patty and Charlyne fought about whether trust funds should be used to pay for his dental care and whether trust funds should be used to reimbursement Patty for her out of pocket expenses and/or pay for her fees as conservator. Charlyne filed a petition seeking an order from the Court to confirm that as trustee she had sole discretion to determine what expenditures to make from the SNT. In response Patty filed pleadings alleging that Charlyne's failure to distribute funds from the trust for Daniel's medical care was a breach of fiduciary duty. The Court ordered Charlyne to distribute $30,000 from the SNT to Patty to begin Daniel's dental work. Daniel had his first dental procedure and died.

Shortly after Daniel's death Charlyne filed her first and final account and report for the SNT with the Court. In addition to approximately $15,000 of trustee fees, more than $45,000 in trust funds were used to pay the guardian ad litem for Daniel. In response, Patty filed a petition for allowance of conservator's fees ($8,000), reimbursement for costs advanced (approximately $90,000) and payment of costs incurred ($38,000). After a three-day evidentiary hearing, the Court authorized that funds from the SNT could be used to pay for some of the fees and costs sought by both Charlyne and Patty. Charlyne appealed, arguing that no legal basis existed to compel the SNT to reimburse Patty or to pay her fees as conservator or her attorney's fees.

On appeal, Patty argued that the SNT was part of Daniel's estate and thus subject to pay her fees as conservator and her attorney's fees. Charlyne contended that the SNT was not part of Daniel's estate and for this reason, she had no authority to direct the trust to disburse funds for these things. The Court found that while Daniel's estate was not part of the SNT, however, because the SNT was a third-party SNT (and established by his mother and funded with monies that were not his funds), the probate Court's order directing the trustee to reimburse Patty from the trust for her expenditures and costs incurred on Daniel's behalf was based on the terms of the trust. The Court went on to specify that Daniel's mother, Roberta's intentions were stated clearly in the trust and that the primary use of trust funds was to provide a supplemental and emergency fund for Daniel. Except for a few specific costs, the Court of Appeals ruled that the Trial Court did not err in ordering that Patty be reimbursement for her out of pocket expenditures made on Daniel's behalf.

Williams v. Bambery, ___ So.3d ___, No. 2D2023-2436 (Fla. 2d DCA, May 17, 2024). Florida District Court of Appeal determined that trial court had acted in excess of its jurisdiction and therefore quashed sua sponte order of trial court that had initiated an official investigation into all of the sub-accounts of one pooled SNT after successor guardian got permission to move the funds from one ward's sub-account to another pooled SNT on alleged suspicion that ward's assets had been misappropriated.

From September 2016 to March 2022, John A. Williams served as plenary guardian of the Ward, Mary Margaret Bambery. While Williams served as guardian, the Ward's assets were joined, pursuant to a court order, into the pooled SNT for which Williams serves as trustee (the Asset Preservation Pooled Trust Fund).

Following Williams' discharge as guardian, Matthew Young was appointed as the new plenary guardian. A few months later, Young filed an emergency petition with the trial court expressing concern that the Ward's assets held in the pooled SNT had been misappropriated. As a result, Young obtained permission to move the Ward's assets to a different pooled SNT.

Five months later, and without warning or notice to the parties, the trial court sua sponte entered an order appointing the Florida Division of the Inspector General, Guardianship Section, to do a complete review of ALL of the sub-accounts of the Asset Preservation Pooled Trust Fund.

Williams filed a petition for writ of prohibition with the Florida District Court of Appeal, asserting that the trial court acted in excess of its jurisdiction in issuing the sua sponte

order. Not surprisingly, the court of appeal agreed that the trial court had acted without jurisdiction and quashed the order appointing the Division of Inspector General.

In the Matter of Ellen H. (Cassandra H.), 2024 N.Y. Slip Op 50248(U) Unpublished (Sup Ct, Broome County, March 5, 2024). Mother and guardian, who failed to account and later misappropriated funds as trustee of daughter's special needs trust, was surcharged in the amount of $450,000.

Cassandra H. was a minor in 1984 when her parents (and co-guardians), Ellen and Scott, filed a personal injury action on her behalf. There was a substantial award to Cassandra and a self-settled special needs trust (SNT) was established and funded with settlement proceeds (including income from an annuity). Ellen and Scott served as co-trustees of the SNT. The Court ordered that annuity payments awarded to Cassandra be deposited directly to the SNT so that she would remain eligible for Medicaid. In 2006, the Court found that Ellen and Scott were misusing trust funds and warned them that they owed a duty to Cassandra to make sure that the funds were property accounted for, and must follow the terms of the trust to make sure that the funds were used in a way yielded a benefit to Cassandra.

Scott switched the depository of the annuity payments awarded to Cassandra from the account at HSBC Bank, N.A. held by the SNT to accounts titled in Scott's and/or Ellen's names, individually (nicknamed "Cassie's checking" and "Cassie's savings"). These two accounts received a total of $574,965.49 in annuity payments from 2016 to 2023.

Ellen and Scott were instructed to file annual accountings for the SNT with the Court and from 2016 to 2022, the Court Examiner was unable to approve the trust accountings. Moreover, in their capacity as go-guardians, they failed to file annual guardianship reports as required. The investigation into the accounts titled to Ellen and Scott found that there were cash withdrawals from the accounts and funds from these accounts were used to pay their debts (including auto and RV loans), expenditures made in California and Arizona (during a time when Cassandra was unable to leave her group home in New York), expenses for driveway repairs and a hot tub at Ellen's home as well as miscellaneous shopping expenses that did not benefit Cassandra.

After Scott's death, Ellen remained Cassandra's guardian and trustee. In 2023, the Court removed Ellen as trustee. Upon the Court's appointment of a successor property guardian and successor trustee of the SNT, the Court undertook an investigation of Ellen and Scott's actions as property guardians and co-trustees. The Court applied an abuse of discretion standard in analyzing the expenditures taken by the co-trustees and imposed a surcharge on Ellen in the amount of $450,000 for improper and unsupported expenditures from

Cassandra's funds. In its ruling, the Court acknowledged that it did not find that Ellen failed to fulfill her responsibility as person guardian for Cassandra. The Court emphasized that while "the travails and challenges of being the parent of a disabled child are immeasurable, "fiduciary duty still applies."

In the Matter of the Davi H. Kato Special Needs Trust, No. A-0414-22 Unpublished (N.J. Super. Ct. App. Div., February 26, 2024). In case where family moved back to Brazil and, with permission from the court, terminated New Jersey SNT and created new irrevocable trust with a different co-trustee, prior co-trustee objected and requested final commission of approximately $72,000, only half of which was approved, and the appellate court affirmed the decision of the trial court but remanded the former trustee's final commission for a slight increase.

Fabio and Maria Kato are natives of Brazil. While visiting New Jersey in 2015, they had a son, Davi H. Kato, who was born with cerebral palsy. The Katos filed a lawsuit alleging medical malpractice and ultimately reached a settlement in the amount of $5,700,000. The trial court approved the settlement and established a first-party SNT to be funded with $3,147,486.42 of the settlement. Tristan Cavadas-Cabelo and OceanFirst Bank were named as trustees.

Cavadas-Cabelo is a New Jersey attorney who came to know the Katos through his mother, who served as a Portuguese for the Katos. According to Fabio Kato, the Katos selected Cavadas-Cabelo as a trustee because they believed he spoke fluent Brazilian Portuguese, which would make administration of the trust easier. It turned out, however, that, while he spoke Portuguese, Cavadas-Cabelo did not speak Brazilian Portuguese. This language barrier and other things led to a breakdown in the relationship between the Katos and Cavadas-Cabelo.

In 2022, the Katos and Davi moved back to Brazil with no intention of returning to the United States. The Katos then moved to terminate the SNT and create a new irrevocable trust with OceanFirst and a newly named individual as co-trustees. They also requested attorneys' fees. OceanFirst supported the motion. Cavadas-Cabelo opposed it, contending termination of the trust was not in Davi's best interests and suggesting the Katos wished to terminate the trust so they could use the funds for their own purposes. Cavadas-Cabelo also requested a final commission of $72,435.67. After two hearings, the court terminated the SNT (with the pay-back to the State of New Jersey), created the new irrevocable trust, approved the requested attorneys' fees, but only allowed a final commission for Cavadas-Cabelo in the amount of $31,738.41. Cavadas-Cabelo appealed.

The appellate court reviewed the evidence and the relevant statutes and affirmed the order of the trial court, with one exception. The appellate court's calculation of the final commission due to Cavadas-Cabelo, based on the various New Jersey statutes that address this issue, amounted to $38,086.09, not $31,738.41.

In re Resignation of Kingsbury, 173 Ohio St.3d 1276, 2024-Ohio-90, ___ N.E.3d ___ (Ohio, January 12, 2024). Attorney who was convicted for stealing from clients, at least in part SNTs, sentenced to four years imprisonment, and ordered to pay $750,000 restitution, petitioned from prison and was allowed to resign from the practice of law, but one justice in his dissent argued that attorney should not have been allowed to resign until full restitution (she still owed $600,000) is paid.

After stealing more than one million dollars from various sources, including a number of special needs trusts, Dorthea Jane Kingsbury, Esq. was indicted on four counts of theft, one count of telecommunications fraud, four counts of money laundering and five counts of fraudulent actions concerning a tax return. She eventually pleaded guilty to lesser charges and was sentenced to four years in prison and ordered to pay restitution to her victims totaling $750,000. The Supreme Court of Ohio Court received notice of Kingsbury's felony conviction on March 21, 2023. On November 30, 2023, the Court received Kingsbury's application for retirement. Kingsbury was incarcerated and suspended from practicing law at the time when she submitted an application for retirement. While the Court granted her application for retirement, one judge (Hon. J. Fischer) wrote a blistering dissent, noting that the Court granted her application to retire when Kingsbury still owed $600,000 in restitution. He argued that allowing Kingsbury (or any attorney for that matter) to resign from the practice of law when she still owed her clients money, benefits Kingsburg was at the cost of the Lawyers' Fund for Client Protection, as well as other attorneys and the general public.

Matter of Krame, ___ N.Y.S.3d ___, 2023 N.Y. Slip Op. 06137 (N.Y. App. Div., 2d Dep't., November 29, 2023). Attorney who was disciplined and suspended from the practice of law for 18 months in the District of Columbia argued that he should not receive reciprocal discipline in New York because the length of the proceedings in DC violated his due process rights and his DC acts did not constitute misconduct in NY, but the NY Supreme Court, Appellate Division, disagreed and suspended him from the practice of law in NY for three years.

As we discussed last year, not long after Krame joined the District of Columbia Bar in 1983, he developed an expertise in administering special needs trusts. He preferred to be compensated based on a flat percentage of trust assets, typically 1%, determined annually. While that was once a fairly standard compensation scheme, by 2005, much to Krame's chagrin, judges in the Probate Division of the D.C. Superior Court indicated that he and other trustees should instead be paid on an hourly basis. Krame resisted that change in various ways, which eventually drew the attention of the Disciplinary Counsel and prompted an investigation into his handling of three special needs trusts.

After a thorough investigation and a ten-day evidentiary hearing in front of an ad hoc hearing committee, the ad hoc committee found that Krame violated various rules of professional conduct, including when he recklessly (but not intentionally) submitted four altered time entries in support of a trustee fee petition, and they recommended that Krame be suspended from the practice of law for six to eighteen months. The DC Board on Professional Responsibility disagreed with the ad hoc committee's credibility findings, determined that some of Krame's rule violations were intentional, and therefore recommended that Krame be disbarred.

The District of Columbia Court of Appeals held that the ad hoc committee's credibility findings were binding on the Board when making findings on the ultimate issue of Krame's intent, but that Krame did in fact violate five different rules of professional conduct. Considering the Board's incorrect reliance on its determination that Krame's rule violations were intentional, and aggravating factors, such as the vulnerability of the trust beneficiaries involved, and mitigating factors, such as Krame's otherwise unblemished record, his long history of serving the disabled and elderly communities, the significant time Krame has devoted to the profession, and the amicus brief that over a dozen of Krame's longstanding clients filed on his behalf, the Court decided to suspend Krame from the practice of law in the District of Columbia for eighteen months.

The present case arose because Krame is also licensed in the State of New York. On February 16, 2023, the New York Supreme Court, Appellate Division, issued an order to show cause directing Krame to show cause why reciprocal discipline should not be imposed upon him for his conduct in DC. In his unsworn response, Krame asserted various defenses, including that delays in the 13-year disciplinary process in DC constituted a violation of his due process rights. However, the New York court noted that both the ad hoc committee and the Board on Professional Responsibility in DC had concluded that the length of the disciplinary process in Krame's case was at least partly due to his request that the investigation be held in abeyance pending his appeal of certain compensation issues. Krame also asserted that his misconduct in DC does not constitute misconduct in New York. The New York court disagreed, explaining that many of the DC RPC rules that Krame violated have counterparts that are substantially similar in New York. Accordingly, the

New York court decided to suspend Krame from the practice of law in New York for three years.

In re: Tara Elwell, 378 So.3d 718 (La., February 1, 2024). Louisiana Supreme Court made sure to extend probation period for attorney subject to disciplinary action (and arbitration) for charging excessive fees in uncontested case to appoint successor trustee of SNT.

Tara Elwell, Esq. was retained by the grandmother of the beneficiary of a special needs trust to provide legal services necessary to appoint a successor trustee. The case was uncontested and Elwell charged more than $100,000 in fees. The fees, paid from the trust, were deemed excessively high and unjustifiable by the Court, especially since Elwell failed to provide contemporaneous billing records. The Court imposed sanctions in the initial disciplinary proceeding involving Elwell, which included a probationary term. After the Court's initial ruling, the Louisiana State Bar Association Fee Dispute Arbitration Program declined to review the case. When this occurred, Elwell failed to notify the Office of Disciplinary Counsel (ODC) or take any corrective action. The Court later surmised that her inaction was an attempt to avoid the consequences of her prior misconduct, hoping the probationary period from the earlier discipline would lapse without further consequences.

Upon notice that Attorney Elwell never participated in the fee arbitration process as ordered, the Supreme Court of Louisiana revisited the Case and found that it had exclusive jurisdiction over attorney disciplinary proceedings. The Court went on to revise the terms of Elwell's probation (granting an extension to February 6, 2025) so that Elwell and ODC had time to mutually select a third-party arbitration service. The Court's opinion confirmed that Elwell will be bound by the ruling of the arbitrator. Elwell was ordered to immediately return $75,000 of the disputed fee to her counsel's trust account pending the arbitrator's ruling. The Court went on to note that Elwell could request that the Court terminate the extended period of probation early by showing that the disputed fee issue had been resolved.


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Empowering Individuals with Special Needs: Harnessing AI in the Legal Representation of Clients with Special Needs

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Empowering Individuals with Special Needs: Harnessing AI in the Legal Representation of Clients with Special Needs

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EMPOWERING INDIVIDUALS WITH SPECIAL NEEDS: HARNESSING AI IN THE LEGAL REPRESENTATION OF CLIENTS WITH SPECIAL NEEDS

I. THE HISTORY OF ARTIFICIAL INTELLIGENCE.

In the early part of the 20th Century, science fiction began to contemplate the idea of artificial intelligence. The silent 1920 film, *Metropolis,* depicted a bleak future in which the villain builds an android, HEL, to mislead oppressed workers and seize power. Stanley Kubrick's 1968 movie, *2001:A Space Odyssey,* features the HAL-9000 supercomputer which values the mission over human life and can be seen as a prototypical representation of AI harming humans due to inaccurately formulated goals and program specifications. In the 1970 film, *Colossus: The Forbin Project*, the supercomputer Colossus is created to control the United States' nuclear weapons arsenal, but then joins with its Soviet counterpart, Guardian, to take control of the world. *Colossus* was one of the first films to explore an existential threat posed by AI, and what could happen if it takes on an uncontrollable life of its own. Other popular examples from the movie industry include *Blade Runner* (1982), *the Terminator* (1984), *the Matrix* (1999), *I, Robot* (2004), and *Wall-E* (2008).

In the real world, the first digital computers were only invented about eight decades ago as shown on the below chart (see fig. 1). Since that time, technology has grown rapidly.

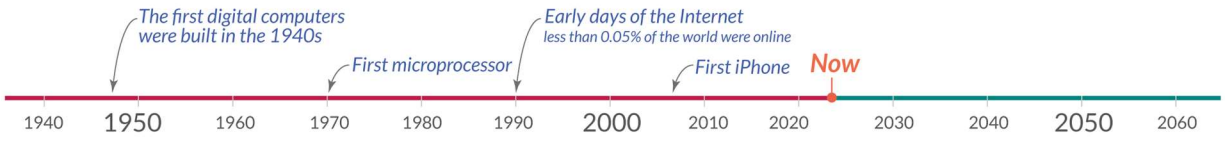

Fig. 1: From *The brief history of artificial intelligence: The world has changed fast – what might be next?* By Max Roser, OurWorldInData.org. https://ourworldindata.org/brief-history-of-ai.

The earliest substantial work in the field of artificial intelligence was done in the mid-20th century by the British logician and computer pioneer, Alan Turing (Copeland, 2023). In 1935, Turing described an abstract computing machine consisting of a limitless memory and a scanner that moves back and forth through the memory, reading what it finds and writing further symbols. The actions of the scanner are dictated by a program of instructions that are also stored in the memory in the form of symbols. This is Turing's stored-program concept, now known simply as the universal Turing machine (Copeland, 2023). Turing gave quite possibly the earliest public lecture (London, 1947) to mention computer intelligence, saying, "What we want is a machine that can learn from experience," and that the "possibility of letting the machine alter its own instructions provides the mechanism for this" (Copeland, 2023). In 1948, Turing introduced many of the central concepts of AI in a report entitled "Intelligent Machinery."

In 1950, Turing introduced a practical test for computer intelligence that is now known simply as the Turing Test. The basic idea of the Turing Test is simple: a human judge engages in a text-based conversation with both a human and a machine, and then decides which of the two they believe to be a human. If the judge is unable to distinguish between the human and the machine based on the conversation, then the machine is said to have passed the Turing Test.

The first working AI programs were written in 1951 to run on the Ferranti Mark 1 machine of the University of Manchester: a checkers-playing program written by Christopher Strachey and a chess-playing program written by Dietrich Prinz (Russell and Norvig, 2021). In 1956, Allen Newell, Cliff Shaw, and Herbert Simon developed the *Logic Theorist*, an artificial intelligence program designed to mimic the problem-solving skills of a human being. The *Logic Theorist* is considered by many to be the first artificial intelligence program, and it was presented at the

Dartmouth Summer Research Project on Artificial Intelligence, where the term "artificial intelligence" was coined (Anyoha, 2017).

From 1957 to 1974, AI flourished (Anyoha, 2017). Computers could store more information and became faster, cheaper, and more accessible. The details of two of the best-known early AI programs, *Eliza* and *Parry*, were published in 1966 and gave an eerie semblance of intelligent conversation (Copeland, 2023). *Eliza*, written by Joseph Weizenbaum of MIT's AI Laboratory, simulated a human therapist. *Parry*, written by Stanford University psychiatrist, Kenneth Colby, simulated a human paranoiac (Copeland, 2023). Psychiatrists who were asked to decide whether they were communicating with *Parry* or a human paranoiac were often unable to tell. Nevertheless, neither *Parry* nor *Eliza* could reasonably be described as intelligent, as their responses were canned—constructed in advance by the programmer and stored away in the computer's memory (Copeland, 2023).

During the 1970s and 1980s, there was an evolution of AI techniques. The first one was the "expert system," which imitated human's aptitude to make decisions (Abonamah et al., 2021). For such AI systems, every effort is made to incorporate all of the information about some narrow field that an expert (or group of experts) would know, so that a good expert system can often outperform any single human expert. Computers started to utilize reasoning depending on "rules" - an "if-then/else" procedure used to respond to queries. There are many commercial expert systems, including programs for medical diagnosis, chemical analysis, credit authorization, financial management, corporate planning, financial document routing, oil and mineral prospecting, genetic engineering, automobile design and manufacture, camera lens design, computer installation design, airline scheduling, cargo placement, and automatic help services for home computer owners (Leppert and Schaeffer, 2023).

Another approach which was dominant in the 1970s and 1980s was Symbolic AI. Symbolic AI algorithms work by processing symbols, which represent objects or concepts in the world, and their relationships. The main approach in Symbolic AI is to use logic-based programming, where rules and axioms are used to make inferences and deductions (DataCamp, 2023). Symbolic AI has been applied in various fields, including natural language processing, expert systems, and robotics. Some specific examples include:

- *Siri* and other digital assistants use Symbolic AI to understand natural language and provide responses.
- Medical diagnosis systems use Symbolic AI to provide recommendations to doctors based on patient symptoms.
- Autonomous cars use Symbolic AI to make decisions based on the environment, such as recognizing stop signs and traffic lights.
- Computer vision systems use Symbolic AI to recognize objects and patterns in images.

Connectionism, or neuronlike computing, developed out of attempts to understand how the human brain works at the neural level and, in particular, how people learn and remember (DataCamp, 2023). Connectionism has been used to create artificial neural networks, which are computer systems that are designed to mimic the way the brain works by learning from example. Applications of neural networks include the following:

- Visual perception. Networks can recognize faces and other objects from visual data. For example, neural networks can distinguish whether an animal in a picture is a cat or a dog. Such networks can also distinguish a group of people as separate individuals.

- Language processing. Neural networks are able to convert handwritten and typewritten material to electronic text. Neural networks also convert speech to printed text and printed text to speech.
- Financial analysis. Neural networks are being used increasingly for loan risk assessment, real estate valuation, bankruptcy prediction, share price prediction, and other business applications.
- Medicine. Medical applications include detecting lung nodules and heart arrhythmias and predicting adverse drug reactions.
- Telecommunications. Telecommunications applications of neural networks include control of telephone switching networks and echo cancellation on satellite links (DataCamp, 2023).

During the 1990s and 2000s, many of the landmark goals of artificial intelligence had been achieved (Anyoha, 2017). In 1997, reigning world chess champion and grand master, Gary Kasparov, was defeated by IBM's *Deep Blue*, a chess playing computer program. This highly publicized match was the first time a reigning world chess champion lost to a computer and served as a huge step towards an artificially intelligent decision-making program (Anyoha, 2017). In the same year, speech recognition software, developed by Dragon Systems, was implemented on Windows (Anyoha, 2017). This was another great step forward but in the direction of the spoken language interpretation endeavor. It seemed that there wasn't a problem machines couldn't handle. Even human emotion was fair game as evidenced by *Kismet*, a robot developed by Cynthia Breazeal that could recognize and display emotions (Anyoha, 2017). A timeline of some of the more significant systems is set forth below (see fig. 2).

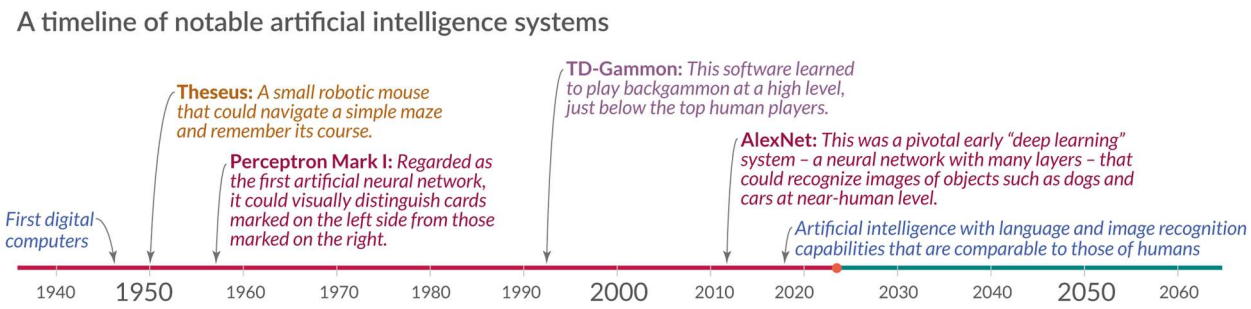

Fig. 2: A timeline of notable artificial intelligence systems from *The brief history of artificial intelligence: The world has changed fast – what might be next?* By Max Roser, OurWorldInData.org. https://ourworldindata.org/brief-history-of-ai.

The 2010s saw a rise of deep learning and the development of AI applications in image recognition, nature language processing, and autonomous vehicles. Deep learning is a method in artificial intelligence that teaches computers to process data in a way that is inspired by the human brain. Deep learning models can recognize complex patterns in pictures, text, sounds, and other data to produce accurate insights and predictions.

Language and image recognition capabilities of AI systems have developed very rapidly in the 21st Century. The below chart (see fig. 3) stems from a number of tests in which human and AI performance were evaluated in five different domains, from handwriting recognition to language understanding (Roser, 2022). Within each of the five domains, the initial performance of the AI system is set to -100, and human performance in these tests is used as a baseline set to zero (Roser, 2022). This means that when the model's performance crossed the zero line, the AI system scored more points in the relevant test than the humans who did the same test (Roser, 2022). Just 10 years ago, no machine could reliably provide language or image recognition at a human level. But, as the chart shows, AI systems have become steadily more capable and are now beating humans in tests in all of these domains (Roser, 2022).

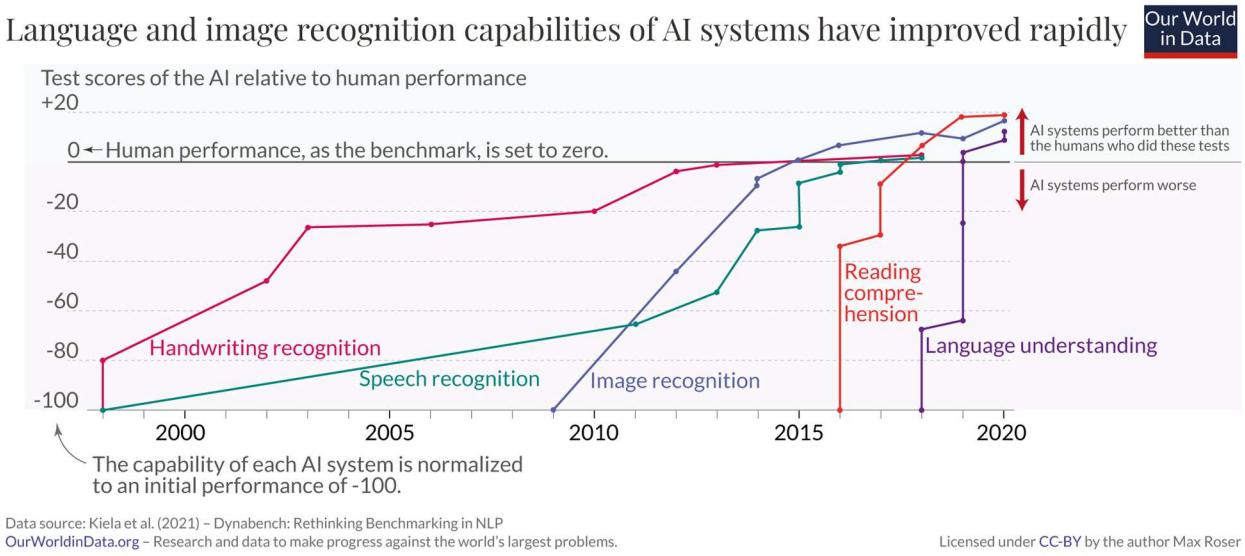

Fig. 3: Test scores of the AI relative to human performance from *The brief history of artificial intelligence: The world has changed fast – what might be next?* By Max Roser, OurWorldInData.org. https://ourworldindata.org/brief-history-of-ai.

Today, AI is integrated into a wide range of new domains. Smart assistants, such as Amazon *Alexa*, *Google Assistant*, and Apple's *Siri*, utilize natural language processing and machine learning to understand and respond to user queries, manage appointments, control smart home devices, and provide personalized recommendations (Roser, 2022). Self-driving cars and autonomous vehicle systems leverage AI technologies such as computer vision, sensor fusion, and reinforcement learning (Roser, 2022). AI is used in financial systems for fraud detection, credit scoring and risk management. It is integrated into healthcare systems for medical imaging analysis, diagnostic support, drug delivery and personalized medicine (Roser, 2022). Large AIs called recommender systems determine what you see on social media, which products are shown to you in online shops, and what gets recommended to you on YouTube (Roser, 2022). Increasingly, they are not just recommending the media we consume, but based on their capacity to generate images and texts, they are also creating the media we consume (Roser, 2022).

II. USING AI TO EMPOWER PERSONS WITH SPECIAL NEEDS

Technology has been opening doors for individuals with special needs, from motorized scooters to hearing aids, for a long time and in the coming years, AI will begin to supercharge these efforts with new abilities and expanded access (Snow, 2019). AI is already easing communication, creating learning opportunities, promoting a more independent lifestyle, and providing a connection to the outside world for people with disabilities, and it has the exciting potential to lead us to a more inclusive future regardless of ability.

Overall, there are about 42.5 million Americans with disabilities, making up 13% of the civilian noninstitutionalized population, according to U.S. Census Bureau data from 2021. This group includes people with hearing, vision, cognitive, walking, self-care or independent living difficulties (Leppert and Schaeffer, 2023). According to the Bureau of Labor Statistics, the unemployment rate for persons with disabilities is twice that of persons without disabilities. In 2022, the unemployment rate was 7.6 percent for persons with disabilities, compared with the unemployment rate for persons without disabilities, which was 3.5 percent. AI may help level the playing field.

A. SPEECH AND COMMUNICATION

A key area where AI has been utilized is to assist people who have difficulty with speech and communication. *Voiceitt* is an accessible speech recognition technology company that uses AI and machine learning to assist people with non-standard speech and speech impairments (Jagati, 2023). The technology is designed to recognize and adapt to non-standard speech patterns, thereby enabling clearer communication (Jagati, 2023). This technology actually learns from the individual's unique speech patterns and uses this information to translate it into a form that is easily understood by others. This can be particularly helpful for persons with cerebral palsy, Parkinson's

disease and Down syndrome where producing clear speech can be challenging (Jagati, 2023). *Voiceitt* also has a live captioning capability to allow real-time speech transcription during video calls or live interactions.

In addition, AI can reduce the communication gap for nonverbal individuals with motor disabilities who rely on typing text into computers to communicate. A team from the University of Cambridge and the University of Dundee, developed a new context-aware method that reduces this communication gap by eliminating between 50% and 96% of the keystrokes the person has to type to communicate (Kristensson et al., 2020). The method developed by Per Ola Kristensson and his colleagues uses artificial intelligence to allow a user to quickly retrieve sentences they have typed in the past (Kristensson et al., 2020). Prior research has shown that people who rely on speech synthesis, just like everyone else, tend to reuse many of the same phrases and sentences in everyday conversation (Kristensson et al., 2020). However, retrieving these phrases and sentences is a time-consuming process for users of existing speech synthesis technologies, further slowing down the flow of conversation (Kristensson et al., 2020). In the new AI enhanced system, as the person is typing, the system uses information retrieval algorithms to automatically retrieve the most relevant previous sentences based on the text typed and the context of the conversation that the person is involved in (Kristensson et al., 2020). Context includes information about the conversation such as the location, time of day, and automatic identification of the speaking partner's face. The other speaker is identified using a computer vision algorithm trained to recognize human faces from a front-mounted camera.

Researchers at UC San Francisco have successfully developed a "speech neuroprosthesis" that has enabled a man with severe paralysis to communicate in sentences, translating signals from his brain into words that appear as text on a screen (Marks, 2021). This

study focuses on translating signals intended to control muscles of the vocal system for speaking words, rather than signals to move the arm or hand to enable typing and taps into the natural and fluid aspects of speech, promising a more rapid and organic means of communication (Marks, 2021).

B. VISION

Almost 20 million Americans — 8 percent of the U.S. population — have visual impairments. Visual impairments, including blindness, are one of the leading causes of loss of independence among people age 65 and older (Guralnik et al., 1999). Costs related to visual impairments total about $40 billion a year in the U.S. Medical costs account for almost 60 percent — $22 billion — of the total cost (Georgetown University, 2019). Although many causes of visual impairments are preventable, the number of people with such impairments is expected to double within the next three decades (Georgetown University, 2019). Visual impairments range from poor vision to blindness, and cannot be completely corrected by glasses, contact lenses, medication, or surgery. People with visual impairments have difficulty performing routine tasks, such as reading a newspaper. Compared to those who do not have difficulty seeing, people who have impaired vision are more limited in their activities, including paid work and social engagements. Furthermore, people with visual impairments generally use more health care services and experience higher out-of-pocket health care costs than those who do not have visual impairments (Georgetown University, 2019).

AI-powered imaging tools now have the potential to assist visually impaired individuals by converting visual data into various kinds of interpretable formats. For instance, tools like *OCR.best* and *Image2TxT* are designed to automatically decipher visual cues and convert them into text and audio-based responses (Jagati, 2023). The AI-driven tool *Be My Eyes AI* acts as a tour guide, food

blogger, and personal assistant ushering in a new form of complex, and human-mimicking assistance using OpenAI's hyper-realistic AI language model (DiBenedetto, 2023). AI-based image tools can also be used to increase and decrease contrast and optimize the resolution quality of images in real time. As a result, individuals with conditions like myopia and hyperopia can alter the resolution of images to suit their visual abilities (Jagati, 2023). Smart assistants like Amazon's *Alexa* and Apple's *Siri* have become some of the biggest helpers for blind users, allowing them to get online more easily (Jagati, 2023).

C. HEARING

As of the first quarter of 2023, the WHO estimates that approximately 430 million people currently have "severe disabling hearing loss," which accounts for nearly 5% of the global population (Jagati, 2023). Moreover, the research body has indicated that by 2050, over 700 million people — or one in every 10 people — will have disabling hearing loss (Jagati, 2023).

Over 100,000 deaf and hard of hearing individuals have used *Ava*, an app that allows them to take part in group conversations in either English or French (with more limited use for Spanish, Italian, German, and Russian) (Snow, 2019). Everyone engaged in a conversation opens *Ava* on their phones, then speaks normally as the app listens in. *Ava* converts spoken words into text in nearly real time, rendering each speaker's words into a different color for those needing to read along to follow the chat. Users are discovering new ways to open up voice-based assistants to the deaf, too. One project made Amazon's *Echo* able to understand and respond in sign language using a webcam (Snow, 2019).

Another platform called *Whisper* harnesses sound separation technology to enhance the quality of incoming speech while reducing background noise to deliver sharper audio signals. The

platform also uses algorithms to learn and adapt to a user's listening preferences over time (Jagati, 2023).

A company called *Vuzix* has developed eyeglasses that can display text directly on the lenses (Tugend, 2022). Roshan Mathew, a graduate student in computer-human interaction at the Rochester Institute of Technology, has tried the *Vuzix* glasses and loves them. "When I have to use a smartphone or laptop when talking to someone, I can't maintain face-to-face contact," Mr. Mathew, who is deaf, said. "Communications are not just what we say, but what we see." (Tugend, 2022).

D. MOBILITY

The Center for Disease Control and Prevention notes that a little over 12% of Americans experience mobility issues (Jagati, 2023). AI in this context is being used to assist with navigation and movement capabilities for wheelchairs and in the development of mobility-focused exoskeletons and prosthetic limbs.

HOOBOX Robotics' *Wheelie 7*, allows wheelchair users to initiate moves like going forward, turning, and stopping by making nine distinct facial expressions (Snow, 2019). Firms like UPnRIDE and WHILL have created products that offer autonomous navigation and movement capabilities for wheelchairs (Jagati, 2023).

AI also appears in mobility-focused exoskeletons and prosthetic limbs, improving the autonomy of finer movements in prosthetic arms and boosting the power of electromyography-controlled nerve interfaces for electronic prosthetics (Jagati, 2023). AI-based systems can actuate and read different nerve inputs simultaneously, improving the overall function and dexterity of the devices (Jagati, 2023). The University of Stanford has also developed an exoskeleton prototype that uses AI to improve energy expenditure and provide a more natural gait for users (Jagati, 2023).

In 2011, Gert-Jan Oskam became paralyzed from the hips down due to a spinal cord injury after being involved in a motorcycle accident. The Dutch patient has regained the ability to walk again after getting an implant that acted as a 'digital bridge' between his brain and spinal cord (Yao, 2023). AI was the key. The device is called a brain-spine interface that can pick up Oskam's thoughts about wanting to walk through electrical activity in the cortex (Yao, 2023). This signal travels to an external computer he wears and is then sent to an implant within his spine (Yao, 2023).

E. Autism Spectrum Disorder

About 1 in 36 children have been diagnosed with an autism spectrum disorder in the United States, a statistic that may be higher considering those who remain undiagnosed (Haslan, 2023). While the prevalence of the condition (sometimes characterized by differing use of language and social awareness) has led to strides in early diagnosis and educational support, students who age out of the educational system confront a dearth of opportunities (Haslan, 2023).

Over 60% of all autistic adults (including roughly 2 million with college degrees) struggle to obtain and keep employment due to a myriad of challenges they face in the workplace, from the sensory overload of a noisy office to understanding the social dynamics—such as how you speak differently to a peer than a CEO (Haslan, 2023). Real-time conversations are especially difficult for people with autism as they require individuals to simultaneously analyze and process facial expressions, information, tone, word choice and more, which can impede understanding and hamper work performance (Haslan, 2023). Yet people with autism often have unique skill sets—including attention to detail and faster recognition of patterns. Employment programs, particularly large companies like Microsoft and IBM, have over the past decade capitalized on the skills of autistic individuals in supported environments (Haslan, 2023).

Some of the benefits of AI for individuals with autism spectrum disorder (ASD) include the following:

- Personalized Learning: AI can adapt to the unique learning style of each individual, providing a personalized learning experience. This is particularly beneficial for those with ASD, who often require tailored educational approaches. AI can adjust the pace, content, and method of instruction to optimize learning outcomes.
- Improved Communication: One of the key benefits of AI for individuals on the autism spectrum is that it can help bridge the communication gap that they may experience. Many autistic individuals struggle with verbal communication, whether it's difficulty expressing themselves or trouble understanding others. AI can assist in translating and interpreting nuanced human communication, making it easier for those with ASD to interact with the world around them.
- Social Interaction Training: AI-powered robots and virtual characters can provide a safe and controlled environment for individuals with ASD to practice social interaction. These AI entities can simulate various social scenarios, helping those with ASD to learn and understand social cues and norms.
- Emotional Recognition: AI can be trained to recognize and interpret human emotions. This can be particularly beneficial for individuals with ASD, who often struggle with understanding and expressing emotions. By providing real-time feedback on emotional states, AI can help those with ASD navigate emotional interactions.
- Behavioral Analysis and Intervention: AI can analyze behavioral patterns and predict potential challenges or meltdowns. This allows for timely interventions and the

implementation of coping strategies, reducing stress for both the individual with ASD and their caregivers.

- Enhanced Independence: AI can assist individuals with ASD in accomplishing daily tasks and routines, promoting independence and self-confidence. This can range from AI-powered reminders for tasks to AI-assisted navigation for those who struggle with spatial orientation.
- Therapeutic Applications: AI can be integrated into therapeutic interventions, such as Cognitive Behavioral Therapy (CBT). By providing personalized and adaptive therapeutic content, AI can enhance the effectiveness of these interventions.
- Early Detection and Diagnosis: AI can analyze subtle patterns and indicators that might be overlooked by humans, potentially enabling earlier detection and diagnosis of ASD. Early diagnosis is crucial as it allows for early intervention, which can significantly improve outcomes for individuals with ASD.
- Accessible Therapy: AI can make therapeutic resources more accessible to those who might not otherwise have access to them. For example, AI-powered apps can provide therapeutic exercises and strategies directly to smartphones, making therapy accessible anywhere, at anytime.
- Data-Driven Insights: AI can analyze large amounts of data to provide insights into ASD. This can lead to a better understanding of the disorder and inform the development of new strategies and interventions (Donnelly, 2023).

A new communications platform in development at the University of Maryland could increase employment opportunities for the autistic community by helping individuals navigate the nuances of communication with their neurotypical colleagues. The platform. called *Fostering Inclusivity*

through Technology (FIT), is supported by a $1.5 million Grand Challenges Grant from UMD (Haslan, 2023). The platform could use artificial intelligence to support real-time interactions in the virtual workspace, with potential features ranging from interpreting nonverbal cues like facial expressions to an indirect language translator for better understanding (Haslan, 2023). The project team is working with the autistic community throughout the design process to ensure the platform works as intended (Haslan, 2023).

Empowered Brain™ is the world's first wearable system that helps students with autism, ADHD, and other social-emotional challenges to learn the life skills crucial for happy self-sufficiency. An individual looks through a wearable computer or "digital coach" that recognizes social situations and guides the user toward appropriate responses (Molko, 2020). The real-time reinforcement builds social-emotional skills and self-confidence, and creates data for progress reports (Molko, 2020). This facilitates increased functional independence, also enabling some to interact more effectively in a standard workplace setting (Molko, 2020).

Social robots, which are made to interact with humans, can help teach social and educational skills to students of all abilities, but have significant potential with children with autism. Children with autism tend to respond to robots "in a way that they don't to puppets or pet therapies, or to many of the other kinds of things that we've tried," said Brian Scassellati, a professor of computer science, cognitive science and mechanical engineering at Yale University (Tugend, 2022). Scassellati suggested that may be because robots seem human-like, but are nonjudgmental (Tugend, 2022).

A humanoid robot, named *Nao*, learns about a child's behavior by using two cameras and four microphones to record the child's facial expression and body language as the child interacts (Sinha, 2018). Once it records the data, it carefully assesses the data to figure out the most effective way

to gain the child's attention. *Milo*, developed by the company Robokind, shows emotions through facial expressions, can communicate with its own voice, and can teach children about social norms (Sinha, 2018).

An app called *Identifor Companion* is helping adults and children find employment (Sinha, 2018). It includes an AI-powered virtual assistant called *Abby* that is capable of having real back-and-forth conversations with the users. It learns the routines of users and keeps their school, work and social life on track (Sinha, 2018).

III. AI IN ELDERLY CARE

A. PROMOTING INDEPENDENCE

AI-powered systems can assist older adults in performing daily activities, such as medication management, fall detection, and navigation, enabling them to live independently for longer (Padhan et al., 2023). Innovative home technologies with AI algorithms can detect deviations from standard behavior patterns and provide timely emergency alerts (Padhan et al., 2023). In the context of aging, AI may also be used to support a more sophisticated level of decision-making in the home by older adults who are living independently or desire to do so. This includes the use of AI to automate home safety risk prevention and the capability to respond to emergencies in real-time (Padhan et al., 2023). The system can send a real-time alarm to the family, care facility, or medical agent without human assistance if it determines that something odd might occur (broadly) or something is wrong with the user's health practices or medical recommendations (Padhan et al., 2023). In addition, AI-driven wearable devices can monitor vital signs and activity levels, promoting a healthier and more independent lifestyle.

B. Monitoring of Chronic Diseases

AI algorithms also have the potential to revolutionize health monitoring for older adults (Padhan et al., 2023). By analyzing data from wearable devices, electronic health records, and other sources, AI can provide real-time data analysis, detect early warning signs of diseases, and provide personalized treatment plans and recommendations (Padhan et al., 2023). AI-enabled telemedicine platforms also enable remote monitoring and virtual consultations, improving access to healthcare for older adults in remote or underserved areas (DeAngelis, 2023). In addition to a diagnostic and management algorithm, humankind has created iPad software with Reshma Merchant in Singapore for geriatric syndromes (RGA). It has been demonstrated that AI can read retinal scans like doctors (Vigario, 2019). AI will also be crucial in the deprescription process, and possible applications include the ongoing development of virtual medicine and improved assessment of osteoporosis and fracture risk concerning age, frailty, and life expectancy (Mohapatra et al., 2023).

C. Assistive Robots

Robotic systems equipped with sensors and actuators can provide physical assistance to older adults with mobility support, personal hygiene, and household chores (Mohapatra et al., 2023). These robots can be programmed to adapt to individual needs, providing personalized and responsive care. Robotic exoskeletons and mobility aids enable older adults with mobility impairments to regain independence and perform activities they would otherwise struggle with (Mohapatra et al., 2023). Robots with a mind are being created to help elderly patients in hospitals with their therapy (Mohapatra et al., 2023). By physically touching humans, these robots can affect their emotional, physical, and social well-being. With this addition, older adults' spirits were seen to improve (Mohapatra et al., 2023).

Social robots offer companionship and engagement, providing emotional support and cognitive stimulation (Mohapatra et al., 2023). These robots can engage in conversations, play games, and even assist in reminiscence therapy, improving older adults' overall quality of life (Mohapatra et al., 2023). The robot's acceptance among older people is greatly influenced by its physical appearance. When dementia-stricken seniors were given companion animal robots, positive outcomes were discovered (Mohapatra et al., 2023). Studies reveal that companion animal robots of the right size, weight, and shape can stimulate the brains of older people with dementia.

IV. LEGAL AND ETHICAL CONSIDERATIONS

In the United States, AI regulation is decentralized which can cause uncertainty surrounding what legal implications can result from the use of artificial intelligence (Watters, 2023). While we do have some rules that regulate the outcomes, there is often confusion around the actual operational usage of AI tools. These include:

- Violations to intellectual property rights;
- Data privacy issues that violate General Data Protection Regulation (GDPR);
- Violations of employment regulations;
- Inappropriate usage of copyright data;
- Disputes concerning contract law when generative AI is used;
- Consumer confidentiality and issues with personally identifiable information (PII); and
- Inaccurate usage of generative AI output.

In addition to the legal concerns raised by AI, there are many ethical concerns which must be addressed. Numerous conversations are being had all over the world about the ethical use of

technology. Without clear and concise guidelines for how AI tools can and should be used, there is potential for misuse and legal consequences (Watters, 2023).

A. PRIVACY

The training of AI models requires massive amounts of data, some of which includes personally identifiable information (Watters, 2023). There is currently little insight into how the data is being collected, processed and stored which raises concerns about who can access the data and how they can use it (Watters, 2023). There are other privacy concerns surrounding the use of AI in surveillance. Law enforcement agencies use AI to monitor and track the movements of suspects (Watters, 2023). While highly valuable, many are worried about the misuse of those capabilities in public spaces, infringing upon individual rights to privacy (Watters, 2023). This is particularly true in the context of AI developed to assist those with disabilities, as data profiles of people with disabilities are sometimes easy to spot, which makes privacy a particular concern—especially for conditions that have a high chance for stigmatization, like mental health issues (Snow, 2019).

B. BIAS

Another ethical concern surrounding AI is bias. Human biases are well-documented, from implicit association tests that demonstrate biases we may not even be aware of, to field experiments that demonstrate how much these biases can affect outcomes (Manyika et al., 2022). Over the past few years, society has started to wrestle with just how much these human biases can make their way into artificial intelligence systems — with harmful results. All types of AI need diverse data sets to prevent algorithms from learning bias or coming up with results that discriminate against certain groups (Snow, 2019). Bias can creep into algorithms in several ways. AI systems learn to make decisions based on training data, which can include biased human decisions or reflect

historical or social inequities, even if sensitive variables such as gender, race, or sexual orientation are removed (Manyika et al., 2022). AI can help identify and reduce the impact of human biases, but it can also make the problem worse by baking in and deploying biases at scale in sensitive application areas (Snow, 2019).

For example, as the investigative news site ProPublica has found, a criminal justice algorithm used in Broward County, Florida, mislabeled African-American defendants as "high risk" at nearly twice the rate as it mislabeled white defendants (Manyika et al., 2022). Other research has found that training natural language processing models on news articles can lead them to exhibit gender stereotypes.

While this problem is usually invoked in the context of racial and gender discrimination, people with disabilities are also at risk (Snow, 2019). If individuals with special needs are not being reflected in the data from the start, it will jeopardize their access to ubiquitous technologies that are becoming an essential part of the fabric of the modern world (Snow, 2019).

C. SECURITY

Security remains a top priority when it comes to AI (and really any branch of computer science) (Watters, 2023). Lax security can have a wide-ranging impact. For example, AI is susceptible to malicious attacks, which can compromise outcomes (Watters, 2023). The Cybersecurity Infrastructure and Security Agency (CISA) references documented instances of attacks leadings to misbehaviors in autonomous vehicles and the hiding of objects in security camera footage (Watters, 2023).

D. JOB DISPLACEMENT

Job displacement is a concern that is frequently cited in discussions surrounding AI. There is fear that automation will replace certain aspects or entire job roles, causing unemployment rates

to spike industries (Watters, 2023). According to CompTIA's Business Technology Adoption and Skills Trends report, 81% of U.S. workers have recently seen articles which focus on the replacement of workers with AI (Watters, 2023). The same report found that 3 out of 4 workers are very or somewhat concerned about how automated technologies will impact the workforce (Watters, 2023).

E. DEEPFAKES

The rise of deepfake is concerning. Generative AI's capacity to produce content that blurs the lines between reality and fabrication is alarming (Dey, 2023). From synthetic news reports to manipulated videos, these creations can distort public perception, fuel propaganda and detrimentally impact both individuals and organizations (Dey, 2023).

Deepfakes are now able to circumvent voice and facial recognition which can be used to override security measures (Watters, 2023). One study even showed that a Microsoft API was tricked more than 75% of the time using easily generated deepfakes (Watters, 2023). There is also concern over whether deepfakes could be used to influence the stock market if a CEO was believed to be making decisions or taking actions that were considered questionable (Watters, 2023). With no oversight and easy access to the software, the abuse of deepfakes presents a significant security gap.

F. MISINFORMATION

Misinformation has a way of creating social divides and perpetuating untrue opinions to the detriment of organizations and others (Watters, 2023). As a topic that has gained scrutiny in the context of the political upheaval seen in recent years, misinformation can affect public opinion and cause severe reputational damage (Watters, 2023). Once misinformation becomes widely shared on social media, it can be difficult to determine where it originated and challenging to combat. AI

tools have been used to spread misinformation, making it appear as though the information is legitimate, when it is in fact not (Watters, 2023).

G. Exploitation of Intellectual Property

A recent lawsuit against *ChatGPT* involving several popular writers who claim the platform made illegal use of their copyrighted work has brought attention to the issue of AI exploitation of intellectual property (Watters, 2023). Several authors, including Jodi Picoult and John Grisham, recently sued *OpenAI* for infringing on copyright by using their content to train their algorithms, claiming that this type of exploitation will endanger the ability of authors to make a living from writing (Watters, 2023). This kind of exploitation has owners of intellectual property concerned about how AI will continue to impact their livelihoods.

H. Explainability and Accountability

It's not enough to simply put AI tools out into the world and watch them work. It can be particularly important to understand the decision-making process with certain AI applications (Watters, 2023). In some cases, it can be difficult to understand why certain AI tools came to conclusions which can have sizeable implications, especially in industries such as healthcare or law enforcement, where influencing factors must be considered, and real human lives are at stake (Watters, 2023).

Furthermore, the increasing prevalence of AI in all industries means that we use AI tools to make decisions daily. In cases where those decisions lead to negative outcomes, it can be difficult to identify who is responsible for the results (Roser, 2022). Are companies on the hook for validating the algorithms of a tool they buy, or do you look to the creator of an AI tool? The quest for accountability can be a deep rabbit hole which can make it difficult to keep individuals and companies accountable (Watters, 2023).

V. CONCLUSION

Today, we stand on the brink of the Fourth Industrial Revolution, which has been defined by the World Economic Forum as follows:

> "The Fourth Industrial Revolution represents a fundamental change in the way we live, work and relate to one another. It is a new chapter in human development, enabled by extraordinary technology advances commensurate with those of the first, second and third industrial revolutions. These advances are merging the physical, digital and biological worlds in ways that create both huge promise and potential peril. The speed, breadth and depth of this revolution is forcing us to rethink how countries develop, how organizations create value and even what it means to be human. The Fourth Industrial Revolution is about more than just technology-driven change; it is an opportunity to help everyone, including leaders, policy-makers and people from all income groups and nations, to harness converging technologies in order to create an inclusive, human-centered future. The real opportunity is to look beyond technology, and find ways to give the greatest number of people the ability to positively impact their families, organizations and communities" (Schwab, 2016).

The potential of AI to benefit people with special needs is exciting and far-reaching. Through the application of advanced technologies, AI has the capacity to enhance accessibility, foster independence, and improve the overall quality of life for individuals with disabilities. By leveraging AI driven solutions in areas such as assistive devices, communication tools, healthcare, education, and employment, people with disabilities can gain greater empowerment and inclusion in society. However, it is crucial to address ethical considerations, data privacy, and the need for inclusive design practices to ensure that AI solutions truly serve the diverse needs of individuals with disabilities. As AI continues to advance, it holds the promise of creating a more inclusive and equitable world for people of all abilities.

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November 22, 2024

Clearing the Air

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Stetson 2024 National Conference on Special Needs Planning and Special Needs Trusts

October 18, 2024- Main Conference Breakout Session #1

1:30pm-2:20pm

CLEARING THE AIR- TRUST PRACTICES AND GATHERING INFORMATION

Ethan J. Ordog, Esquire (Begley Law Group, P.C., Moorestown, New Jersey)

Outline of Topics:

A. Intake and the Importance of Gathering Information /Understanding Circumstances

B. Intake Forms/Public Benefits and Impact on Trust Administration

C. Trustee Selection

D. Budget and Sustainability of the Trust/ Allowable Distributions and Setting the Record Straight

E. Roadmap for Success in Establishing and Funding of a Special Needs Trust

A. Intake and the Importance of Gathering Information

All too often a personal injury attorney, financial advisor, family member or potential client reaches out to a special needs practitioner, in a panic and in need of a consultation or for work to be performed "that day", because they were advised that in order to maintain public benefits, that a special needs trust is required because the individual cannot have *ANY* assets or otherwise risk the loss of much needed benefits being received. Of course, after a customary moment to calm down the individual and be able to more poignantly direct the conversation, it is common to have a much more nerve settling communication regarding the circumstances and the corresponding timing of a review of the matter. While there are the occasions whereby there is a more emergent issue presented, i.e. a hearing is scheduled for the following day, in most instances, in order to ensure that a plan can be developed and explained, the importance of gathering information cannot be understated. Further, it is imperative to understand the scope of what information/direction has been provided to the individual or "client", so as to be able to set expectations and reasonable outcomes for the options that might exist or be recommended.

However, to that end, in many of these instances, an individual may have been subject to misinformation or simply a lack of proper direction, which may complicate the circumstances by which an estate/trust practitioner enters the matter. As these matters often have lengthy and trying stories as background, it is imperative to be able to provide comprehensive services, to the extent possible, while being able to simplify the specific issues that need to be addressed and dealt with accordingly. Despite the communications that involve an individual being "disabled" and/or otherwise being the recipient of public benefits, consistently, the specific benefits being received are unknown. While an individual believes that income is received from Social Security and/or medical insurance is being received from some "governmental" program,

including Medicare or Medicaid, until the insurance cards can be reviewed and/or correspondence from Social Security can be secured, it is often speculative at best as to what programs or benefits the individual may receive. Compounding such issue is the direct request for information on other benefits which may be received, including housing assistance, other sources of income, food/utility assistance, etc.

Although the securing of a full understanding of income, insurance and other public benefits is paramount from the estate/trust practitioner standpoint, perhaps, as is the case with many of these preliminary communications/request for assistance, the most challenging aspect is the formal willingness of the individual who needs to be protected, in some manner, regardless of the benefits being received, to consent to engage in services which will "tie up" funds to be received or transferred to maintain benefits and/or the insertion of an individual/individuals who may have direct oversight over the manner in which funds are expended. In some instances, most specifically from a disability/care need perspective, the individual sought to be protected might lack the capacity to engage in these communications or fully understand the nature of what is being done to ensure that assets attributable thereto will not impact eligibility for benefits. But for those when the individual sought to be protected is actively involved, you can have an individual who fully understands the need and importance of planning and having certain difficult conversations versus the individual who simply believes that they do not need/want to hear about any restrictions and that their money should not be subject to anything other than a check written to them directly. Moreover, even for the individuals who might fall into the category that they understand the need for planning and the imposition of a Trust, so as to protect valuable public benefits they receive, they simply are unrealistic in the assets which are held in the Trust and the accessibility or availability thereof.

The individual often is under a misconception or perhaps miscalculation in their mind that a settlement, transfer of funds to the Trust or other action taken with respect to the assets, will enable the Trust to purchase assets, including but not limited to a house, car, personal items, entertainment, etc., which far exceeds the value of any and all assets placed into the Trust. Despite explanation of the goal and the need to maintain a level of assets for the beneficiary of a Trust for a period of time, the individual has often, in their own mind, earmarked all of the assets for purposes other then what the scope of the Trust could or should be utilized. Of course, all of these communications must be within reason and are not to say that the individual would be precluded from such disbursements, but it is imperative to set straight the formal logistics and circumstances surrounding these matters.

Depending on who reaches out directly to the estate/trust practitioner, there also remains that fine line of ensuring why or how this individual has been advised to reach out to inquire about services. In some cases, if a member of the family of a "disabled" individual reached out, they may fully have the best interests of the individual in mind and are simply assisting because the individual beneficiary may be unable or in the crux of dealing with other matters, sometimes equally as important as the planning conversation. However, in these instances where a member of the family reaches out, it is often brought or raised during initial communications, the scope of the interest, possible enjoyment and/or potential distribution of funds for the benefit of others. There remains a recognition by certain individuals that a settlement or discussion of the transition of assets to ensure eligibility for benefits, should someone result in a benefit to other members of the family/friends. Rebuffing these beliefs is also more difficult when it has been advised by civil counsel and/or other professionals involved that assets may be used which, in theory, sound like benefits are being directed to more individuals that just the beneficiary of the

Trust, etc. While it is recognized that certain benefits, in themselves, i.e. a purchase of a home, vehicle, other items for entertainment purposes (television, computer, etc.), may have a benefit to other individuals, it is important to set those expectations quickly so as to avoid issues down the road, especially if assets are placed into a Trust and a Trustee is now dealing with individuals who have a unique perspective on the scope of the funds in the Trust and allowable distributions therefrom.

Intake can be directed from the individual who is seeking to be protected or retain services, members of the family, friends or professionals involved. As stated above, it can be frustrating for an estate/trust practitioner to be assuming a role in the matter and be advised, despite many years of the involvement, potentially, of family members and/or professionals, how little important information is known about income, benefits, assets, debts/obligations, medical condition, etc. In order to provide that guidance in the scope of information necessary, it is important to have intake forms which secure information regarding the individual, but which also, as is often the case, prompt individuals to think more comprehensively into their situation and the need to have information known or available. To the extent possible, as well, information that can be provided to the individual, family and/or professionals which explains the analysis that the estate/trust practitioner should undertake is important from the perspective of education, but also to limit the need to explain, often to many individuals, similar points of emphasis under the circumstances, especially when there IS often some timeline/need to act to ensure that benefits are not jeopardized, etc.

B. Intake Forms (See Attached)

For an estate/trust practitioner to be able to efficiently, accurately and correctly assess a situation, make recommendations and prepare required documents, in addition to providing direction regarding the logistics thereof, it is imperative that information/documentation is gathered. In dealing with a Special Needs Trust, as well as the corresponding issues that may arise regarding protective arrangements, public benefits and the needs of the individual, while different practitioners may have their own opinions on the scope of what they require or desire to complete a matter of this kind, the intake forms seek to understand the general background of the individual, establish an understanding of the family dynamic, level of capacity, corresponding medical conditions and public benefits being received. Moreover, the intake seeks to ensure that an understanding of assets, debts (particularly liens) and income attributable to the individual is provided so that same can be considered. Further, the intake seeks to develop an understanding of the scope of professionals involved, as well as potential recommendations which have been made, i.e. related to the financials (structure, investment, etc.), in addition to the possible Trustee who might serve.

Additionally, the intake forms seek to understand what family has been involved, the scope of estate planning and other legal documents which might exist or which may need to be created, while also attempting, at a preliminary level, to understand immediate needs for items/distributions that must or should be considered in the development of recommendations/action items. If there is any present legal relationships that should be known, Guardian, Power of Attorney, Conservator, Personal Representative of an Estate, etc., the intake should seek to secure such information, so any further communications can be had and/or correspondence directed, as may be necessary.

While general intake may request or secure information, generally on public benefits being received and/or which an individual may be eligible, it is important to establish a process of how to ensure the specific related to public benefits being received by the individual are known, in addition to ongoing steps to ensure that the individual and/or professionals involved are aware of the criteria for continuing eligibility or initial application for a benefit based upon circumstances known during the initial planning process and/or thereafter. Specific public benefits intake form, as attached, may assist an individual and/or their representative, as the case may be, to think through and be able to secure information on benefits being received. Providing information on state specific programs may also be important to determine possible eligibility for benefits which could be received.

Of course, for a Trustee, particularly one who has discretionary authority over the distribution of assets, it is often a point of emphasis, as directed by a Trust, that all assets, sources of income and public benefits which might be available to an individual beneficiary are considered when determining distribution/approval of budget items to be paid from the Trust. Notwithstanding the intention to understand and secure this information, the Trustee must also be mindful of changes which may impact the individual's eligibility and make a point, if not annually, to direct for confirmation of present public benefits being received, etc. This is also important if issues arise during the time in which the Trustee is involved and assistance which might be requested regarding communications to preserve, restore and/or challenge determinations which may impact the beneficiary accordingly.

C. Trustee Selection

As an estate/trust practitioner, particularly one who engages in Trust planning, particularly in the Special Needs arena, there are many factors to be considered when developing a workable and comprehensive plan that is acceptable to those involved but which will also have sustainability and success moving forward. Once all of the attorneys and certain necessary professionals involved in the planning process have "completed" (is it ever really done?) their involvement, often a Trustee, designated in the Trust document to serve, is the primary entity with whom the beneficiary, their family and/or professionals are communicating with. It used to be, given the intention, as stated by the client/family, that there was a desire to have a relative, friend, local banker, etc., serve as Trustee. With further education, more clients/representatives have consented to and understood the need to engage the services of a corporate Trustee. However, with recent news of issues with certain corporate Trustees, as well as many entities who have determined to exit the Special Needs Trust administration market, it is perhaps more prudent than ever to have information and documentation explaining the scope of the involvement of a Trustee and reasons for selection.

A Trustee, serving generally in such a role, but specifically in furtherance of the administration of a Special Needs Trust, must be mindful of the following:

1. Mistakes in Administration
    a. Improper distribution
    b. Action/Inaction which results in payment of taxes/failure to properly invest the assets
    c. Action/Inaction which result in a loss of public benefits

    d. Failure to comply with intentions of the Grantor and/or administrative terms that are included in the Trust document

2. Knowledge of Legal Matters
    a. Tax filings- 1041/1040 Income Returns
    b. Protective Arrangements that may be required
    c. Accounting
    d. Tracking of expenditures
    e. Communications with Client
    f. Process for requests for distribution
    g. Fee approval for Trustee
3. Knowledge of Public Benefits
    a. Programs
    b. Eligibility
    c. Changes to the programs or requirements
4. Other Factors to Consider
    a. Access to Investment Advice and Direction
    b. Competent Counsel
    c. Issues arising with beneficiary (work, addiction, etc.)
    d. Family relationships/Influence
    e. Termination of or closing of Administration of the Trust upon passing of Beneficiary
    f. Retention of Care Consultant

D. Budget and Sustainability of the Trust/ Allowable Distributions and Setting the Record Straight

Despite the efforts of many in defining the scope of the distributions from a Special Needs Trust, it is recognized that there remain hurdles to a full understanding of the availability and accessibility of the assets held therein. Of course, particularly depending on the beneficiary and the specific intentions of how they believe the money can be used, it is important to engage in the exercise of an initial budget and address same annually, at the very least, if not sooner based upon stated or required need from the Trust.

In the context of the involvement in this process by the estate/trust practitioner, so as to ensure the knowledge of what, generally can be spent/used from the Special Needs Trust, the engaging of budget meeting, wherein it is identified what are immediate needs, as well as ongoing/continued expenses or what may become expenses, is extremely prudent, so as to be able to address the scope of any concerns or questions regarding allowable disbursements. While the numbers nearly always change, the underlying premise for such an exercise is to establish a baseline of the expenses of an individual beneficiary, have a more comprehensive understanding of expenses they have, which might not have been thought of by them in prior communications, as so as to provide a further resource to the Trustee who will assume responsibility for the disbursements from the Trust moving forward. It is recognized that a Trustee values the information provided so as to allow the relationship to progress and have another tool that helps the beneficiary understand the knowledge of their personal circumstances is already known by the Trustee. An example of a budget intake form/assignment form is attached with the materials.

To the extent possible, professionals involved with Special Needs Trusts, as well as the administration thereof, to avoid confusion, but to also have something formal to provide to a beneficiary, representatives and/or other professionals involved with the matter, a document, form, article, etc., which details what can and what cannot be spent from the Trust. To that end, an explanation, if a distribution cannot be effectuated, can be included to avoid and/or limit the need to have similar communications and provide identical explanation to multiple parties involved, to the extent possible or reasonable. In building the relationship with a beneficiary, their representative or others involved, it is crucial that animosity does not develop and that they understand all parties are working towards a common goal/purpose, subject to logistical requirements which are designed to protect the individual and benefits presently being received or which could/will be received in the future.

Distributions from the Special Needs Trust

Allowable but In-Kind Support/Maintenance (ISM) Impact for SSI

Mortgage Payment	Rent
Property Insurance (Lender required)	Gas
Property Taxes	Electricity
Water	Sewer
Heating Fuel	Garbage Collection

**** Food as of 9/30/24 no longer considered for ISM calculation purposes****

Other Allowable Distributions from a Special Needs Trust

Purchase of Home	Clothing
Phone/Cable/Internet	Vehicle (Insurance, Gas, Maintenance)
Pre-paid Funeral (With some limits/requirements)	

Tuition/Books/Tutor

Furniture/Tools/Household Supplies

Entertainment

Property Insurance (not lender required)

Television/Computer/Electronics (be mindful of scope and amount)

Medical Equipment

Travel (beneficiary and caregiver- be careful)

Care management/Support (be mindful of state specific limitations and scope of parental support obligation)

Medical Insurance Premiums/Co-Pays and Deductibles/Non-Covered Medicals

Commuting/Transport Expenses

Prescription Drugs (be careful of coverage by other sources)

Personal Needs- hair, cigarettes, alcohol, toiletries, non-prescription drugs

Reading Materials

Legal Fees (depending on scope, may want to get approval)

Distributions Not Allowed

Cash (too hard to track)

Family Travel

Gifts for others

Excessive amounts for allowable distributions

E. Roadmap for Success in Establishing and Funding of a Special Needs Trust

In consideration the successful establishment and funding of a Special Needs Trust, create a roadmap, specifically to ensure that all steps are covered, and information is secured, to ensure that a comprehensive plan has been established. A general roadmap, although the estate/trust practitioner will want to cater it to their own practice/process, might look like the following:

1. Intake and Fact Gathering- what is the client's disability, what are the financial circumstances- i.e. inheritance, civil settlement, assets attributable thereto. What is the family dynamic? Does the client have capacity?
2. Estate Planning Documents- Will, Powers of Attorney, Healthcare Directive/Living Will
3. Trust Document- type of Trust- Special Needs Trust, Settlement Trust
4. Public benefits Confirmation (What is the client receiving? Other benefits which could be received?)
5. Liens/Debts
6. Is an MSA required?
7. Who will serve as Trustee?
    a. Process for Requests for Distribution
    b. Access to funds- Card?
8. Budget and allowable distribution confirmation- Life Care Plan?
9. Court Order for Funding and Establishment of Trust
10. What Agencies are required to be noticed of the establishment and funding of the Trust
11. Do they have professionals in place to assist moving forward…
    a. Trust Attorney
    b. Disability Attorney

c. Financial Advisor

d. Trustee

e. Therapist

f. Physicians

g. Care Consultant

h. Lien Resolution Expert

i. MSA Professional

j. Others

PERSONAL INJURY & ESTATE PLANNING QUESTIONNAIRE

Date_____ File Number_____

This form is extremely important. The accuracy and completeness in responding will help our firm provide the best representation.

A. INJURED PERSON

Full Name:_____

Nickname:_____ Gender: □ Male □ Female

Street Address _____

City_____ State_____ Zip_____

Home Phone No._____ Fax No._____

E-mail address_____ Cell No._____

Birth Date_____ Social Security No._____

Medicaid No._____

Injured Person is: □ Married □ Single

Injured Person: □ Has Capacity □ Is A Minor Expected to Have Capacity
□ Is Incapacitated □ Is A Minor Expected to be Incapacitated

Injured Person is: □ A U.S. Citizen □ A Qualified Alien □ Don't Know

Is Injured Person a Veteran? □ Yes □ No

If there is a disability, did the disability begin prior to age 22? □ Yes □ No

If there is a disability, did the disability begin prior to age 26? □ Yes □ No

Has the Social Security Administration made a Determination of Disability? □ Yes □ No

Injured Person Suffers from:

□ Anoxic Brain Injury
□ Asperger Syndrome
□ Attention Deficit Disorder (ADD)
□ Attention Deficit Hyperactivity Disorder (ADHD)
□ Autism
□ Bi-Polar Disorder
□ Blindness
□ Borderline Personality Disorder
□ Brain Injury
□ Cerebral Palsy
□ Childhood Disintegrative Disorder
□ Deafness
□ Depression
□ Developmentally Delayed
□ Dissociative Disorder
□ Down Syndrome
□ Epilepsy
□ Fragile X Syndrome
□ Mental Illness
□ Mental Retardation
□ Obsessive Compulsive Disorder
□ Paraplegia
□ Quadriplegia
□ Rett Syndrome
□ Schizoaffective Disorder
□ Schizophrenia
□ Spina BiFida
□ Tourettes Syndrome
□ Traumatic Brain Injury
□ Other:_____

B. SETTLEMENT AMOUNT

$_____ Gross

$_____ Costs

$_____ Fees

$_____ Liens

$_____ Net

$_____ Allocation to Injured Person

$_____ Anticipated Structure

$_____ Anticipated Lump Sum

$_____ Allocation to Injured Person's Spouse

$_____ Allocation to Others

C. INJURY/PROGNOSIS

Date of Accident/Injury_____

Brief Description of Injury_____

How did Injury Occur?_____

D. PUBLIC BENEFITS/PRIVATE INSURANCE

1. **Public Benefits.** Is Injured Person receiving or will Injured Person apply for any of the following benefits?

Supplemental Security Income (SSI) ☐ Receives ☐ Applied For ☐ N/A

Amount of SSI: $_____

If receiving, please provide a copy of the Determination of Disability Letter.

Social Security Disability Income (SSDI) ☐ Receives ☐ Applied For ☐ N/A

Amount of SSDI: $_____

If receiving, please provide a copy of the Determination of Disability Letter.

Childhood Disability Benefits (CDB or DAC) ☐ Receives ☐ Applied For ☐ N/A

If receiving, please provide a copy of the Determination of Disability Letter.

Medicaid ☐ Receives ☐ Applied For ☐ N/A

If receiving, please provide copy of Medicaid card.

New Jersey Family Care ☐ Receives ☐ Applied For ☐ N/A

If receiving, please provide copy of NJ Family Care card.

Medicaid Waiver ☐ Receives ☐ Applied For ☐ N/A

Waiver Name: _____

If receiving, please provide copy of Medicaid card.

Katie Beckett Waiver ☐ Receives ☐ Applied For ☐ N/A

Children's Health Insurance Program (CHIP) ☐ Receives ☐ Applied For ☐ N/A

Medicare ☐ Receives ☐ Applied For ☐ N/A

If receiving, please provide copy of Medicare card.

Medicare Buy In ☐ Receives ☐ Applied For ☐ N/A

Does the State pay Medicare Part B Premiums/Deductible? ☐ Yes ☐ No

Federally-Assisted Housing

Section 8 ☐ Receives ☐ Applied For ☐ N/A

Section 202 ☐ Receives ☐ Applied For ☐ N/A

Multi-Family ☐ Receives ☐ Applied For ☐ N/A

Monthly Rent: $_____

SNAP (Food Stamps) ☐ Receives ☐ Applied For ☐ N/A

Monthly Amount: $_____

Prescription Drug Assistance ☐ Receives ☐ Applied For ☐ N/A

Low Income Heating & Energy Assistance (LIHEAP) ☐ Receives ☐ Applied For ☐ N/A

Monthly Amount: $_____

Temporary Assistance for Needy Families (TANF) ☐ Receives ☐ Applied For ☐ N/A

Division of Developmental Disabilities (DDD) ☐ Receives ☐ Applied For ☐ N/A

Group Home ☐ Receives ☐ Applied For ☐ N/A

Psychiatric Institutionalization ☐ Receives ☐ Applied For ☐ N/A

Veterans Disability Benefits

Pension	□ Receives	□ Applied For	□ N/A
Housebound	□ Receives	□ Applied For	□ N/A
Aid & Attendance	□ Receives	□ Applied For	□ N/A

Other Public Benefits □ Receives □ Applied For □ N/A

Name: _____

2. **Private Insurance.** If injured person is covered by private medical insurance:

Name of Insurance Company: _____

Insurance Obtained Through: □ Injured Person □ Father □ Mother □ Other - _____

E. PERSONAL INJURY ATTORNEY

1. **Name of Attorney** _____

Name of Law Firm _____

Street Address of Law Firm _____

City _____ State _____ Zip _____

Telephone No. _____ Fax No. _____

E-Mail Address _____ Cell No. _____

2. **Name of Paralegal** _____

Telephone No. _____ Fax No. _____

E-Mail Address _____ Cell No. _____

F. TRUST INFORMATION

Who will establish the Trust?

□ **Injured Person/Beneficiary**

□ **Father - Name:** _____ SSN _____

Street Address _____
(if different from injured person)

City _____ State _____ Zip _____

Telephone No. _____ Fax No. _____

E-mail Address _____ Cell No. _____

U.S. Citizen? □ Yes □ No

☐ **Mother - Name:**_____ SSN_____

Street Address _____
(if different from injured person)

City_____ State_____ Zip_____

Telephone No._____ Fax No._____

E-mail Address_____ Cell No._____

U.S. Citizen? ☐ Yes ☐ No

Parents are: ☐ Married ☐ Divorced ☐ Separated

If parents are not living together, Injured Person lives with: ☐ Mother ☐ Father

☐ **Court:** **State:** ☐ New Jersey: ☐ Law Division
☐ Chancery Division: ☐ Probate ☐ Equity

☐ Pennsylvania: ☐ Court of Common Pleas ☐ Orphans' Court

County:_____

If trust is going to be established by the court, please attach a copy of the Complaint.

☐ **Grandparent - Name:**_____ SSN_____

Street Address _____
(if different from injured person)

City_____ State_____ Zip_____

Telephone No._____ Fax No._____

E-mail Address_____ Cell No._____

☐ **Guardian - Name:**_____ SSN_____

Street Address _____
(if different from injured person)

City_____ State_____ Zip_____

Telephone No._____ Fax No._____

E-mail Address_____ Cell No._____

Co-Guardian (if applicable) - Name:_____

Street Address _____ SSN_____
(if different from injured person)

City_____ State_____ Zip_____

Telephone No._____ Fax No._____

E-mail Address_____ Cell No._____

G. LIENS

Does this case involve any of the following liens that need to be address?

Medicaid	□ Yes	□ No
Medicare	□ Yes	□ No
Medicare Advantage	□ Yes	□ No
Medicare Part D	□ Yes	□ No
ERISA	□ Yes	□ No
Federal Employees Health Benefits Act (FEHBA)	□ Yes	□ No
Federal Medical Care Recovery Act (FMCRA)	□ Yes	□ No
Veterans Administration Claims	□ Yes	□ No
TRICARE Claims	□ Yes	□ No
Welfare Liens	□ Yes	□ No
Violent Crimes Compensation	□ Yes	□ No
State Worker's Compensation	□ Yes	□ No
Federal Employee Compensation Act (FECA)	□ Yes	□ No
Hospital Liens	□ Yes	□ No
Child Support	□ Yes	□ No
State Division of Mental Health	□ Yes	□ No
NJ Division of Developmental Disabilities (DDD)	□ Yes	□ No

Other _____

H. BANKRUPTCY

Has Injured Person ever filed for bankruptcy? □ Yes □ No

If yes: What was the filing date? _____

What was the discharge date? _____

The undersigned hereby represent to Begley Law Group and each of its attorneys that the information contained in this Questionnaire is accurate and complete, and that the undersigned understand that the law firm and its individual lawyers will rely on this information. The undersigned understand that if the information contained herein is inaccurate or incomplete, the recommendations made by the law firm may not be appropriate.

_____

Signature

PERSONAL INJURY SUPPLEMENTAL QUESTIONNAIRE

Date_____ File Number_____

Name of Injured Person _____

Name(s) of Client _____

This form is extremely important. The accuracy and completeness in responding will help our firm provide the best representation.

A. INJURED PERSON

Injured Person is (*select one*): □ Under age 18 □ Under age 65

B. REFERRAL SOURCE (IF OTHER THAN PERSONAL INJURY ATTORNEY)

Name of Individual or Company_____

Contact Person (*if applicable*) _____

Street Address_____

City_____ State_____ Zip_____

Preferred Telephone No._____ E-mail Address_____

C. STRUCTURED SETTLEMENT BROKER

1. Name of Company_____

Street Address _____

City_____ State_____ Zip_____

2. Name of Contact_____

Telephone No._____ Fax No._____

E-Mail Address_____ Cell No._____

3. Name of Assistant_____

Telephone No._____ E-Mail Address_____

D. FINANCIAL ADVISOR

1. Name of Company_____

Street Address _____

City_____ State_____ Zip_____

2. Name of Contact_____

Telephone No._____ Fax No._____

E-Mail Address_____ Cell No._____

3. Name of Assistant_____

Telephone No._____ E-Mail Address_____

E. TRUST INFORMATION

1. **Trustee**. Who will serve as Trustee?

Name of Initial Trustee _____

Street Address _____

City _____ State _____ Zip _____

Telephone No. _____ Fax No. _____

E-mail Address _____ Cell No. _____

Contact Person (*if corporate trustee*) _____

If the trustee is an individual, is he/she bondable? ☐ Yes ☐ No ☐ N/A

F. INCOME

Is the Injured Person employed? ☐ Yes ☐ No

If yes: Name of Employer: _____

Amount of Monthly Income: $_____

Does Injured Person receive unearned income? ☐ Yes ☐ No

G. ESTATE PLANNING DOCUMENTS

1. **Client**

Document	Has	Needs	Completed
Will			
Living Trust			
Living Will			
Power of Attorney			
Tax Planning			
Other: _____			

2. **Parent(s)**

Document	Has	Needs	Completed
Will			
Living Trust			
Living Will			
Power of Attorney			
Third Party Special Needs Trust			
Tax Planning			
Other: _____			

H. SPECIAL NEEDS TRUST (SNT)

Is an SNT required? ☐ Yes ☐ No

If yes, Trust established by Court Order? ☐ Yes ☐ No

If yes, BLG to file for Court Order? ☐ Yes ☐ No

Identified appropriate Trustee? ☐ Yes ☐ No

If yes, Name of Trustee: _____

I. SETTLEMENT PROTECTION TRUST (SPT)

Is an SPT required? ☐ Yes ☐ No

If yes, Trust established by Court Order? ☐ Yes ☐ No

If yes, BLG to file for Court Order? ☐ Yes ☐ No

Identified appropriate Trustee? ☐ Yes ☐ No

If yes, Name of Trustee: _____

J. MEDICARE SET-ASIDE ARRANGEMENT (MSA)

Is an MSA required? ☐ Yes ☐ No

If yes, type of MSA: ☐ Self-Administered ☐ Custodial ☐ SNT ☐ Pooled Trust

Arrange for MSA calculation? ☐ Yes ☐ No

Arrange for submission of MSA calculation to CMS? ☐ Yes ☐ No

K. GUARDIANSHIP

Has a Guardianship been obtained? ☐ Yes ☐ No

If yes, obtain copy of Court Order.

If no, is BLG to file for Guardianship? ☐ Yes ☐ No

L. PROBATE

Is BLG to represent the Personal Representative in the administration of the estate? ☐ Yes ☐ No

If yes, is there a Will? ☐ Yes ☐ No

If yes, obtain a copy of the Will.

If no, who is the Administrator? _____

Has allocation between WD & SC been determined? ☐ Yes ☐ No

Has Department of Revenue letter been obtained? ☐ Yes ☐ No

Is the proposed Executor/Administrator bondable? ☐ Yes ☐ No

Has Court Order been obtained appointing Executor/Administrator? ☐ Yes ☐ No

Have Letters of Administration/Testamentary been obtained? ☐ Yes ☐ No

If yes, please provide a copy.

Has EIN been obtained? ☐ Yes ☐ No

If yes, EIN # _____

Has previous counsel been involved in the probate? ☐ Yes ☐ No

If yes, Name of Counsel: _____

Has inventory been filed? ☐ Yes ☐ No

Have probate fees been paid? ☐ Yes ☐ No

If yes, amount: $_____

Have Short Certificates been obtained? ☐ Yes ☐ No

If yes, please attach a copy.

Are Death Certificates correct? ☐ Yes ☐ No

If yes, please attach original.

Has an estate account been opened? ☐ Yes ☐ No

If yes, please name bank and give account number:

Bank: _____

Account Number: _____

Have publications been placed in appropriate newspapers? ☐ Yes ☐ No

If yes, please provide name of newspaper _____

Have death taxes been paid? ☐ Yes ☐ No

M. LITIGATION SUPPORT

Check all that apply:

☐ Testify at Friendly Hearing
☐ Mediation
☐ Arbitration
☐ Qualified Settlement Fund (QSF)
☐ Medicaid Lien Reduction
☐ Medicaid Lien Resolution

N. CLIENT

Who is the Client? (*select all that apply*):

☐ Injured Person
☐ Spouse of Injured Person
☐ Father of Injured Person
☐ Mother of Injured Person
☐ Grandmother of Injured Person
☐ Grandfather of Injured Person
☐ Guardian(s) of Injured Person
☐ PI or Family Law Attorney
☐ Trustee

O. EXCEPTIONS FROM CONFIDENTIALITY

Select all that apply:

☐ Attorney
☐ Trustee/Co-Trustees
☐ Structured Settlement Broker
☐ Financial Advisor
☐ Other Family Members:

_____

_____

P. ADDITIONAL INFORMATION

Please attach copies of the following, if available:

1. Complaint
2. Pre-Trial Memo
3. Settlement Agreement/Release
4. Life Care Plan
5. Guardianship Order
6. Letter from Social Security Administration Determining Disability
7. Copies of Medical Insurance Cards, including:
    - Private
    - Medicaid
    - Medicare
    - Other _____
8. List of Disabled Person's Assets

Q. PETITION INFORMATION

1. Please attach copies of the following, if available:
    - Order Approving Settlement
    - Valuation of Proposed Home
    - Valuation of Proposed Vehicle
    - Proposed Budget Form

2. Narrative to Justify Trust Distribution
    - *Residence.* A residence is needed because: _____
    _____
    _____
    _____
    - *Vehicle.* A vehicle is needed because: _____
    _____
    _____
    _____
    - *Vacation.* A vacation is needed because: _____
    _____
    _____
    _____

Trust Beneficiary is unable to go unaccompanied because:

_____

_____

_____

4. Narrative for Caregiver

A caregiver from an agency is needed because: _____

_____

_____

_____

A caregiver parent is needed because: _____

_____

_____

_____

The undersigned hereby represent to Begley Law Group and each of its attorneys that the information contained in this Questionnaire is accurate and complete, and that the undersigned understand that the law firm and its individual lawyers will rely on this information. The undersigned understand that if the information contained herein is inaccurate or incomplete, the recommendations made by the law firm may not be appropriate.

_____

Signature

_____

Signature

NOTES:

PUBLIC BENEFITS INTAKE

Name_____

SSN_____ DOB_____

1. **SOCIAL SECURITY** - Does the client receive SSI or SSDI? ☐ Yes ☐ No

   If so, please provide monthly amount: Dollar Amount: $_____

   If so, please provide our office with the Social Security Determination Letter.

2. **MEDICAID/MEDICARE** - Does the client receive Medicaid or Medicare? ☐ Yes ☐ No

   If so, please provide our office with a copy of their card(s).

3. **MEDICARE SUPPLEMENT** - Does the client receive any Medicare Supplement Insurance? ☐ Yes ☐ No

   If so, are they paying a premium? Dollar Amount: $_____

   Please provide our office with a copy of their card.

4. **MEDICARE ADVANTAGE** - Does the client receive Medicare Advantage? ☐ Yes ☐ No

   If so, are they paying a premium? Dollar Amount: $_____

   Please provide our office with a copy of their card.

5. **SNAP/FOOD STAMPS** - Does the client receive SNAP? ☐ Yes ☐ No

   If so, please provide our office with a copy of their Snap card.

6. **FEDERAL ASSISTED HOUSING** - Does the client receive Section 8? ☐ Yes ☐ No

   If so, please provide our office with the Housing Authority Letter.

7. **PRIVATE MEDICAL INSURANCE** - Does the client have any private insurance? ☐ Yes ☐ No

   If so, please provide our office with a copy of their card

8. **AFFORDABLE CARE INFORMATION**- Does the client receive insurance under the Affordable Care Act? ☐ Yes ☐ No

   If so, please provide our office with a copy of their card

9. **DISABILITY** - Is the client disabled? ☐ Yes ☐ No

   If yes, what is the disability? _____

10. **FUTURE MEDICAL TREATMENT**- Will ongoing medical treatment be required? ☐ Yes ☐ No

    If yes, please attach a copy of the Life Care plan.

If there is no Life Care plan available, please describe in detail future treatment:

_____

_____

Budget

For: _____ File No. _____

1. **Shelter** - Number of people living in household: _____

Item	Monthly (pro-rata share)	Paid By*
ISM – Should be paid for by SSI to ensure no ISM reduction in SSI.		
Rent		
Mortgage		
Other Mortgage (specify) _____		
Real Estate Taxes (unless included in mortgage payment)		
Heat		
Electric and Gas		
Water and Sewer		
Homeowner's Insurance Required by Lender		
NON-ISM – Pro-rata share can be paid for by Trust.		
Telephone (landline)		
Cable TV		
Internet		
Cell phone		
Streaming Services (Netflix, Hulu)		
Repairs and Maintenance		
Renter's Insurance		
Homeowner's Insurance Not Required by Lender		
Trash and/or Garbage Removal		
Condominium or Co-op Fees		
Other: _____		
Other: _____		
Other: _____		
Shelter Total		

* T = Trustee, B = Beneficiary, CC = Credit Card, M = Medicaid, P = Private Insurance, O = Other

2. Transportation

Item	**Monthly (pro-rata share)**	**Paid By***
Auto Insurance		
License and Registration		
Gas		
Oil and Maintenance		
Other: _____		
Other: _____		
Other: _____		
Transportation Total		

* T = Trustee, B = Beneficiary, CC = Credit Card, M = Medicaid, P = Private Insurance, O = Other

3. **Personal**

Item	Monthly (pro-rata share)	Paid By*
ISM – Should be paid for by SSI to ensure no ISM reduction in SSI.		
NON-ISM – Pro-rata share can be paid for by Trust.		
Household Supplies		
Clothing and Shoes		
Hair Care		
Vacations		
Entertainment – Specify: _____		
Non-prescription Drugs, Cosmetics, Toiletries and Sundries		
Prescription Drugs not covered by Medicaid		
Unreimbursed Medical		
Unreimbursed Psychiatric/Psychological/Counseling		
Unreimbursed Dental		
Unreimbursed Orthodontic		
Unreimbursed Medical Insurance		
Unreimbursed Caregiver		
Estimated Trustee's Fees		
Other: _____		
Personal Total		

* T = Trustee, B = Beneficiary, CC = Credit Card, M = Medicaid, P = Private Insurance, O = Other

4. **Summary of Monthly Expenses & Income** (computed at 4.3 weeks)

Shelter Total	
Transportation Total	
Personal Total	
Grand Total – Expenses	
Subtract Social Security	
Subtract Other Income	
Grand Total/Net	


STETSON
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STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

November 22, 2024

SNTs--Preserving the Residence and Other Real Estate: Separating Fact from Fantasy

STETSON LAW

Center for Elder Justice

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Preserving the Residence and Other Real Estate: Separating Fact from Fantasy

Emily B. Kile, Mushkatel, Gobbato, & Kile, P.L.L.C.
Elizabeth N. R. Friman, Fleming & Curti, PLC

-

Stetson Law, National Conference on
Special Needs Planning and Special Needs Trusts
Friday, October 18, 2024

I. Introduction

A. Real estate issues arise in every type of special needs planning context. This is particularly true when we consider estate planning, Medicaid planning and estate administration.

B. Skilled professionals will be prepared to spot these issues that relate to the ownership, transfer and sale of real estate for a beneficiary with special needs. With thoughtful work and planning unnecessary complexity and conflict down the road can be avoided.

C. Be very careful when considering the sale or transfer of real estate (particularly a primary residence) if Medicaid is involved, or may be involved in the future.

D. Much consideration should go into whether real estate will be held individually by the individually, in a self-settled special needs trust (SNT) or a third-party SNT.

E. When considering how to address real estate issues, it is imperative to gather *specific* information about the following things:

1. Who is the beneficiary and what benefits is she eligible to receive now, and/or in the future;
2. Is the beneficiary able to engage in any conversation about the real estate to be transferred, sold or purchased;
3. What assets the beneficiary and or the special needs trust owns – this includes both liquid and illiquid assets;
4. Who owns the real estate in question (do not be afraid to confirm with a title report) and who manages the real estate;
5. How is the real estate used;
6. Are there other issues, like special family considerations or tax planning matters that relate to the real estate that add context to the questions and decisions;

F. Frequently there are presumptions about property ownership, e.g. the property was always supposed to be used in a certain way, or made available for a certain person, or group of people. Or, there may be a presumption that the property is valuable now, and will grow in value in the years to come.

G. Do not make recommendations about real estate without other professionals involved. Work with a team that may include CPAs, investment advisors, guardian/conservator, trust officer/trustee and most importantly, the beneficiary.

II. Residence

A. Current living circumstances: Transferring a primary residence to an SNT takes careful thought and planning. A beneficiary may live in a family home that her parents later decide to convey to a third-party SNT that they establish through their estate plans, with the rationale that the beneficiary will benefit from remaining in a familiar place once when her parents are no longer alive.
B. When having a discussion about the transfer or purchase of a primary residence to a Special Needs Trust (SNT), it is imperative to understand the following:
    1. Where does the beneficiary currently reside and is this placement a good fit for the beneficiary now, and in the future?
    2. What are the important considerations for the beneficiary as it relates to a primary residence? For instance, is close proximity to resources like doctors, day programs, friend/family an issue?
    3. What kind of benefits does the beneficiary currently receive (or hope to receive in the future), and how will these benefits align with the beneficiary's use of the residence?
    4. Who else is living, or will be living, with the beneficiary in the residence?
    5. Is there major work needed for the beneficiary to comfortably (and safely) remain in the residence?
    6. Who is going to be paying for the monthly expenses, e.g. utilities and annual expense like property taxes and insurance?
C. Budget and Care Plan
    1. Maintaining a home is expensive and when real estate is conveyed to a SNT, funds should be allocated solely for real estate expenses. It is unadvisable to fund a SNT with real estate unless there are ample funds to maintain the property.
        1. How do budget for this? Should the budget factor in the continuing care of the beneficiary (including accommodations to the home) as more care may be needed in the future? Are there also funds available for caregiving and other needs of the SNT beneficiary? Will the beneficiary want to remain in the home when the parents pass away? Is another child in the family going to live in the home and be the caregiver? How will the other family members feel about the caregiver child having a "free place to live"?
    2. In many cases, a family will assume that transferring the family residence where the beneficiary has lived all of her life to a SNT for the benefit of a beneficiary will save the beneficiary money. This can be a false assumption and merits specific financial analysis.
    3. Involving a case manager, in addition to the trustee and any guardian/conservator is important when developing the budget. In some cases if there is court oversight related to the SNT or the estate of the beneficiary, then the Court may also need to approve the budget.

4. Is Medicaid involved? If so, does the beneficiary or the SNT own other real estate? If owned outright, and outside of the SNT, would there be benefits to the beneficiary?
5. If some of the beneficiary's resources need to be used on real estate-related expenses, the are there also funds available for caregiving services and other needs of the beneficiary?

D. Family emotions: If there is high emotional sentiment regarding the residence, will the beneficiary want to remain in the home if family members die, or remove familiar tangible personal property in the home (in the event of an estate administration).
    1. How do the rest of the family feel about giving ownership and/or use to the SNT for the benefit of the beneficiary?
    2. If things are copacetic now about the beneficiary's use of the residence, will things stay that way if the beneficiary (or trustee) what to sell the residence in the future and use the proceeds from the sale of the residence for the benefit of the beneficiary?
E. Oversight
    1. Even in cases where there are funds available to sustain real estate expenses, who is responsible for overseeing the maintenance of the property? Not everyone is cut out to be a property manager and this job can be particularly difficult for a trustee who is simultaneously balancing other duties to the beneficiary.
    2. Remember caregivers are hired to provide care, not to mow the lawn, fix a leaking toilet or install grab bars in the bathroom.
F. Funding SNT with things other than real estate
    1. Clients may benefit from a frank conversation about whether to allocate non-real estate assets to an SNT. Before diving into a complex plan to fund an SNT with real estate, consider reviewing whether there are other assets (like a retirement account) that the beneficiary with special needs could derive special benefits from, while also avoiding some of the risks that real estate can bring, especially to a SNT.

III. Rental

A. The idea of purchasing (or gifting) an income producing property for someone who is unable to earn an income through a traditional job is understandable. There are many different types of income producing property. For example, a decision about renting out a guesthouse that is located on the property where the beneficiary resides or an Airbnb will be different that a decision that may relate to a commercial building.
    1. Sometimes people think that renting out a room in the home where the beneficiary lives is a good idea because it will provide the beneficiary with companionship and income to pay household expenses. This assumption should never be made.
B. Clients need to be educated to understand the challenges of giving income producing real estate to beneficiaries who are on SSI, Medicaid and other income-tested programs.

C. If an SNT owns rental property, in addition to the normal expenses like property taxes, then there will be ongoing costs for things like extra insurance and management.
    1. Even if a property is "income producing" that may not mean that after the expenses related to the property are paid that there will be any income remaining.

D. Rental property creates an extra layer of liability for trustees of SNTs. This is particularly true when considering commercial buildings and apartment complexes. Using LLCs and other corporate entities to hold the rental real estate is important to think about. As the layers of ownership, and reporting get more complex, the administrative costs and burdens also grow.
    1. Property management companies can add cost, but they can lend helpful expertise and reduce liability.
    2. If the SNT is one of multiple owners of rental property, then things can get more complicated when it comes to decision making.

IV. Vacation Property

A. Ownership: Many families share a beloved vacation home and there is not always planning about how ownership will be shared with future generations. This creates special questions when there may be a family member with special needs.
    1. If ownership, or a partial interest, is conveyed to a SNT, what kinds of family discussions are important to have before the interest is transferred?

B. Not all real estate (especially vacation property!) is easily accessible and sometimes, without the property support, there can be safety issues for someone with special needs.
    1. How can someone determine today if a beneficiary with special needs will enjoy the use of a family vacation home in the future? What is the system to request use of the home and whose vacation takes priority? If accommodations need to be made to a vacation home so that a beneficiary with special needs can use the property, does that impact the use of the property by other owners? Who pays for these accommodations?
    2. If the SNT beneficiary requires assistance, how is the "caregiver" family member's right to the use the property separately impacted?

C. Expenses: Many vacation properties are only used part of the year and this means that unexpected maintenance issues can creep up. Some owners may want to make improvements to vacation property, while others may disagree.
    1. If a SNT holds an interest in a vacation property and expenses are shared among owners, how might considerations differ when it comes to chipping in for expected and unexpected expenses? Would these be considered acceptable distributions from the SNT?

D. Sale: Vacation homes can hold terrific sentimental value. This is one reason why emotions can run high when someone with a partial interest wants to sell her interest in a vacation property that is used by the rest of the family.

1. Family legacy, rights of first refusal, discounts, fair market values and tax issues are all important to consider when it comes to the decision of whether to sell real estate.
2. The trustee of an SNT, especially an independent trustee, may have a challenging time finding an agreeable solution for all owners. Can good planning make future conversation easier?

E. Ownership Structure: As vacation homes are passed down to various generations, ownership can become more complex as more people have an interest in the property and ideas about how it should be managed.
    1. Should the vacation home be owned by an LLC or other corporate entity and then the SNT is the member?
    2. Are there any benefits if the SNT is a partial owner of a vacation property, when the SNT could just pay rent when the beneficiary wants to use the property?

Preserving the Residence and Other Real Estate: Separating Fact from Fantasy

Emily B. Kile, Mushkatel, Gobbato, & Kile, P.L.L.C.
Elizabeth N. R. Friman, Fleming & Curti, PLC

-

Stetson Law, National Conference on
Special Needs Planning and Special Needs Trusts
Friday, October 18, 2024

1

Introduction

- Real estate issues and related planning issues affect every family.
- Everyone has a “war story” to tell from their practice!
- We wanted to try and frame the issues we see most commonly.

2

Residence

3

Current Living Situation

- Where does the beneficiary live now?
- Is it best for them to remain in place?
- What are best practices for conveying real estate to an SNT?

4

Budget and Care Plan

- How do you budget for the home?
- Are there also funds for caregiving services and other needs of the beneficiary?
- Will the beneficiary want to remain in the home once the parents pass away?
- Who will be the caregiver?
- How will the rest of the family feel about your plan?

5

Oversight

- Who is responsible for overseeing the maintenance of the property?

6

Alternate Assets

- Is real estate the best asset to fund the SNT?
- Are there other assets to fund the SNT that the beneficiary could derive special benefits from? Like a retirement account?

7

Rental Properties

8

Rental Property

- The idea of purchasing an income producing property for someone who is unable to earn an income through a traditional job is understandable.
- Clients need to be educated to understand the challenges of giving income producing real estate to beneficiaries who are on SSI, Medicaid and other income-tested programs.

9

Unique Costs & Other Issues

- If an SNT owns rental property, in addition to the normal expenses like property taxes, then there will be ongoing costs for things like extra insurance and management.
- Rental property creates an extra layer of liability for trustees of SNTs.
- Property management companies can add cost, but they can lend helpful expertise.
- If the SNT is one of multiple owners of rental property, then things can get more complicated when it comes to decision making.

10

Vacation Properties

11

Ownership

- Who owns the property now?
- How will ownership be shared with future generations?
- If an interest is being conveyed to a SNT, what should you consider beforehand?

12

Use

- Can the beneficiary use the property safely?
- Will the beneficiary still enjoy the use of the property in the future?
- How does the family decide who can use the home?

13

Rental

- Does the family rent out the property when it is not in use?
- How is rental income disbursed?

14

Expenses

- How are unexpected expenses shared amongst owners?
- How does the family make decisions around home improvements?
- Are maintenance or improvements to a vacation home acceptable distributions from the SNT?

15

Sale

- What if the trustee of the SNT wants or needs to sell the interest?
- This can be made difficult because of family legacy, rights of first refusal, discounts, fair market values and tax issues.
- Can good planning make future conversations about sale easier?

16

Ownership Structure

- Should the vacation home be owned by an LLC or corporate entity?
- Will the vacation home be owned individually with the SNT as a partial owner?
- What are the tax issues and liability concerns?

17

Resources

The Special Needs Alliance

Leaving a Residence to a Person with a Disability
August 2024 - Vol. 18, Issue 8

https://www.specialneedsalliance.org/

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Questions?

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National Conference on Special Needs Planning and Special Needs Trusts

November 22, 2024

The Life of a Trust: Key Stages Over Time

STETSON LAW

Center for Elder Justice

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The Life of a Trust: Key Stages Over Time

Mary E. O'Byrne, Moderator

Bowie & Jensen, LLC

Towson, MD

Panelists:

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

Stacy Scrip, Trust Case Manager
Capital First Trust Company
Milwaukee, WI

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Many attorneys serve as special needs trustees or contemplate adding a fiduciary practice to their business model. They may advocate with trustees whose beneficiaries are the attorney's clients, or advise trustees on their roles and responsibilities. By their nature, trusts are long term planning tools and the trustee's tie to a beneficiary may last for years. The success of this enduring relationship is made more likely by starting with a clear understanding by both the trustee and beneficiary (and often the beneficiary's family) of the goals, guidelines and processes involved and by both sides remaining flexible and communicating consistently and effectively over time. The special needs trustee will also eventually have to manage the termination of the trust. Most often the trust will terminate when the beneficiary dies. The termination of a trust may come before that time if assets are depleted, or significant changes occur in the beneficiary's circumstances. In all trust terminations, clear guidelines will help the trustee manage this process more effectively.

Understanding the perspective of professional trustees can help attorneys better to counsel and advocate for their clients, who may be trustees or beneficiaries, as well as help the attorneys who are or are considering serving as fiduciaries themselves.

Three professional trustees have been invited to discuss the three stages in the life cycle of a special needs trust. Together, they currently serve over 2,100 first and third party special needs beneficiaries. Our panelists represent a nonprofit trust company offering pooled trust accounts as well as trustee services for stand alone trusts in the state of Connecticut; a for profit national trust company serving as trustee for individual trusts; and an attorney in private practice in Indiana with a robust fiduciary practice in addition to his elder law, special needs and estate planning practice. Our panelists have shared their checklists for the beginning, ongoing and termination phases of administering a special needs trust. These are attached.

Attachment 1 – PLAN of CT: New Trust Funding Checklist.

Attachment 2 - Capital First: SNT Account Review; General Account Review; 90 Day New Account Review.

Attachment 3 – Fechtman Law Office: Procedure for Closing Trust Administration; Closing a Trust Checklist; Trust Administration Closing Memo.

Attachment 1 – PLAN of CT: New Trust Funding Checklist.

New Trust Funding

Checklist

Funding

- ☐ **1.** Verify origin of funds
- ☐ **2.** Verify potential for additional funding
  - ☐ a. IRA
  - ☐ b. Life Insurance
  - ☐ c. Property to be sold/estate to close/settlements
    - ☐ d. Annuity
- ☐ **3.** Reach out to any institutions that may have funds for the trust. Begin paperwork
- ☐ **4.** Begin investment assessment

Trust Document Review

- ☐ **1.** Review the trust document for any specific concerns. Document the concerns
- ☐ **2.** Verify remainder beneficiaries and addresses
- ☐ **3.** Review the *Letter of Intent*
  - ☐ a. Is it likely there have been changes due to the passage of time?
  - ☐ b. Review priorities
  - ☐ c. Document concerns for follow up
- ☐ **4.** Verify/collect essential documents
  - ☐ a. SSA letter
  - ☐ b. Guardianship/Conservatorship appointment
  - ☐ c. State benefit letters

Account Set Up

- ☐ **1.** Obtain Tax ID if needed
- ☐ **2.** Reach out to banking institution to open new account
- ☐ **3.** Discuss funding/expected rate of spending with investment manager
- ☐ **4.** Set tickler to ensure investment of funds

Beneficiary Contact

- ☐ **1.** Set up an appointment to meet with the beneficiary/designated agent
- ☐ **2.** Confirm benefits received and impacts to trust disbursements
- ☐ **3.** Discuss expectations, budget and expected rate of spending
- ☐ **4.** Follow up the meeting with a summary in writing/welcome packet
- ☐ **5.** Send first contact letter to remainder beneficiaries

Software Systems Updates

- ☐ **6.** Make updates in software systems
  - ☐ a. Confirm/update addresses/phone numbers
  - ☐ b. Confirm designated agents
  - ☐ c. Enter statement recipients
  - ☐ d. Update benefits
  - ☐ e. Set ticklers for accountings
  - ☐ f. Update billing information

Trusts Established Through a Court

- ☐ **1.** Submit inventory
- ☐ **2.** Set tickler for annual accounting

Other- Self-Settled Trusts

- ☐ **1.** Ensure trust document has been provided to appropriate agencies as required
- ☐ **2.** Discuss the following with beneficiary/designated agent
  - ☐ a. The trust's inability to pay bills upon the passing of the beneficiary and pre-paid funeral options
  - ☐ b. Distributions must be for the sole benefit of the beneficiary
  - ☐ c. State payback provisions
- ☐ **3.** Verify proof of disability on file

Attachment 2 - Capital First: SNT Account Review;

General Account Review;

90 Day New Account Review.

CAPITALFIRST TRUST COMPANY
A matter of trust.

Annual Account Review – SNT TO **Start Date:**

ACCOUNT INFORMATION			
Account Name:		Trust Officer:	
Account Number:		Trust Administrator:	
Account Type:	SNT		

GOVERNING INSTRUMENT	
Yes	Read governing instrument and verify administration of the trust is in line with the agreement.

CLIENT RELATIONSHIP	
No	Have there been any complaints about administration or compliance that were not documented on the Watch or Complaint List since the last review?

TRANSACTION HISTORY		
Yes	Verify pending disbursements are current and trust masters are accurate.	
Yes	Verify all distributions made are accurate and all mandatory distributions have been made.	
Yes	Verify all documentation for distributions, including Trust Outlines and co-fiduciary decisions, are in SharePoint.	
Yes	Verify fees charged are consistent with fee schedule.	
0.0%	Prior Year Distribution %	If >5%, complete a depletion analysis or state the reason it is not necessary to complete:
N/A	If the distribution percentage is greater than 10%. Depletion letter was mailed:	

INVESTMENTS & ASSETS		
	Vehicle Lien	Insurance Coverage Period:
	Trust Owned Real Estate	Insurance/Property Taxes current on Salentica:

DELEGATED TRUST	
	For trusts with delegated authority, list date trust officer and investment advisor verified the investment objective/allocation is appropriate for the trust's purpose, beneficiary's needs, and horizon.

TASKS	
Yes	Verify the accuracy of synoptic records.
N/A	Verify all accountings are current and timely. Last date of latest accounting filed:
N/A	Review and complete any outstanding tasks in CFO.
	Beneficiary status:
Yes	Beneficiary address: Does the address for the beneficiaries on Salentica and CFO match?

CAPITALFIRST TRUST COMPANY
A matter of trust.

Statement recipients:	
List name(s) of authorized person(s):	
List documentation on file for the authorized person(s):	
	True Link Card
	Agreement on file/Copy of card
	Verify spending monitor is appropriate under the terms of governing document.
	Verify public benefits on file are current.
	If no, update file immediately and mail form to client.
	Review terms of document for after-life planning and discuss with beneficiary.

CLIENT OUTREACH	
Confirm Beneficiary Address: Yes	
Confirm Citizenship: Yes	Confirm Residency: Yes
Yes	Verify authorized person(s) has received their account statement and tax information.
	Discuss potential trust distributions and other relevant matters.
Comments:	

Trust Officer Signature: Date:

If randomly selected for review, the Trust Director signature:

Trust Officer Director: Date:

Date of last account review entered in Salentica and CFO:

CONVERSATION CHECKLIST	
	Direct Deposit Form
	Vehicle Registration
	Updated Driver's License
	True Link Activity Agreement

CAPITALFIRST TRUST COMPANY
A matter of trust.

Annual Account Review – Wealth TO **Start Date:**

ACCOUNT INFORMATION			
Account Name:		Trust Officer:	
Account Number:		Trust Administrator:	
Account Type:			

	GOVERNING INSTRUMENT
	Read governing instrument and verify administration of the trust is in line with the agreement.

	CLIENT RELATIONSHIP
	Have there been any complaints about administration that were not documented on the Complaint List since the last review?

	TRANSACTION HISTORY	
	Verify pending disbursements are current and trust masters are accurate.	
Yes	Verify all distributions made are accurate and all mandatory distributions including net income have been made.	
	If net income distributions are mandatory, verify information on Net Income Calculations spreadsheet.	
Yes	Verify all documentation for distributions, including Trust Outlines and co-fiduciary decisions, are in SharePoint.	
Yes	Verify fees charged are consistent with fee schedule.	
0.0%	Prior Year Distribution %	If >5%, complete a depletion analysis or state the reason it is not necessary to complete:
N/A	If the distribution percentage is greater than 10%. Depletion letter was mailed:	

	INVESTMENTS & ASSETS	
	For ILIT's, verify insurance premiums have been paid.	
	For ILIT's, verify a copy of the Crummey notice is on file.	
	Trust Owned Real Estate	Insurance/Property Taxes current on Salentica:

	DELEGATED TRUST
	For trusts with delegated authority, list date trust officer and investment advisor verified the investment objective/allocation is appropriate for the trust's purpose, beneficiary's needs, and horizon.

	TASKS
Yes	Verify the accuracy of synoptic records.
	Review and complete any outstanding tasks in CFO.
Yes	Beneficiary address: Does the address for the beneficiaries on Salentica and CFO match?
Statement recipients:	

CAPITALFIRST
TRUST COMPANY
A matter of trust.

CLIENT OUTREACH		
Confirm Beneficiary Address:		
Confirm Citizenship:		Confirm Residency:
	Verify authorized person(s) has received their account statement and tax information.	
	Discuss potential trust distributions and other relevant matters.	
Comments:		

Trust Officer Signature: Date:

If randomly selected for review, the Trust Director signature:

Trust Officer Director: Date:

Date of last account review entered in Salentica and CFO:

CAPITALFIRST TRUST COMPANY
A matter of trust.

Date:

Department:

New Account - 90 Day Review

Trust Type:

ACCOUNT INFORMATION: (First Person to Start Checklist)	
Trust name:	
Account number:	Annual review month:
Case Manager:	Trust Officer:
Original or authenticated copy of physical Trust Document in hard copy file:	
If no, requested: Status:	
Authorized Party:	If Authorized Party is a financial Power of Attorney or guardian/conservator, is the legal document or birth certificate on file:
Is any current beneficiary or Authorized Party a non-US citizen or resident:	
BSA risk rank:	Tier rank:
Funding date:	Funding amount:
Trust Officer introduction call date:	
Run New Account Review (599) report, save to Sharepoint file and review account setup:	

OPERATIONS: (Director or Case Manager)	
Investment function:	PRS account profile:
Data feed working (SMA):	Cost basis uploaded:
Online access (SMA):	Last Pass entry (SMA):

ASSET ALLOCATION/INVESTMENTS: (Trust Administration)			
Money Market (CTFC & SMA):	$		
Invested:	$		
If core, dollar cost averaging:			
ESI (secondary market annuity):	$		
Annuity (listed at surrender value):	$	Contract on file:	
Insurance (listed at surrender value):	$	Contract on file:	Premium notice:
Real Estate:	$		
Specialty Assets:	$		
Other:_____	$		
Verify that all assets owned by the trust are booked on CFO: CM ☐ TO ☐ DR ☐			
List any large distributions that may impact asset allocation:			
Comments:			

TRANSACTION HISTORY/ADMINISTRATION: (Trust Officer)	
Trust masters:	Describe:
Caregiver payments:	Attorney fees:
Item masters:	Describe:
Mandatory Income/Unitrust Distributions: Frequency: If other:	
Net Income Calculations spreadsheet reflects account: Trust Master estimates for Unitrust payments:	
ILIT's – If insurance premium is paid by CFTC, are Crummey notices on file: If no, explain:_____	
Notes:	

CAPITALFIRST TRUST COMPANY
A matter of trust.

TRUSTEE FEES: (Case Manager and Operations)	
Fee schedule:	CFO Fee Schedule Code No. _____ Is fee schedule saved in Sharepoint: Is the account part of a consolidated/household relationship? If yes, family/associated accounts listed: _____ _____ Any assets excluded from fees: If excluded, what: _____ Operations associate reviewing set up? Date:
Fee computation:	Verified Computation of Commission Report matches fee schedule in Sharepoint file: Requires correction: Setup fee charged: If waived, reason: _____

BANK SECRECY ACT (BSA)/ANTI MONEY LAUNDERING (AML): (Director)
Confirm CIP information gathered for each grantor, current beneficiary, POA, guardian, and/or conservator:
Confirm results from all OFAC searches are in the account's Personal & Intake folder:
Confirm Citizenship, source of funds, anticipated use and PEP gathered on the Intake form:
Confirm foreign assets are properly coded:

SALENTICA: (Trust Officer and Director)
Confirm citizenship and residency status is added for each contact in Salentica: (grantor/beneficiary/POA/guardian/conservator)
Contacts entered:
Is the beneficiary receiving public benefits:
If yes, confirm that public benefits are entered on Salentica:
Confirm front-end notes have been entered in Salentica:
Ticklers are entered in CFO:

ADMINISTRATIVE - Statements and Tax: (Trust Officer and Director)	
Statements: Are all beneficiaries and parties required under the agreement and governing law to receive accountings set up to receive statements?	
Tax Type:	Preparer: ☐ EY ☐ Outside If outside, who: _____
If EY, are all main and sub-accounts set to bridge?	
Are the appropriate beneficiaries set up to receive tax reporting documents?	
If Wealth, GST status:	
Are date of death inventory, Form 706, and/or Form 709s in SharePoint? If no, explain: _____ _____	

TRANSFER DOCUMENTATION: (Case Manager)	
Inherited IRAs	
12/31 Value:	RMD current year:
If transfer, RMD factor:	RMD satisfied prior to transfer:
Account owner date of death:	
Tax	
Prior 3 years tax returns:	
Tax register/Report showing transactions for the prior year:	
Estimated tax payment schedule:	
If Grantor is deceased, date of death:	
3-year statements:	
Zero balance statement:	

CAPITALFIRST
TRUST COMPANY
A matter of trust.

OPEN ITEMS/COMMENTS:	

REVIEWED BY:
Case Manager:
Trust Officer:
Director:
Operations Manager:

FINAL STEPS: TA enters the review completion date in Salentica.

Attachment 3 – Fechtman Law Office: Procedure for Closing Trust Administration;
Closing a Trust Checklist;
Trust Administration Closing Memo.

PROCEDURE FOR CLOSING TRUST ADMINISTRATION CASES

1. Send closing letter indicating that trust fund has been completely depleted.

2. Make sure that all trustee fees have been paid.

3. Check the Task List to ensure that all projects have been completed.

4. Change the "Case Status" on the Case List to read "Closed".

5. Change the Current File Location under the Settings tab in PC Law Matters to "Closed."

6. Set aside all important documents, such as court pleadings, original trusts, deeds, titles, annuity contracts.

7. Shred the printer reconciliation spreadsheets, and then scan and shred everything else.

8. Complete Closing Memo and move file to closed files.

CLOSING A TRUST CHECKLIST

1. Condolence (Send card to family)
2. Request a copy of death certificate
3. Who are the heirs? (Adopted children, siblings and ½ siblings, prior to DOD, husband/wife even if deceased)
4. Was there a Will?
5. Do we have to pay Medicaid? (Was the deceased over 55 when services were billed/paid?)
6. Do we need to open an Estate?
7. Tax Issues?
8. 1040 (final)?
9. 1041?
10. K-1?
11. Will there be 1099s? (Look to see when assets sold/capital gain/interest)
12. Is a small estate affidavit needed?
13. Will there be any more annuity payments? (Need to notify of DOD)
14. Who do they pay to and when?
15. Is there another settlement?
16. Is there a Medicare Set-Aside account?
17. Are there any non-investment assets? (House, vehicle, etc.-May need to release lien. May need to transfer. Will need to pay to record Deed)
18. Cancel services. (Auto and homeowners insurance, utilities, lawn services, etc.)
19. Is there a pre-paid burial? Grave plot? Monument?
20. Is there an IRA, 401(k)? (Who are the beneficiaries?)
21. Is the trustee bonded? May have a refund or post-date on final accounting for release.)
22. Do we report to the Court? (Accounting)
23. Make sure funds are liquidated.
24. Tax preparation fee.
25. Taxes due.
26. Medicaid payback.
27. Trustee final fees.
28. Prepare final accounting and maybe supplemental.
29. Send letter to trust beneficiary or their family to claim contents in file.

Trust admin/admin

TRUST ADMINISTRATION CLOSING MEMO

Date:_____

Case Name and Number: _____

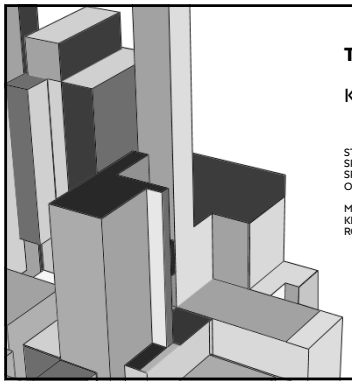
Case Type: _____ Atty:_____ Responsible Person:_____

Referral Source: _____

Overview of Case: _____
_____
_____

Identify any future projects or information that may be helpful if this case is reopened: _____
_____
_____
_____

_____ Prepare and send closing letter
_____ Review billing and payment status and review with responsible attorney, as needed
_____ Change Current File Location in PCLaw Matters
_____ Change Case Status in Case List
_____ Remove case from Task List
_____ Organize file and prepare for storage
_____ File to closed files



THE LIFE OF A TRUST:

KEY STAGES OVER TIME

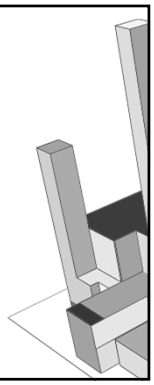
STETSON NATIONAL CONFERENCE ON
SPECIAL NEEDS PLANNING AND
SPECIAL NEEDS TRUSTS
OCTOBER 18, 2024

MARY E. O'BYRNE, MODERATOR
KERRY TEDFORD-COLES, STACY SCRIP AND
ROBERT W. FECHTMAN, PANELISTS

1

AGENDA

- Introductions
- Begin as you mean to go on.
- Keeping it real for a really long time.
- All good things must come to an end.
- Questions



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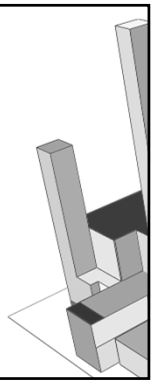
2

PANELISTS

- Kerry Tedford-Coles, Executive Director of Planned Lifetime Assistance Network of Connecticut, Inc. (PLAN of CT), Wethersfield, CT.
- Executive Director of the National PLAN Alliance (NPA), Member, Pooled Trust National Standards Committee, Board Member and Co-Chair Outreach & Education Committee of Association of Pooled Trusts (APT).
- PLAN of CT serves as trustee for 1,440 accounts, 269 are stand-alone and 1171 are pooled trust accounts.
- ktedford-coles@planofct.org



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3

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- Stacy Scrip, Trust Case Manager, Capital First Trust Company; Milwaukee, WI
- Registered Settlement Planner and Certified Trust and Financial Advisor; member of the Board of Directors of the Society of Settlement Planners.
- Capital First serves as Trustee for over 3,200 trusts, of which more than 500 are special needs trusts.
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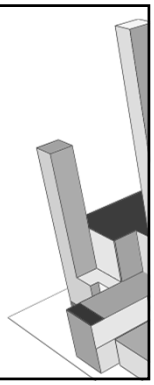

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PANELISTS

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- Attorney in private practice focusing on older and disabled persons, estate planning and trusts, health law, Medicaid planning, professional trustee since 2004, Certified Elder Law Attorney by the National Elder Law Foundation; member of National Academy of Elder Law Attorneys, member and past president of the Special Needs Alliance. Bob serves as trustee for 199 trusts.
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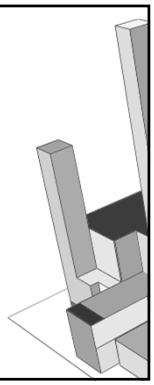


5

5

BEGIN AS YOU MEAN TO GO ON

GETTING STARTED WITH A NEW TRUST

6

KEEPING IT REAL – COMMUNICATION AND ADAPTATION

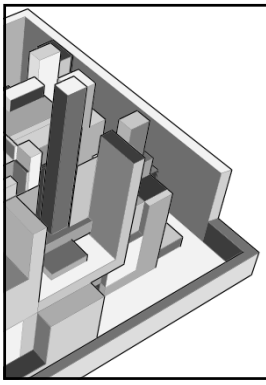
Maintaining an effective relationship between trustee and beneficiary over time

7

ALL GOOD THINGS MUST COME TO AN END

STEPS IN TERMINATION OF A TRUST – EXPECTED AND UNEXPECTED

8



QUESTIONS?

Panelists' checklists are found in your materials.

9

THANK YOU

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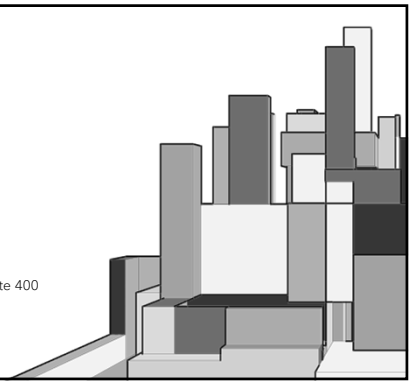

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National Conference on Special Needs Planning and Special Needs Trusts

November 22, 2024

Don’t Accept Mental Health Differences at Your Firm… Embrace Them!

STETSON LAW

Center for Elder Justice

Access and Justice For All®

Stetson University College of Law

2024 National Conference on Special Needs Planning and Special Needs Trust

Course Title:

Don’t Accept Mental Health Differences at Your Firm, Embrace Them

Speaker:

Jeffery G. Meyers, AIA, NCARB, LEED AP BD+C

Chief Executive Officer

DS Architecture

#ProudlyBipolar

Overview:

This course provides a fact-based business case proving that embracing mental health differences at companies is a profitable endeavor. By accommodating mental health and cognitive difference, leadership demonstrates commitment to core values that attract and retain talent with unique strengths and insights. Resources for mental health reduce burnout and turnover and increase productivity. Stigma-free workplace culture benefits both neurotypical and neurodiverse individuals at all levels of the firm. Embracing cognitive diversity as an organization leads to stronger culture, and in turn, business growth.

Top Takeaways:

- Incorporating Mental Health: How to make mental health accommodation a foundation of your firm's culture
- Diversity and Attracting Talent: Commitment to mental health accommodation and diversity is highly sought-after in potential employers
- Strengths in Differences: Individuals with mental health and cognitive differences bring unexpected strengths to your team
- Discussing Mental Health: Creating safe outlets for discussing mental health in the workplace
- Destigmatizing Mental Health: Educating your entire firm on destigmatizing mental health conditions

Mental Health Crisis in the Workforce

"The extent of America's mental health crisis is alarming. Tens of millions of U.S. workers are experiencing mental health issues and are less productive because of it, inundating organizations with a vast array of new challenges. Mental health issues such as burnout and stress are hampering short-term productivity and long-term business growth." - SHRM Foundation. Society for Human Resources Management.[1]

1. Companies' bottom lines suffer as a result of mental health issues such as burn out, exhaustion, hopelessness. *Id.* at 2,4.
    a. The solution is hiding in plain sight: leadership plays an essential role in curating mental health resources. *Id.* at 2.
    b. Mental health burden statistics:
        i. 280 million people globally affected by depression. Depression Worldwide.[2]
        ii. 40% of autistic individuals are unemployed, and 38% are underemployed. ASD Employment Predictors.[3]
            1. As much as 80% of autistic individuals are unemployed by some private estimates. Invisible Diversity.[4]
        iii. 88.1% employees reported concerns with stress levels over the past year. Am. Psych. Ass'n.[5]
        iv. 1 in 4 adults in the US report experiencing mental illness. SAMHSA Data.[6]
2. Crisis in the Construction Industry

a. The Centers for Disease Control and Prevention found that men working in construction have one of the highest suicide rates by population: their rate of suicide is about four times higher than the general population and is the second-highest rate of all workplace industries at 45 per 100,000. Suicide Rates by Industry.[7]

3. Health is in our control. Illness is out of our control, but treatable. Organizations are stronger when both mental health and mental illness are addressed and accommodated for by leaders.

Cognitive Diversity

Terminology: Neurotypical refers to individuals with neurologically typical patterns of thought or behavior. Invisible Diveristy, *supra* note 4. Neurodiversity as a concept regards individuals with differences in brain function and behavioral traits as part of normal variation in the human population. *Id.* Cognitive diversity is a broad term to refer to differences in the way people think, act, and are motivated. In the workplace, this includes factors that would cause individuals to problem-solve differently and how people approach intellectual processing. *Id.*

ADHD (approximately ***4%*** of the population). *Id.*

3.5 million with ***autism.*** *Id.*

2.9 million with ***dyslexia*** *Id.*

1. Neurodivergency occurs on a bell curve with most of the population falling in the middle. There is no typical person, and a significant portion of the population are on a spectrum of neurodivergency, bringing unique traits, skills and capabilities. HOK.[8]

a. A cognitive diverse workplace consists of both neurodiverse and neurotypical individuals.
b. Mental health resources benefit both groups, and can enable increased performance via support and inclusivity.

"Many people with neurological conditions such as autism spectrum disorder and dyslexia have ***extraordinary skills****, including in pattern recognition, memory, and mathematics. Yet they often struggle to fit the profiles sought by employers." – Harvard Business Review.* Competitive Advantage.[9]

2. Neurodiversity as a Competitive Advantage
    a. Cognitively diverse conditions can also be associated with a propensity to possess unique skills and abilities that enable superior performance and productivity in key roles. Invisible Diversity, *supra* note 4.
3. Superpowers of the Neurodivergent
    a. Dyslexia: Visual Thinking, Pattern Recognition, QA/QC and Complex Reasoning. *Id.*
    b. Mood Disorders (Bi-Polar, Major Depression): Strong Creativity. *Id.*
        i. Mood disorders studies dating back to the 1970s show creativity, including in visual and literary arts. *Id.*
    c. ADHD: Problem Solving and Creativity. *Id.*
    d. Anxiety (Social Anxiety and PTSD): Group Tasks and Evaluation of Situations for Threats. *Id.*
        i. Experts suggest anxiety can equip individuals to be better leaders. *Id.*

4. Neurodiverse employees at SAP developed a technical fix that delivered $40 million in savings. *Id.* EY's head of recruiting for the Middle East and North Africa region found some employees with dyslexia, dyspraxia, and Asperger's syndrome rank in the top 2% in certain skills and business areas. *Id.* J.P. Morgan hired workers with autism, it found that they were 50% more productive and learned faster. *Id.*
5. Bipolar Disorder
    a. Bipolar disorder causes unusual shifts in mood, energy, activity levels, and the ability to carry out day-to-day tasks. Bipolar Disorder.[10] People experiencing these shifts often do not recognize their likely harmful or undesirable effects. *Id.* Approximately 45 million people worldwide suffer from bipolar disorder at any given time. *Id.*
6. Case Study: Jeffery Meyers

Jeffrey Meyers has been a family member at DS Architecture for 22 years, becoming a partner in 2010 and full owner in 2019. As a leader of his business and his community, Jeff is inspired by any chance to unite and connect with people, with a true passion for developing and mentoring leadership. He is passionate about the intersection of architecture and social issues, particularly education, equitable healthcare, public policy, historic preservation, diversity, and environmentalism. He has spent many years leading and contributing to the Northeast Ohio community with philanthropic ands service initiatives, raising awareness and providing resources with seemingly boundless energy and enthusiasm.

Jeff is a neurodivergent individual who is diagnosed with bipolar disorder. Bipolar is recognized as a disability both by the United States Government and by the state of Ohio. Jeff's journey to partnership and ultimately sole ownership of a midsize architectural firm involved

overcoming major obstacles related to his mental health condition. These impediments have created hardships in his personal life and career that neurotypical individuals do not experience. DS Architecture believes in educating all clients, consultants, contractors, and potential staff on mental health awareness, which includes openness about Jeff's diagnosis. This effort and transparency, along with Jeff's continued medical treatments, have caused additional disadvantage due to the social stigma associated with mental health issues. Mental health is not often discussed with openness or compassion, or discussed at all, in the AEC industry. Jeff sees this as a challenge and an opportunity to change the narrative and dissolve stigma around mental health. He has spoken at over 20 leadership conferences around the country, often on the topic of mental health and neurodiversity.

7. Case Study: DS Architecture

"Our growth is based on empowering each person's unique cognitive strengths."

In 1983, David Sommers founded our firm on the simple value of "people come first." In 2010, inspired by the notion of a firm rooted in culture, Jeffrey Meyers became a partner with hopes of providing others the opportunity to truly enjoy the architectural profession. In 2011 the firm supplemented culture with design by hiring Eric Pros, who embraces and emphasizes the principle that design matters. Today the firm considers itself a culture-based design firm, led by six studio directors with diversity of thought, typology, and approach. Together we strive to shape the world by inspiring the next generation of architectural professionals to embrace an unparalleled commitment to both culture and design.

a. Firm's Core Values:

- Fairness
- Trustworthiness

- Conviction
- Collaboration
- Commitment to Knowledge

Our decisions and our growth are guided by these 5 Core Values and David Sommer's principle of family, which remains essential today.

a. Our yearly mental health respite is an example of a decision that helps everyone.
b. Our benefits include robust mental health coverage and a specific short term disability insurance in case of mental health crisis
c. Firm leadership believes in the 60 | 30 | 10 principle – when delegating a task, 60% will be done exactly how you want, 30% will be done right, but not how you would do it, and 10% will be done wrong. We encourage creativity and learning from each other, and also use this as an indicator of workplace wellbeing rather than perfectionism
d. Strong workplace culture leads to more business output
e. Growth of Firm: from a team of 4 to 19 and a revenue of $300,000 to $2.8 million

8. Is there a link between neurodiversity and success?
    a. Notable public figures with neurodiverse tendencies or diagnosis include:
        - Elon Musk (Asperger's)
        - Frank Sinatra (Manic Depressive/Bipolar)
        - Selena Gomez (Bipolar)
        - Mel Gibson (Bipolar)
        - Leonardo DiCaprio (OCD)
        - Henry Ford (Dyslexia)

- Ernest Hemingway (Depression)
- Thomas Jefferson (Asperger's)
- Michael Phelps (ADHD)
- Bill Gates (Dyslexia)

b. Musk named his electric car and power cell company Tesla, after the engineer and inventor Nikola Tesla, who was himself most likely autistic. Was Nikola Tesla Autistic?.[11]

Neurodiversity in the Workplace

"Managers say [hiring neurodiverse talent is] already paying off in ways far beyond reputational enhancement. Those ways include productivity gains, quality improvement, boosts in innovative capabilities, and broad increases in employee engagement." - Harvard Business Review. Competitive Advantage, *supra* note 9, at 3.

1. A growing number of prominent companies have reformed their HR processes to access neurodiverse talent. Invisible Diversity, *supra* note 4.
    a. JP Morgan's Autism at Work program, Hewlett Packard's neurodiversity program in cybersecurity, Microsoft's altered hiring strategy to recruit autistic individuals for roles that use their strengths. *Id.*
    b. Innovation in diversity of thought- 88% HR professionals believe offering mental health resources an increase productivity. 78% say offering such resources can boost organizational return on investment. Soc'y for Hum. Res. Mgmt., *supra* note 1, at 13.

2. Why don't companies tap neurodiverse talent?
    a. It comes down to the way they find and recruit talent, and decide whom to hire and promote. Competitive Advantage, *supra* note 9, at 6.
        - HR processes are not scalable. *Id.*
        - Behaviors of neurodiverse individuals are believed to be counter to normal practices. *Id.*
        - Employee fails the interview process. *Id.* at 7.
        - Conformity required of processes. *Id.* at 8.
3. Without neurodiverse talent, companies miss out on unique innovation, diversity of thought, and differential skill sets from "the edges" of the bell curve. *Id.* at 7.

"HPE's program has placed more 30 participants in software-testing roles at Australia's Department of Human Services (DHS). Preliminary results suggest the organization's ***neurodiverse testing teams are 30% more productive*** *than the others"* – Harvard Business Review. *Id.* at 5.

Mental Health for All

"When people don't have access to mental health services, their employer can expect to spend as much as 300% more on health care. It's actually more expensive for companies to do nothing than it is to invest in good mental health." —Dr. Jenna Carl, VP of Clinical Development and Medical Affairs. Mental Initiative Impact.[12]

1. Access doesn't mean your firm has to do everything. There are partners to aid. Invisible Diversity, *supra* note 4.

a. A study of 90,000 people found that stigma is one of the top reasons people don't receive care. 13% didn't receive care because others might have a negative opinion. 13% said it was because it might have a negative impact on their job. Statistics on Mental Health.[13]

b. Half of American workers are uncomfortable talking about their mental health in the workplace. *Id.*

c. Stereotypes generate obstacles, especially for high performers who may be struggling under perceived expectations and feel asking for help may be a sign of weakness. As a result, they may suffer stress, burnout, lack of work/life balance, and contribute to unnecessary conflict between individuals. Building Mentally Health Workplace.[14]

2. The Cost of Poor Mental Health: How do we make poor mental health in individuals and culture tangible?

a. World Health Organization estimates $1 trillion in lost productivity due to anxiety and depression. Soc'y for Hum. Res. Mgmt., *supra* note 1, at 4.

b. Outward signs of poor mental health in workers: Building Mentally Health Workplace, *supra* note 14.

- Lack of Focus & Attention
- Short Temper
- Uncontrolled Reactivity
- Bringing Personal Problems to Work
- Increased Tension Between Coworkers

a. Internal results of not addressing mental health issues: *Id.*

- Burnout
- Defense Mechanisms
- Neglecting Basic Self Care
- Tension
- Anxiety Attacks
- Unhealthy Coping Strategies

3. Why aren't organizations offering mental health resources to their employees? From a poll of employers: Soc'y for Hum. Res. Mgmt., *supra* note 1, at 7.
    - 33% say we haven't thought about workplace mental health. *Id.*
    - 27% say we are unsure of which benefits to provide. *Id.*
    - 21% say we don't have resources. *Id.*
    - 21% say it's too expensive. *Id.*
    - 18% say we don't know how to find or choose a plan. *Id.*
    - 11% workplace mental health isn't an issue in our organization or industry. *Id.*
    - 11% our employees are not interested in these resources. *Id.*
4. The most common reason cited is a general lack of recognition. Uncertainty leads to paralysis in leadership. The lack of capacity is a real issue. *Id.*
5. What are the benefits of Mental Health Awareness?
    a. Mental health is a business issue. *Id.* at 5. Not a firm issue, but a business issue.
        i. 58% of employees claim a healthy work/life balance is more important than financial compensation. *Id.* at 14.

ii. 86% of HR professionals indicated that offering mental health resources can increase employee retention. *Id.* at 12.

iii. 72% of HR professionals think mental health resources can attract new talent. *Id.*

iv. 88% of HR professionals believe offering mental health resources can increase productivity. *Id.* at 3.

v. 94% of HR professionals believe that by offering mental health resources, organizations can improve the overall health of employees. *Id.*

Building a Mental Health Foundation: Solutions and Accommodations

If an employee of yours was approached by a friend asking, "How does your firm handle mental health?" How would you want them to respond? Can you identify any possible negative perspectives they might bring up? Do your leaders lead by example?

1. A strong foundation can inspire and lead others will be able to incorporate mental health accommodation easily. A firm's mental health approach must come from the leaders of a firm and be embraced by all. Best Practices.[15]
2. Implementing strategy: Start with Trust. *Id.*

vi. Leaders promote mental health awareness, have a strong core value foundation, and create programs for support

vii. Consistency is key

viii. Communicate and offer preemptive options to employees before they reach a crisis point or disciplinary action is needed

ix. Create avenues encouraging conversations to address mental health

3. Front Line Leaders make the difference. *Id.* at 927.

    i. Direct managers promote mental health in casual and professional employee conversations

    ii. Lead by example. Participate in trainings and programs (provided or self-directed)

    iii. Flexible scheduling or allow time off for therapy, mental health days, programs

    iv. Maintain employee trust by keeping conveyed information confidential

4. Destigmatize: Educate your entire firm and normalize mental health and neurodiversity. *Id.* at 926.

    i. Humans are social beings that thrive when working in groups and sharing resources and workloads. Our brain is highly attuned to our social environment, using the same neural pathways for pain and pleasure to assess social interactions for potential threats and rewards. Neural Bases of Social Pain.[16]

    ii. Addressing the elephant in the room can feel awkward and even threatening for everyone.

    iii. Honesty and compassion are key to counteract this, and starts with education and a culture of openness.

iv. Peer groups: *"Peer training was cited as an effective method of breaking down these stereotypes and allowing employees to be vulnerable in a space that feels safe."* – Learning Collaborative Summary.[17]

5. The Environment: The social and physical environment can enhance or interfere with or enhance employee performance. HOK, *supra* note 8, at 6.
    i. Accommodating employees across a wide spectrum, including neurodivergence
        - Hypersensitive individuals who prefer controlled, predictable environments
        - Hyposensitive individuals who prefer additional sensory stimuli
    ii. These accommodations can take many forms, from personal resources and tools to the designed workplace environment
    iii. Designing for cognitively diverse individuals involves creating spaces to accommodate their unique work processes and needs. *Id.* at 9.
        - Collaborative spaces
        - Focus / Refresh spaces
        - Consideration for levels of sensory stimuli in different areas
        - Access to multiple types of space as needs may change with the work task or employee
6. HR & Management - Effective communication and processes are essential for leading a cognitively diverse team. Invisible Diversity, *supra* note 4.
    a. How are organizations measuring the efficacy of their mental health resources? Soc'y for Hum. Res. Mgmt., *supra* note 1, at 12.

- 48% employee engagement surveys. *Id.*
- 47% utilization of mental health resources. *Id.*
- 43% productivity and attendance. *Id.*
- 40% utilization of employee benefits. *Id.*
- 35% surveys to assess mental health & stress. *Id.*
- 30% one-on-one interviews with employees. *Id.*
- 20% healthcare and pharmaceutical claims. *Id.*
- 13% do not measure. *Id.*
- 11% vendor/third party company. *Id.*

b. Companies that have a reformed HR process include: SAP, Hewlett Packard, Microsoft, Wills Towers Watson, Ford, EY, Caterpillar, Dell Technologies, Deloitte, IBM, JP Morgan Chase, UBS. Competitive Advantage, *supra* note 9, at 3.

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[13] Maria Clark, *30 Disheartening Statistics on Mental Health Stigma*, ETACTICS (July 1, 2021), https://etactics.com/blog/statistics-on-mental-health-stigma.

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Don't Accept Mental Health Differences at Your Firm… Embrace Them!

1

Top Takeaways

1. Incorporating Mental Health
2. Diversity and Attracting Talent
3. Strengths in Differences
4. Discussing Mental Health
5. Destigmatizing Mental Health

2

About Me

Technical Facts

- Sole owner of DS Architecture
- 24 years of A/E Experience
  - CEO
  - Public Safety | Civic Architecture Studio Director
  - Director of Business Development and Marketing
- Growth of firm since 2010 = 6.5Xs
- Affiliated with PSMJ since 2019
  - Event Speaker at Thrive
  - CEO Roundtable
- 20+ Speaking Engagements Nationally
- Master of Architecture w/ Certificate of Urban Design
- AIA, NCARB LEED AP BD+C

Fun Facts

- Finished in the top 5% of the Boston Marathon
- Building Design and Construction 40x40
  - "Growth Generator"
- Worlds first Millennial
- Identical Twin Brother

3

Crisis

"The extent of America's mental health crisis is alarming. Tens of millions of U.S. workers are experiencing mental health issues and are less productive because of it, inundating organizations with a vast array of new challenges. Mental health issues such as burnout and stress are hampering short-term productivity and long-term business growth."

- Society of Human Resources Management (SHRM) Foundation

4

The Global Mental Health Burden in Numbers

280 million people are affected by depression

88.1% of employees reported concerns with their stress levels over the past year.

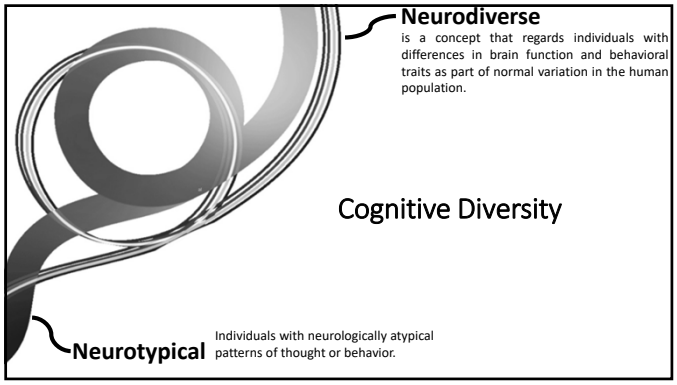
85% of autistic individuals are unemployed as of April 2021

1 in 8 people are living with a mental disorder

5

Mental Health	**Mental Illness**
Stressed	ADHD
Loved	Dyslexia
Burnout	Autism
vs.	
Physical Health	**Physical Illness or Disease**
Diet	Diabetes
Nutrition	Allergies
Sleep Cycle	Colds and Flu

6


Neurodiverse
is a concept that regards individuals with differences in brain function and behavioral traits as part of normal variation in the human population.
Cognitive Diversity
Neurotypical
Individuals with neurologically atypical patterns of thought or behavior.

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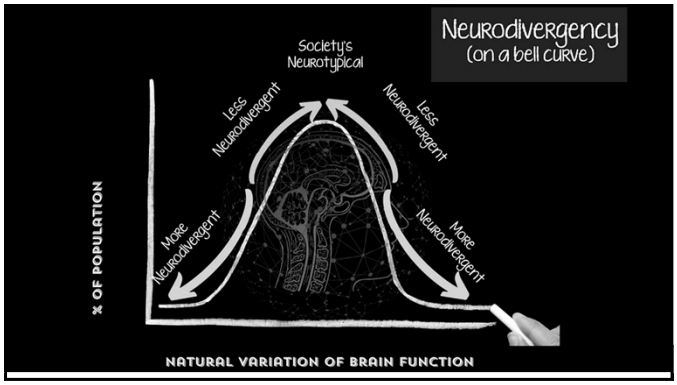
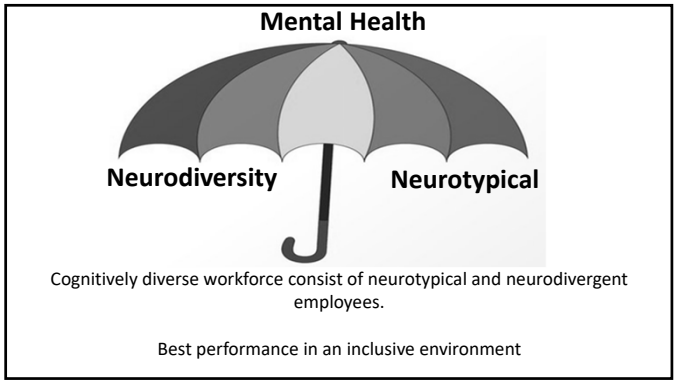

Neurodivergency
(on a bell curve)
Society's Neurotypical
Less Neurodivergent
Less Neurodivergent
More Neurodivergent
More Neurodivergent
% OF POPULATION
NATURAL VARIATION OF BRAIN FUNCTION

8


Mental Health
Neurodiversity
Neurotypical
Cognitively diverse workforce consist of neurotypical and neurodivergent employees.
Best performance in an inclusive environment

9

Mental Health for Neurodiversity

10

Neurodiversity

*"Many people with neurological conditions such as autism spectrum disorder and dyslexia have **extraordinary skills**, including in pattern recognition, memory, and mathematics. Yet they often struggle to fit the profiles sought by employers."*

Harvard Business Review

11

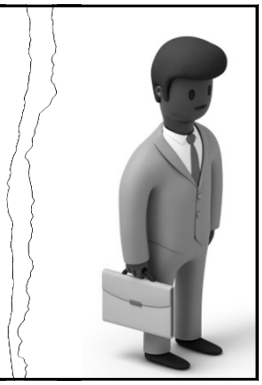
12

13

Neurodiversity as a Competitive Advantage

Harvard Business Review (May-June 2017)

- **Meet "Jack"**
  - Wizard @ Data and Programming Analysis
  - Combination of Mathematical Ability and Software Skills
  - CV: 2 Master's Degrees w/ Honors
  - Department's Most Productive Employee
  - Hardworking and Never Wants to Take Breaks
- - Ideal Candidate for a A/E Firm



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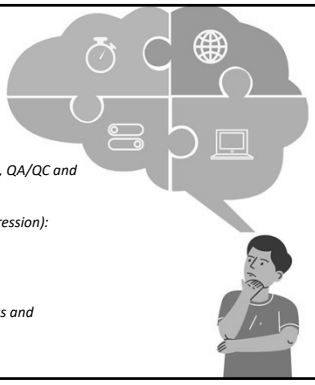
Superpowers of the Neurodivergent

Dyslexia: Visual Thinking, Pattern Recognition, QA/QC and Complex Reasoning

Mood Disorders (Like Bi-Polar and Major Depression): Strong Creativity

ADHD: Problem Solving and Creativity

Anxiety (Social Anxiety and PTSD): Group Tasks and Evaluation of Situations for Threats



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Bipolar Defined

Bipolar disorder causes unusual shifts in mood, energy, activity levels, and the ability to carry out day-to-day tasks. People experiencing these shifts often do not recognize their likely harmful or undesirable effects. Approximately 45 million people worldwide suffer from bipolar disorder at any given time.

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Growth of Firm

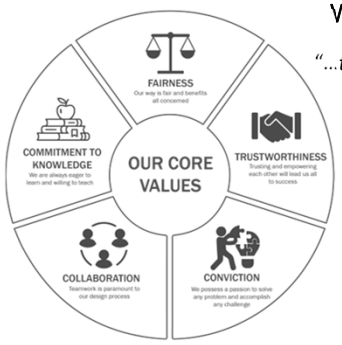
2010 + $

2024 + $$$$$$$$

"Our growth is based on empowering each person's unique cognitive strengths."

17

Why Mental Health Works



"...the potential returns are great."
-Harvard Business Review

"Diversity of Thought comes from Diversity of Experiences"

18

Don't just take it from me

- JP Morgan: Autism at Work
- Hewlett Packard: Neurodiversity program in cybersecurity
- Microsoft: altered hiring strategy to recruit autistic individuals for roles that use their strengths

"…paying off in ways far beyond reputational enhancement."
-Harvard Business Review

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Is there a link between neurodiversity and success?

20

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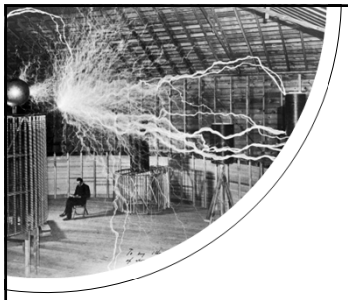

Nikola Tesla

The "**father of the 20th century**"

22

Elon Musk and Nikola Tesla's are not the only ones with neurodiverse tendencies or a diagnoses.

23

"Major employers, business experts, and researchers are recognizing a powerful new source of competitive advantage: 'invisible diversity' in the work place."

- One Mind at Work

24

Why Don't Companies Tap Neurodiverse Talent?

- HR processes are not scalable
- Behaviors of neurodiverse individuals are *believed* to be counter to normal practices
- Employees fails the interview process
- Conformity required of processes

25

Opportunities of Neurodiversity

"HPE's program has placed more 30 participants in software-testing roles at Australia's Department of Human Services (DHS). Preliminary results suggest the organization's ***neurodiverse testing teams are 30% more productive*** *than the others"*

Harvard Business Review

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Mental Health for All

27

Mental Health is a Business Issue

"When people don't have access to mental health services, their employer can expect to spend as much as 300% more on health care. It's actually more expensive for companies to do nothing than it is to invest in good mental health."
—Dr. Jenna Carl, VP of Clinical Development and Medical Affairs

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Statistics on Mental Health Stigma

13% didn't receive care because others might have a negative opinion

33% said it was because it might have a negative impact on their job

A study of **90,000** people found that stigma is a one of the top reasons people don't receive care

*etatics.com

29

Stereotypes Generate Obstacles

High Performers

30

The Cost of Poor Mental Health

1 Trillion worth of lost productivity due to anxiety and depression.

-World Health Organization

31

The Cost of Poor Mental Health

Poor mental health leads to less productivity

- Lack of Focus & Attention
- Short Temper
- Uncontrolled Reactivity
- Bringing Personal Problems to Work
- Increased Tension Between Co-Worker

32

The Cost of Poor Mental Health

- Burnout
- Defense Mechanisms
- Neglecting Basic Self Care
- Tension
- Anxiety Attacks
- Unhealthy Coping Strategies

33

Why aren't organizations offering mental health resources to their employees?

33% we haven't thought about workplace mental health

27% we are unsure of which benefits to provide

21% we don't have resources

21% it's too expensive

18% we don't know how to find or choose a plan

11% workplace mental health isn't an issue in our organization or industry

11% our employees are not interested in these resources

SHRM Foundation

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86% of HR professionals indicated that offering mental health resources can increase employee retention

72% of HR professionals think mental health resources can attract new talent

88% of HR professionals believe offering mental health resources can increase productivity

94% of HR professionals believe that by offering mental health resources, organizations can improve the overall health of employees

* SHRM Foundation

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Building a Mental Health Foundation Solutions and Accommodations

Question:

If an employee of yours was approached by a friend asking, "How does your firm handle mental health?" How would you want them to respond? Can you identify any possible negative perspectives they might bring up?

37

Destigmatize

Educate your entire firm and normalize mental health & neurodiversity

38

Affluminder

A SOCIALLY HEALTHIER WAY FORWARD

We are changing the narrative around mental health to dissolve the stigma around mental illness.

39

40

Destigmatize

Trainings

Offering mental health support programs attract and retain talent.

41

Management Trainings

42

PEER GROUPS

"Peer training was cited as an effective method of breaking down these stereotypes and allowing employees to be vulnerable in a space that feels safe." – One Mind at Work

43

Destigmatize

The Environment

Make mental health accommodation a foundation of your firm's culture

44

45

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48% employee engagement surveys
47% utilization of mental health resources
43% productivity and attendance
40% utilization of employee benefits
35% surveys to assess mental health & stress
30% one-on-one interviews with employees
20% health care and pharmaceutical claims

13% none-we don't measure this
11% vendor/third-party company

How are organizations measuring the efficacy of their mental health resources?

* SHRM Foundation

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Companies that have a reformed HR Process

SAP
Hewlett Packard Enterprise
Microsoft
Wills Towers Watson
Ford
EY
Caterpillar
Dell Technologies
Deloitte
IBM
JP Morgan Chase
UBS

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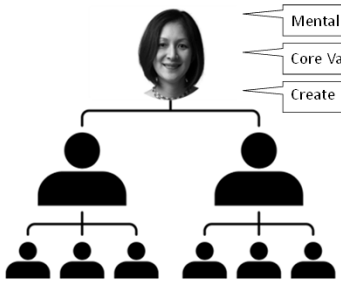
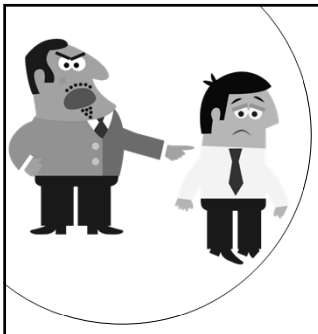
Implementing Strategy



- Mental Health Awareness
- Core Value Foundation
- Create Programs for Support

50



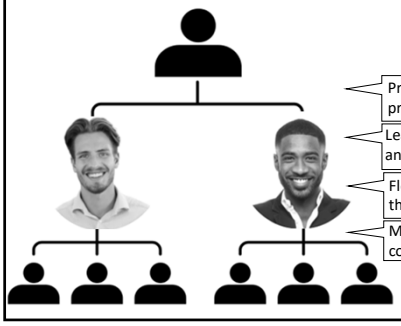
Communicate and Offer Preemptive Options

Communicate options that support to employees before they reach a crisis moment or disciplinary action is needed

Create avenues encouraging conversations addressing mental health

51

Front Line Leaders Make the Difference



- Promotes mental health in casual and professional employee conversations
- Lead by example. Participate in trainings and programs (provided or self-directed)
- Flexible scheduling or allow time off for therapy, mental health days, programs
- Maintain employee trust by keeping conveyed information confidential

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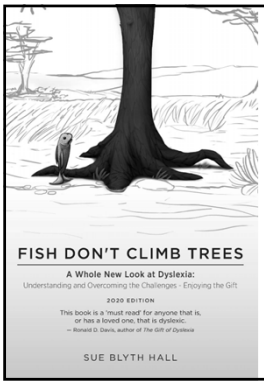

Major Shift in Managing People

Harvard Business Review (May-June 2017)

"Neurodiversity programs induce companies and their leaders to adopt a style of management that emphasizes placing each person in a context that maximizes her or his contributions"

– Harvard Business Review

53

Recommendation

- Start small.
- Destigmatize.
- Trainings.
- Environment.
- HR and Management.

It's a business decision!

54

55

How to normalize mental health at your firm?

Education on the benefits of mental health to the workplace and environment

Highlight personal stories (if you don't have any, use mine from today!)

56

Ř & J

List of Training Programs

https://drkatycook.com/

Headspace for work

57

Mental health diversity commitments today's most sought-after talent wants to see from potential employers

- Mental Health Education
- Stress relief programs
- Tailored Training
  - Learning module to teach soft skills to employees whose neurodivergency makes traditional professional environments challenging
    - Ex: Scheduling tool training for ADHD
  - Suicide prevention

- Benefits:

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"Offering support to employees before they reach a crisis moment is a straightforward way of improving transparency with an organization without singling out employees with issues." – One Mind at Work

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Seven Major Elements to Hire and Retain Neurodivergent Individuals

Specialisterne Foundation

1. *Team with "Social Partners" for expertise you lack.*
2. *Use nontraditional, noninterview-based assessment and training processes.*
3. *Train other workers and managers.*
4. *Set up a support ecosystem*
5. *Tailor methods for managing careers.*
6. *Scale the program.*
7. *Mainstream the program.*

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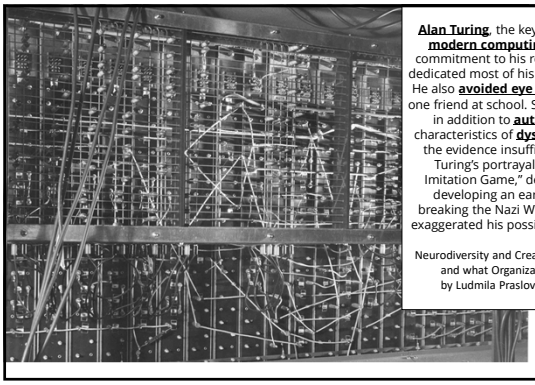

Alan Turing, the key figure in developing **modern computing**, had an extreme commitment to his research interests and dedicated most of his time to his inventions. He also **avoided eye contact** and only had one friend at school. Some have argued that in addition to **autistic traits** he had characteristics of **dyslexia**, but others find the evidence insufficient. It is likely that Turing's portrayal in the movie "The Imitation Game," depicting his work on developing an early computer while breaking the Nazi WW2 code, had greatly exaggerated his possible autistic attributes.

Neurodiversity and Creativity: What we do Well, and what Organizations can do Better.
by Ludmila Praslova, Ph.D., SHRM-SCP

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Hans Christian Andersen is reported to have been socially awkward, "**different**," and often bullied. Some researchers argue that he used his characters to describe autistic experiences. Indeed, his characters represent many **autistic characteristics** and struggles of interacting with the unhospitable and uncomfortable world. These include **communication difficulties** and the high price of masking and fitting in (the **Little Mermaid's** loss of voice and the excruciating pain of walking), being bullied and gaslighted (the **Ugly Duckling**), sensory sensitivities (**Princess and the Pea**), and the inconvenient truth-telling (the Little Child in the Em**peror's New Clothes**).

Neurodiversity and Creativity: What we do Well, and what Organizations can do Better.
by Ludmila Praslova, Ph.D., SHRM-SCP

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Mental Health Benefits

- People Matter More than Projects and Profit
- 1 Week Respite
- Short Term Disability Including Mental Health
- Life Insurance Including Mental Health
- Unlimited PTO within bumpers - goal oriented.

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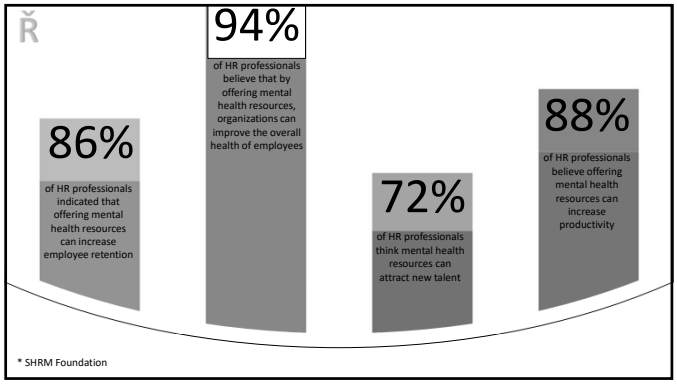
Pieces and Parts

- 45% of people who died by suicide consulted a primary care physician within one month before they passed away.

65



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R

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www.daretolead.brenebrown.com
Leadership Assessment

Training on the following topics:
- Shame
- Empathy
- Vulnerability
- Trust
- Emotional Intelligence
- Courage
- Leadership
- Culture

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Neurodiversity
A Competitive Advantage

Companies Are Seeing Results

- **Productivity Gains**
- **Quality Improvement**
- **Boosts in Innovative Capabilities**
- **Increases in Employee Engagement**

"Hewlett Packard's program has placed more 30 participants in software-testing roles at Australia's Department of Human Services (DHS). Preliminary results suggest the organization's ***neurodiverse testing teams are 30% more productive*** *than the others"*
– Harvard Business Review

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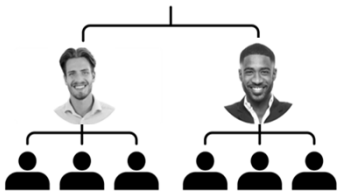
Front Line Leaders Make the Difference



Openly acknowledge that stigma around mental health exists

Firmly and publicly forbid stigmatizing jokes, comments and actions

Participate in Empathy Leadership Training

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Front Line Leaders Make the Difference

Openly acknowledge that stigma around mental health exists	Firmly & publicly forbid stigmatizing jokes, comments & actions
Lead by example by participating in offered trainings & programs.	Educate themselves on mental health challenges & disorders experienced by their employees

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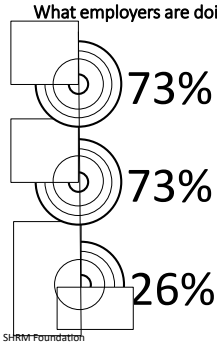
What employers are doing to combat the crisis?



73% offered mental health coverage

73% offered employee assistance programs (EAPs)

26% offered workshops on mental health

* SHRM Foundation

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ONE MIND At Work

"Mental illness will contribute to $16 trillion in lost output by 2030, significantly outpacing heart disease, cancer and diabetes. Depression alone is estimated to cause 200 million lost workdays each year. Today's economy requires an engaged, resilient and innovative workforce. ***Every organization has an economic imperative to address mental health.****"*

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National Conference on Special Needs Planning and Special Needs Trusts

November 22, 2024

Divorce and SNTs

STETSON LAW

Center for Elder Justice

Access and Justice For All®

Stetson 2024 National Conference on Special Needs Planning and Special Needs Trusts

October 18, 2024- Main Conference Breakout Session #3

3:30pm-4:20pm

Divorce and SNTs

Beth C. Manes, Esquire (Manes & Weinberg, LLC, Mountainside, New Jersey)

Ethan J. Ordog, Esquire (Begley Law Group, P.C., Moorestown, New Jersey)

Outline of Topics:

1. Overview of Divorce and Parents of a Child with Special Needs (EJO)
    a. Divorce between Couples
    b. Interplay of involvement of parents of a Child with Special Needs and Divorce Factors

2. Challenges Facing a Family and Logistics to Consider (EJO/BCM)
    a. Professionals Involved
    b. Family members
    c. Life Care Plan
    d. Letter of Instruction

3. Settling a Divorce and Practice Points regarding Agreement between Parents (BCM)
    a. Provisions to Include in Settlement Documents
    b. Custody Considerations
    c. HIPAA
    d. Authority of Guardians

4. Estate and Trust Planning for Divorced Parents with a child with Special Needs (BCM)
    a. Documents Inclusions
    b. Practice Points

5. Financial Considerations and Asset/Debt/Income Checklist (EJO)
    a. Inventory of Assets/ Death benefits
    b. Proper titling with Financial Institutions
    c. Insurance (Whole v. Term Life)

1. Overview of Divorce and Parents of a Child with Special Needs

Divorce between couples remains a prevalent part of society. Despite the desire of individuals to maintain marital bliss, a number of factors play into the dissolution of a marriage. While statistics on the topic of the trend in divorce rates of couples with a child with special needs vary based upon the individuals polled to secure the information utilized, it is recognized that a couple with a child with special needs often have increased logistical considerations and matters to deal with and/or resolve which can complicate their relationship. While all couples can have complications in their relationships, with or without the inclusion of a child with a special need, some specific issues arising, or which may be heightened or increased if a child with special needs is a consideration, include but not be limited to, the following:

- Differences in parenting style
- Commitment associated with medical care/treatment/therapy
- Financial requirements
- Demands of employment
- Complications with rearing of other children/siblings of child with Special Needs
- Lack of a "Marital" like relationship
- Disagreement over decisions related to children and their needs
- Mental Health Considerations

It is recognized that all parents of a child with a special need, married or unmarried, want to ensure that the needs of the child, and for that matter all of their children are met. Parents are often called upon to engage not only in difficult decisions impacting their children, but also to deal with complex issues involving medical care/treatment, legal matters, school considerations, physical care needs, insurance matters, public benefit systems and eligibility, increased financial commitment/responsibility, etc. It seems, in working with individuals who have experienced divorce from their partner in a situation involving a child with a special need, that the foundation

of the relationship is paramount to the success of navigating the resulting circumstances which arise in these matters. Client(s) explain, in those circumstances where the child with a special need was born into the relationship, that they had never discussed/considered how they might deal with or handle the inclusion of a child with special needs into their family. That said, even individuals who knowingly brought a child with known special needs into their relationship, can struggle in their relationship given the variety of decisions and issues which can arise in the raising of and/or corresponding care needs of a child with a special need. Same can be true for a parent of an individual with a child with a special need who seeks to foster a further marital like relationship and the importance of the understanding of a proposed partner as to the time commitments or other factors which may impact the success thereof.

Unfortunately, in dealing with these types of cases as an estate planning/special needs practitioner, it is often stated by clients, who are going through or have gone through a divorce, that they had wished they had been better informed and/or had worked with professionals sooner in the process in an effort to better understand issues that, in many cases, led to differences with their partners, ultimately leading to the filing for divorce.

2. **Challenges Facing a Family and Logistics to Consider**

As a premise to the scope of estate planning/legal representation required for a family that has a child with a special need, it is recognized that a parent/parents are often facing decisions which they might have previously had no experience/training. Moreover, these individuals are often seeking information and guidance on matters which are new to them and which, in themselves, have complexities and considerations which can often seem overwhelming. While it is recognized that many couples who welcome a child into their lives may not have extensive formal training or prior preparation into parenting and could feel

overwhelmed, a couple who has welcomed a child with a special need often have further issues to contend with accordingly. Furthermore, it is also important, when dealing with or addressing a parent or parents of a child with a special need to understand if the special need was a natural occurrence or one stemming from a complication at birth or other resulting injury which may require additional consideration/action.

Professionals and Team

While the scope of the needs of the child, as well as financial considerations, will play a major role in the development of a "team" that is required to address or cover the numerous issues/action items that might need to be resolved, the parent/parents should be mindful of and explore relationships that are necessary to provide guidance and/or expertise. These professionals/members will often include, depending on the circumstances, but may not be limited to, the following:

General Practitioner (Doctor)
Specialty Practitioners (Doctor)
Estate Planning/Trust Attorney
Education Attorney
Personal Injury Attorney
Disability Attorney
Public Benefits Specialist
Life Care Planner
Accountant
Financial Advisor
Therapist
Family Members/Relatives

While Family Members/Relatives are often included in the key figures to maintain in the communications regarding a plan, regardless, they may play an even larger and essential role when parents are divorced in an effort to ensure that "both" sides, to the extent same may be in dispute, have some involvement, particularly if a parent or the parents were to pass away. It is one thing for another child of the divorced parents to assume a more active and perhaps permanent role in the care of the child with a special need, but often the individual designated may have been chosen or considered when the parents were married. Similarly, with many of the professionals or members of the team, it is prudent for both parents, to the extent desired/necessary, to have communications with the professionals involved and develop a relationship to avoid turmoil at the time of a divorce to ensure some continuity in the continued relationship with the child with a special need and the professionals involved.

It is important, as may be required or directed by the parents, to ensure that the professionals involved have some level of communication with one another as to the plan developed and the critical role played by each in the process. Furthermore, as individual(s) may be chosen to participate or be involved with the child with a special need after the passing of a parent/parents, maintaining and having update available from professionals, as well as including such individual(s) in certain communications/meeting, especially critical to the health and well-being of the child, in addition to ones that may impact medical care, residential placement and/or the financial matters associated with the child, is advisable.

Life Care Plan

Not just for litigation purposes… more and more families who are engaging in planning for a child with a special need, want to be able to understand trends and issues which they should be mindful of in the care/treatment plan for their child, in addition to the costs associated. For

litigation purposes, a life care plan is often so different from the perspective of the costs or expenses contained in the Plaintiff v. Defendant report. Notwithstanding, it can be a valuable tool, if the focus is directed accordingly, for parents, as well as those who may assume responsibility/control of the child, to have access to a life care plan. Given the circumstances and the extent to which an individual may have formerly been involved with or kept apprised of decisions impacting the child, a life care plan may provide valuable insight into the condition of the child and anticipated medical/personal needs, in addition to the corresponding costs associated therewith. A life care plan can even become more crucial when parents of a child with a special need decide to get divorced to understand the scope of potential financial commitments or need that the child may have to ensure that one party does not bear a greater burden for no other reason other than a lack of understanding of the potential needs.

Letter of Instruction

For parents of a child with special needs, married or unmarried, it is recognized that such individual(s), in most instances, have realized significant involvement in the development of a care plan, including visits with physicians, dealing with education logistics, realization of financial commitments, understanding the personality and specific likes and dislikes of their child, in addition to many other specific occurrences which might be crucial and beneficial to the maintenance and management of a child with a special need, particularly if the parent(s) are no longer alive and/or able to manage the needs of the child.

One of the most important aspects of planning, specifically in furtherance of the recognition by a parent of a child with a special need, is the coordination of their drafting of a letter of instruction. Therein, a parent or parents, have the opportunity to describe vital knowledge they have obtained in the care of their child, but also recognize the scope of potential

hurdles or obstacles, in addition to the future goals or desires that they would want to advance in furtherance of the care of their child. Depending on the involvement of the individual/family members who has been earmarked for potential involvement with the care or who is in line to be named as a fiduciary, i.e. agent under Power of Attorney/Guardianship, this is often a valuable resource to remember or learn about specifics as it pertains to the history of the child with a special need and/or be guided by the direction of those who had formerly been entrusted with and/or dealing with these matters.

3. **Settling a Divorce and Practice Points regarding Agreement between Parents**

There are many issues to address during settlement negotiations; it is to everyone's benefit to have a special needs attorney involved from the inception. It is incumbent upon the special needs attorneys to educate the family lawyers about the potential consequences of leaving certain issues unaddressed. Although the age of a child with special needs will dictate which issues are immediate and which can be deferred, it is best to encourage the parties to address all issues within the settlement agreement, with time frames for decisions to be made, and a framework for resolution if the parties cannot agree.

a. Child support. When parents of children with special needs get divorced, child support is an issue with respect to the amount, the duration, and the method of payment.

i. Calculation of child support. Most states have guidelines for calculating child support. Typically, the calculation considers both parents' incomes, the standard expenses of raising a child (i.e., food, shelter, clothing, childcare, entertainment costs, transportation), and parenting time. However, these guidelines are developed by economists and do not account for extenuating circumstances, like the often-increased costs of raising a child

with special needs, or the often-reduced income experienced by one of the parents. Therefore, the courts have discretion to deviate from the guidelines, when appropriate.

The child support amount is usually set to support of all the children, without designating a "per child" amount. For example, the agreement might provide for "$xxx per month for the benefit of the parties' three (3) unemancipated children." Then, as each child emancipates, the child support amount may be reduced (though not necessarily by 1/3, this will vary by case and be dependent on the facts therein). Such provision will jeopardize the benefits eligibility for a child with a disability. Therefore, this should be discussed with the parties and the family lawyers so that the share for the child with special needs is easily discernible for the purpose of payment into a self-settled special needs trust, if necessary, or for the purpose of reporting the child's income, if the parties decide not to utilize a special needs trust.

ii. Duration: Child support ends when a child is emancipated. Emancipation is triggered by events like college graduation, marriage, military enlistment, living independently. If at the time of the divorce the parties know that their child will never be emancipated, the agreement should so state. However, if the child with a disability is too young for the parties to know the impact on independence, or if the child is older and there is hope for eventual emancipation, which should also be reflected in the agreement. In those cases, the provision should also include a date by which the parties should either agree on emancipation (or not emancipation) and a plan for resolution of a conflict if there is not an agreement.

iii. Method of payment: Parents and family lawyers are often surprised to learn that child support is deemed income to the child at age 18. It is imperative that the parties be fully advised of the impact of child support on their child's benefits eligibility, and the steps they can take to protect it. If child support is irrevocably assigned to a self-settled special

needs trust ("(d)(4)(A) trust"), it will not be counted as income to the child for purposes of means tested benefits eligibility.[1] The age of the child will likely determine whether or not the decision of whether or not to direct payment of child support into a (d)(4)(A) trust will be made now or in the future. As with the issue of emancipation, it is best to schedule a date by which this decision will be made, and a plan for resolution if there is not an agreement. Of course, delaying that decision has its risks. Primarily, the risk that the parties will not revisit the issue as planned, and the child will be denied benefits. Secondarily, the risk that the parties will revisit the issue within the framework agreed upon, but will then disagree on issues like selection of a trustee. Many parties decide to play it safe by providing that when the child with special needs reaches age 18, that child's support will be paid into a (d)(4)(A) trust. In the best of circumstances, that trust will be drafted, with trustees selected, and attached to the agreement.

Depending on the facts and finances of a particular family, the parents may choose not to direct child support into a (d)(4)(A) trust. For example, sometimes parents do not want to be restricted as to how the child support is spent, as would be the case if it were in a (d)(4)(A) trust. If a family has sufficient means to provide for a child without the need for government benefits, there is no reason for them not to do so. However, some adult programs and supported housing for which families cannot privately pay, require Medicaid eligibility. Therefore, even wealthy families may need to have child support directed into a (d)(4)(A) trust.

iv. Ancillary child support issues. Regardless of whether or not parents choose to prioritize benefits eligibility at the time of their divorce, they should consider what will happen when the payor of child support and the caretaker parent are no longer able to provide financial and daily physical support. It is likely that they will each purchase a life

[1] POMS SI 01120.200 G 1 d; POMS SI 01120.201 J 1 d.

insurance policy to provide funds to replace what they are currently providing (financial and otherwise). It is important to advise them about the resource limits in order to qualify for means tested benefits, and the ramifications of naming that child as the beneficiary of a life insurance policy. Depending on their relationship, the parties can jointly create a third-party special needs trust to be the beneficiary of both of their policies. They may even agree that the survivor of them will serve as trustee, and then agree upon a successor. This trust should also be created at the time of divorce and attached to the agreement.

b. Custody Considerations. Special needs attorneys are often called upon by family lawyers, mediators and judges to opine on issues of physical and legal custody of children with special needs. Although our legal knowledge is important, sometimes we bring even more value to the table by raising issues that do not come up in families without children with disabilities, or by connecting them with experts to opine on the needs of the children with disabilities.

i. Physical custody. Although many families decide that physical custody will be shared equally, this is not so easy when children have disabilities. Families must consider a child's physical limitations and mobility issues. Is there medical equipment that is not easily transported between 2 homes? Are both homes geographically convenient to regular medical/therapeutic/tutoring appointments? How important is routine to a child's daily success? How does a child transition from one environment to another? If the family lives close to a state border, and one parent is going to establish domicile in the other state, consider the child's benefits eligibility if 50% of their time is spent in another state.

What about the child's education? After the divorce, will the parents be living in the same school district? If so, does the child's IEP provide transportation? If it does, it is very likely that the district will only transport to and from one house. If the parents

will not live in the same school district, there should be a discussion about how the districts will determine the child's domicile if physical custody is 50/50. Additionally, the parents should consider which district will be better for the child. For example, if the parents had to fight for special education and related services in the current district, it might be best to have the child remain in that district. On the other hand, if the parents are not happy with the current provision of special education and related services, they might consider having the child domiciled in the other district. If the parents disagree on which district would be in the child's best interest, they should engage the services of an expert to evaluate the programs and render an opinion. However, it is important to keep in mind that a new district does not have to implement the old district's IEP. They will have 30 days to review and propose their own IEP. There is no guarantee that this will be better, or even as good as, the current IEP.

ii. Legal custody. Joint legal custody, which has become the norm, means that divorced parents have equal decision-making power. This becomes problematic mostly in 2 realms.

The first is with respect to the child's healthcare and therapies. If parents disagree on treatments, therapies, etc., the healthcare providers will find themselves in the middle of the dispute and not want to continue to treat the child. Consider having one parent be the primary parent for healthcare decision-making, at least for day-to-day decisions, while requiring that the other parent be informed, and even consulted. It is in the child's best interest for current doctors and therapists to continue to provide needed healthcare.

The second area is education. Unless one parent is the primary parent for education decisions, both parents will have equal say in a child's program and placement. When parents disagree on implementation of an IEP, it will result in a cessation of services unless and

until they either reach an agreement, or a court orders that one of them has sole authority to make decisions. Consider having one parent be the primary parent for education decisions while requiring that the other parent be informed, and possibly entitled to participate in child study team meetings. It is in the child's best interest for there to be continued provision of special education and related services.

c. Transition to adulthood. Just as child support may not stop when a child with special needs reaches ag 18, the need for decisions to be made for that child may also continue.

i. Guardianship/Conservatorship. A child's level of independence and ability to make their own decisions may not be ascertainable at the time of divorce. Even so, it should be addressed in the settlement agreement. The parties should agree on a date by which they will discuss the issue of guardianship/conservatorship, including but not limited to: the specific application to be filed (i.e., limited guardianship, full guardianship), and who should seek appointment as guardian. Even if the parents cannot work together as co-guardians, there is often opportunity for compromise if one parent becomes guardian of the person and the other becomes guardian of the property, with both having the obligation to consult and inform the other. The agreement should also address how any disagreement should be resolved.

**** Guardian Practice Point/Consideration****

A parent may want to be involved in some manner when there is a guardianship filing, although he or she may not have been as actively involved with the child or the care plan developed. In instances of divorced parents this is seen even more and can lead to litigation of the scope of the guardian appointment. Particularly when there is ongoing visitation/custody issues to contend with, it may make sense to include, even if a parent might not want to serve as a Guardian, the recognition of such individual as a HIPPA authorized designee so that the parent can communicate with medical professionals and secure information to the extent deemed necessary. This discussion has led the resolution of multiple divorce parent guardianship proceedings

ii. Benefits. The agreement should address who will be responsible for applying for benefits when the child becomes eligible, and who will be the contact person for programs and representative payee, if necessary.

iii. Protective Arrangement Succession. It is important for the parents to consider, in addition to their own agreement related to the scope of authority and type of protective arrangement that will be pursued upon their child with a special need turning eighteen, it is also equally important to consider who might be involved in future proceedings/documents as guardian/conservator/agent for the child, specifically if the parents have passed away and/or are no longer able to handle the duties and responsibilities.

4. Estate/Trust Planning for Divorced Parents with a child with Special Needs

After all of the points are negotiated and agreed upon, the parties must execute the necessary documents and beneficiary designations to ensure proper implementation.

a. Documents. If the settlement agreement included trusts, those documents must be created. Best practice would be to execute them contemporaneously with the settlement agreement, but the parties might have agreed to address them later. It is important to explain the interplay between 1st and 3rd Party Special Needs Trusts and the impact of improper planning or simply a failure to finalize recommended planning.

b. Beneficiary designations. Some beneficiary designations cannot be changed until after the divorce. The importance of reviewing, and changing where necessary, beneficiary designations cannot be overemphasized. This is important whether or not there are children with special needs, but it is essential when an improper beneficiary designation renders a person with disabilities ineligible for needed programs and services.

c. Practice points. Provide family lawyers with lists of questions to ask, and documents to obtain from clients. Ask for a list of assets and proof of how they are titled, as well as any beneficiary designations in place.

5. Financial Considerations and Asset/Debt/Income Checklist

Inventory of Assets

As indicated above, all individuals, but perhaps even more importantly for a family in the process of a divorce, should have an accurate and up-to-date listing of all assets, debts, obligations and anticipated amounts that might be received, i.e. inheritance, lawsuit settlement, workers compensation benefit, etc. Furthermore, an individual should be able to provide the titling of all assets, in addition to confirmation of the present beneficiary designations, if any, which exist at the time of planning/divorce proceedings. When an individual is asked to engage in the completion of the forms/intake, it is always surprising to them the scope of their assets and/or benefits that they did not realize they even had, i.e. work death benefit, disability, etc. In furtherance of recognizing planning, especially for the purposes of future income, it is also important for individuals, to the extent possible, to understand what potential retirement benefits, i.e. pension, social security, retirement distributions, etc., which might or could be received by them when they retire.

Proper Titling with Financial Institutions

In reviewing accounts, it is also important to ensure that the client(s) are aware of the titling of accounts, i.e. in the name of the client, jointly, beneficiary/TOD/POD designated, etc. It is a consistent issue in the transition of assets that the titling disrupts the planning that has been effectuated because of the manner in which assets have been titled. Moreover, as new accounts, particularly life insurance/retirement accounts may be secured by a client, especially if they have

a child with a special need, given the possible titling to a Special Needs Trust, but really in all circumstances, they must make sure to have proper designations included on the beneficiary pages. Often, when meeting with Counsel, a client engaging in planning will be guided on how to direct for the designations. When they are outside the scope of the planning process, they will often forget or simply be uncertain of the specific inclusion that would be required for the designation of that benefit to a child, trust, etc.

Insurance (Whole v. Term Life)

While most practitioners fully understand and are well versed in the types of life insurance and are able to review a policy and provide guidance and understanding to clients, it is a consistent issue that the clients themselves are unaware of the differences and focus upon the costs and the figure of the insurance without fully understanding the potential downside of limiting their insurance needs. This relationship with the types of insurance, particularly in a situation involving a divorce, if there is a requirement of the securing of/maintaining of a policy must be addressed to ensure is adequately protects or meets the requirements of the agreement, but also, for more prudent purposes, simply is the right fit under the circumstances. Often, clients reach an understanding of this logistical issue when it might be too late to secure a more appropriate policy because of age, costs, medical condition, etc. It can be financially difficult for any individual to maintain a life insurance policy, but it is imperative to educate and direct guidance on the topic to the extent reasonable and plausible.

IF INSURABLE, YOU ARE NEVER MORE INSURABLE THAN YOU ARE TODAY!!


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National Conference on Special Needs Planning and Special Needs Trusts

November 22, 2024

Beyond Goodbye: Trust Considerations in Death and Dying

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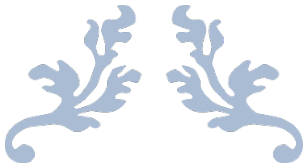


BEYOND GOODBYE

Trust Considerations in Death and Dying

OCTOBER 18, 2024
MEGAN BRAND, EXECUTIVE DIRECTOR, CFPD
CHRISTINA STRONG, ESQ, DILWORTH PAXSON, LLP

Impact of Organ Donation from a Personal Perspective:
(written from the perspective of Megan Brand)

From a very young age, I learned what organ donation was and its impact on the recipients. My mother's father (already deceased by the time I was born) and four of her eight siblings had inherited polycystic kidney disease. The only way it could be treated was through dialysis in the short-term and through kidney transplantation in the longer-term. I remember many excited moments when my aunt received calls to rush to the hospital and the times the kidney was not a match or not viable for some other reason. I also experienced two of aunts being live kidney donors for their siblings—the ultimate gift.

Fast forward to just four years ago when I was a mom to four and an aunt to many nieces and nephews-both biological and through marriage. In the summer of 2020, we received the call that no one wants to get. Our 19 year old nephew (my husband's sister's child) had been shot point blank while serving as a bouncer for a bar after denying entrance to the shooter. His parents share the following;

> *A noble and honorable sacrifice. The star on the driver's license. The conversations with family. This all sounds wonderful, and it is; You are giving a stranger (most likely) the gift of continuing their life....at least for a little while longer. Your loved one, who again, most likely, died unexpectedly, is "living on" still. Our family has gone through this process. We are in our fourth year, going into our fifth, without our son. With a piece of our family missing.*
>
> *This process starts immediately when you get to the hospital. Within minutes, the doctors, surgeons, trauma staff have not only the task of telling you about the trauma your loved one has endured and the regret that there is nothing more they can do, but without delay, there is the other question that they have to ask, will your loved one donate his/her organs? And there begins the rapid fire decision making that will have to take place over the next few days.*
>
> *Understand, that the surgeons/doctors/medical staff need the answer yes or no immediately in order to preserve the organs properly so that a recipient, anxiously awaiting for their phone call can rush to their hospital and prepare for their own life-saving surgery. Again, this is just the beginning of the multitude of phone calls between the Organ Donation center and yourself.*
>
> *Making decisions that will attempt to save someone's life, or at least prolong it a little while longer. Within the first few hours, as you are trying to wrap your head around the tragic death of your loved one, you are called multiple times by the procurement team. There is a deep dive into the patient's lifestyle....drugs, sexual history, health history, surgeries, lifestyle, and at the time...Covid. Positive covid test would have automatically negated our son from being an organ donor. A rule that changed multiple times over within the following year. Given his age, wherehe worked, he was tested multiple times.*

This actually extended his time hooked up to monitors and extended our agony of seeing him in this state. Were there blessings in this as well, hard to see at that time, but perhaps now, yes....our family from across the country were all able to arrive in time for the day of the procurement.

As the procurement team is working behind the scenes to find recipients and work out the logistics, another phone call takes place and you are asked, "are there any organs you do not want donated, and why?" This is not just your usual, heart, lungs, kidneys, this also extends to tissues, bone, eyes...this is another surgery after the procurement of the organs. Our one request was his one remaining eye . His eyes were beautiful, expressive, and deep brown highlighted by his long eye lashes. They held his joy, his sorrow. The answer of course is as much or as little as we want. There is no right or wrong answer. Were we selfish to withhold?

A question that enters your mind. How could it not?

Once those questions are answered, the logistics are in place, all of the testing is done, and the surgeon/doctor has declared your loved one 'dead', then another phone call comes and you have to schedule the actual procurement. For us, a lot of leeway was given. Not sure if this is the case for everyone, but we chose 5 am. For myself, it was a send off, a brightness of the day to give hope to a sad day. But then the ICU staff starts calling, and now you are deciding on prayers and playlists for the procurement surgery. Secondly, the honor walk. It is Covid era, so very few family were allowed to even enter the hospital, let alone be apart of the "walk". This is a humbling experience, and a way for those who have been taking care of your loved one to honor them. But again, the pressure to have something meaningful and put it together while planning a funeral....what is decided in those moments and how to hold a gathering outside while the surgery begins, where family and friends can gather....there is not a checklist, or a guide. What we had were well-meaning nurses and medical staff trying to get a decision from us and we were simply just trying to catch our breath.

The organs that were donated, were his heart (IL), lungs (WI), kidneys (NY, KY), pancreas (OH),liver (KY). We have heard from two of the recipients. We have reached out to all of them, but as this is a highly sensitive, private, special gift, what does a recipient and a donor say? What we have realized as time goes on, is that we don't get to choose. Just as the recipient does not get to choose who their donor is. This is a very difficult thought and realization to have. To begin with, one of the recipients, while well meaning, contacted us long before the initial first year anniversary. While this person wanted to know that their donor was a good person, and the same for us, it also was insensitive and put us in a position we were not ready to deal with.

You hope and pray that the recipients are of the same faith, ideology, good citizens, good people, but again, you don't get to choose. You don't get to choose when you meet them in person and find out that this incredible gift they have received and are thankful for, yet do not treat it as such and continue poor lifestyle habits. You don't get to choose.

In the end, in hindsight, knowing what we know now, would our decisions be the same? I believe so. Our son was a very empathetic, generous young man. We consider it a blessing that a part of him still lives on, someone else, still lives on because of him. We

continue to pray and thankful for the blessings of our son and the gifts he gave the recipient for a continued life.

The experience of each donor family is unique, and the circumstances surrounding each death and gift are, of course, unique. In the United States, about half of adults have registered their wish to be a donor, alleviating the need for their families to make decisions at a difficult time. The lessons we take from this beautiful story, generously shared with us is the lesson that more knowledge, more planning prior to the time of death and donation can provide solace at a time of loss.

The value of life, reflected by death

Mankind has placed value on the deceased human body since the dawn of human curiosity. The value arises in many aspects:

- Emotional, as the object of grief and remembrance- The Iliad (Homer) recounts that Hektor's father requested a truce during which the Trojans can bury their dead. Both armies collected their dead in peace, and this tradition carries on in modern wartime.

- Religious and Cultural-How we treat our dead both defines and reflects our culture, and respect for these beliefs unites us a humans. And perhaps it also defines and reflects intelligence more broadly, as "post – mortem attentive behavior" is shared by elephants, primates, and possibly even dolphins. See e.g. Wakes in the waves – why do dolphins and whales attend to their dead? | Yale Environment Review. Last accessed 9/26/24.

- Scientific and Medical uses, commenced millennia ago (Bay NSY, Bay BH. Greek anatomist Herophilus: the father of anatomy. Anat Cell Bio. 2010;43:280–3. doi: 10.5115/acb.2010.43.4.280). Ancient use may have reflected curiosity about "what's under the hood". But modern, non-transplant uses include medical education, product development, device manufacturing, biomechanics, safety testing, search and rescue, forensic research and exhibition.

- Therapeutic, as the source of life saving and enhancing organs and tissues for transplant.

The legal status of the dead body both demonstrates and responds to changes in its value. Neither this paper nor the talk we will be delivering will delve deeply into whether the human body or its composite parts are deemed property, quasi-property, priceless or worthless under American law. For excellent discussions of these issues see Newman v. Sathyavaglswaran, 287

F.3d 786 (9th Cir. 2002); and an interesting discussion in podcast Head Number 7, Episode 7, September 17, 2024, Head Number 7 | Wondery | Premium Podcasts. That having been said the legal concepts of the status of deceased bodies have included:

- Dead bodies seen as objects under the control of the king/priest, see e.g. "The law of burial places in England at the time of the American Revolution was therefore largely contained in ecclesiastical law. The Church's authority over human remains, particularly after interment, was justified based both on theology (the Church was the spiritual guardian of human remains until the Second Coming of Jesus Christ and the resurrection of the dead) and practical considerations (the Church owned the consecrated real property in which the remains were interred or entombed and therefore had physical control over them When Dirt and Death Collide: Legal and Property Interests in Burial Places (americanbar.org) accessed 9/26/2024

- English common law holding that there was no property right in a dead body, and, therefore, it could not be disposed of by will. See, e.g., Williams v. Williams, 20 Ch.D. 659, 665 (1882).

- Deceased bodies as objects under the control of the "head of the estate", see e.g. Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991);

- Deceased bodies as objects under the control of the "legally close", see original Anatomical Gift Act, 1987; and finally

- An object largely under the control of the individual whose directives pre-mortem direct post-mortem disposition. When that individual, during their lifetime, effectuates that control, it cuts off the ability of survivors or the state to alter or revoke the gift. Revised Uniform Anatomical Gift Act (2006) - Uniform Law Commission (uniformlaws.org)accessed 9/26/2024.

The ability to gift one's body post-mortem existed at E, nglish and American common law , and was exercised as a testamentary gift. (See, e.g. The Anatomy Act (1832) , which permitted a person to donate the corpse of family member in exchange for burial at the expense of the anatomy school.

The Uniform Anatomical Gift Act:

In 1968 in response to the growing viability of organ transplant as a therapy that was more than experimental, the reality of a market in deceased, and living human organs began to loom; hence, the Uniform Anatomical Gift Act was drafted, merging concepts on health law and estate law in a way which also reflected the need to determine whether or not a person is a donor within a time frame that permits the recovery of organs for transplant from a body while it is still on mechanical ventilation. In other words, no probate. This 1968 version was revamped in 1987 and 2006.

Like all Acts promulgated by the Uniform Law Commission, the Uniform Anatomical Gift Act is not a law until it is adopted by an individual state. Not surprisingly, states add their own special concerns and priorities within the general frame work of uniformity. Thus, for the specifics of who may make a gift, to whom, and when one must refer to the state where the donor died.

The adoption and enactment of the UAGA

The UAGA is the sole means of conveying organs and tissues from decedents for permissible uses. It defines the respective roles of participants in testamentary gift of the body, including;

1. The Donor (Testator)
    a. "Donor" means an individual whose body or part is the subject of an anatomical gift.
2. The "Agent (health care representative)
    a. "Agent" means an individual:(A) authorized to make health-care decisions on the principal's behalf by a power of attorney for health care; or(B) expressly authorized to make an anatomical gift on the principal's behalf by any other record signed by the principal. Agents may make a pre-mortem gift of the principal's body.
3. The "Guardian"
    a. The Guardian is a person appointed by a court to make decisions regarding the support, care, education, health, or welfare of an individual. The term does not include a guardian ad litem. A Guardian may make a pre-mortem gift of the principal's body as well.
4. The family and others who are "legally close":

a. an agent of the decedent at the time of death who could have made an anatomical gift under Section 4(2) immediately before the decedent's death;
b. the spouse of the decedent;
c. adult children of the decedent;
d. parents of the decedent;
e. adult siblings of the decedent;
f. adult grandchildren of the decedent;
g. grandparents of the decedent;
h. an adult who exhibited special care and concern for the decedent;
i. the persons who were acting as the [guardians] of the person of the decedent at the time of death; and
j. any other person having the authority to dispose of the decedent's body.

5. The "persons authorized to dispose of the body".

What the UAGA has to say about how the gift is documented?

"Document of gift" means a donor card or other record used to make an anatomical gift. The term includes a statement or symbol on a driver's license, identification card, or donor registry.

Donation in Estate planning:

A donor may make an anatomical gift:

(1) by authorizing a statement or symbol indicating that the donor has made an anatomical gift to be imprinted on the donor's driver's license or identification card;

(2) in a will;

(3) during a terminal illness or injury of the donor, by any form of communication addressed to at least two adults, at least one of whom is a disinterested witness; or

A donor or other person authorized to make an anatomical gift under Section 4 may make a gift by a donor card or other record signed by the donor or other person making the gift or by authorizing that a statement or symbol indicating that the donor has made an anatomical gift be included on a donor registry.

A minor within certain age brackets (generally the age of drivers license) may document a gift, which may be revoked by the parent if the minor dies while under the age of majority

The process of donation (see attached AOPO infographic, used with permission of the Association of Organ procurement Organizations.)

When does the anatomical gift take effect?

1. The "dead donor rule" requires that organs can only be recovered after death has been declared, and that organ recovery never causes the death.

2. Donation After Circulatory Death ("DCD")-When a patient, by means of an advance directive, or the patient's surrogate has determined that based on dire prognosis, the patient would wish life-sustaining treatment to be withdrawn, organs may be recovered if that withdrawal causes death within a short time period.

How is death determined?

The Uniform Determination of Death Act was drafted by the ULC in 1980. It was revisited in 2020 by the ULC, which after three years determined that insufficient consensus was reached on whether and how to amend the Act. To understand existing law:

1. [Determination of Death]. An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.

Part (1) codifies the existing common law basis for determining death—total failure of the cardiorespiratory system. Part (2) extends the common law to include newer procedures for determination of death based upon irreversible loss of all brain functions. Part 2, the cessation of brain function, occurs even while breathing is being artificially maintained. In other words, when artificial means of support preclude a determination under part (1), the Act recognizes that death can be determined by diagnosing loss of brain function.

Under part (2), the entire brain must cease to function, irreversibly. The concept of "entire brain" distinguishes determination of death under the Act from "persistent vegetative state." There is

considerable debate as to whether "the entire brain" death contemplated by the act includes the hypothalamus.

Considerations for the Trustee re: death and trust closure

The trustee has many different and varying considerations when it comes to death of the beneficiary. From the onset of administering the trust, the trustee is considering the life and eventual death of the beneficiary. It is included in budgeting and projections of life expectancy, how a person's disability may impact that life expectancy and planning, the impact of trust distributions and the impact not only on the beneficiary, but the potential for how the disbursement may affect the remainder beneficiary. When trustees are administering a first party disability trust, they are also considering that expenses cannot be paid after the death of the beneficiary and so they are asking beneficiaries, some of whom are quite young, to consider paying for a pre-need end of life plan.

End of Life Plans in and of themselves can and should cause the trustee to explore the religious and cultural considerations of the beneficiary. The treatment of the deceased body is deeply rooted in the rituals of many world religions and family tradition. A trustee must evaluate the expenditure from a budgetary and practical standpoint while also honoring the values of the beneficiary and their family.

As a beneficiary nears their end of life, there may also be disbursement requests that are related to their specific needs at that time. For example, a beneficiary may ask for additional caregiving and medical support that includes massage, music therapy, or other items promoting comfort and relaxation. A beneficiary may go so far as to request payment for medical aid in dying, which is a topic for an additional paper and presentation but must be evaluated in consideration with federal and state laws.

Finally, there are the more transactional considerations that a trustee must consider at the time of death. For a first party trust (both d4a disability and d4c pooled), the relevant POMS SI 01120.203.E.[1] states that the trustee is prohibited from making most disbursements after death, with only a couple of allowable expenses. It states as follows:

[1] POMS is the Program Operations Manual System; https://secure.ssa.gov/poms.nsf/lnx/0501120203

E. Allowable and prohibited expenses for special needs and pooled trusts established under section 1917(d)(4)(A) and (C) of the Act

The following instructions about trust expenses and payments apply to Medicaid special needs trusts and to Medicaid pooled trusts.

1. Allowable administrative expenses

Upon the death of the trust beneficiary, the trust may pay the following types of administrative expenses from the trust prior to reimbursement to the State(s) for medical assistance:

- 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.

2. Prohibited expenses and payments

Upon the death of the trust beneficiary, the following are examples of some of the types of expenses and payments not permitted prior to reimbursement to the State(s) for medical assistance:

- Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- Inheritance taxes due for residual beneficiaries;
- Payment of debts owed to third parties;
- Funeral expenses; and
- Payments to residual beneficiaries.

Further, some states Medicaid regulations may be even more restrictive at the time of death. For example, in Colorado, the trustee is not even permitted to pay for taxes or fees. No disbursements from the account are allowed post death. In addition, there are some third-party trust documents that do not allow burial or other expenses at the time of death or are silent on the burial expenses being paid. The trustee must proceed with caution in these situations as well.

For further understanding on the current issues surrounding the law of determining death by neurologic criteria, see the attached article by Christina Strong, and see also Greer DM, Shemie SD, Lewis A, et al. Determination of brain death/death by neurologic criteria: The World Brain Death Project. *JAMA*. doi:10.1001/jama.2020.11586.

BEYOND GOODBYE

Trust Considerations in Death and Dying

OCTOBER 18, 2024

MEGAN BRAND, EXECUTIVE DIRECTOR, CFPD
CHRISTINA STRONG, ESQ, DILWORTH PAXSON, LLP

1

Connect to purpose

2

Impact of Organ Donation from a Personal Perspective

3

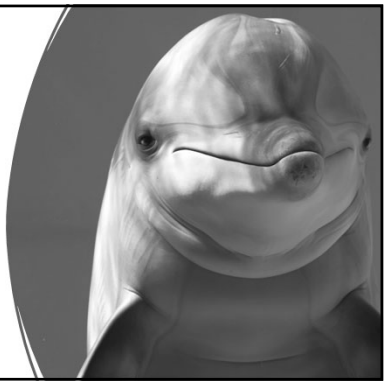
Value of Life, Reflected in Death

- Emotional, as the object of grief and remembrance
- Religious and Cultural-How we treat our dead both defines and reflects our culture, and respect for these beliefs unites us a humans. •
- Scientific and Medical uses, Ancient use may have reflected curiosity about "what's under the hood". But modern, non-transplant uses include medical education, product development, device manufacturing, biomechanics, safety testing, search and rescue, forensic research and exhibition.
- Therapeutic-Life Saving and Enhancing Transplant

4

Post-Mortem Attentive Behavior

- Birds Do It, Bees do It…
- Elephants and Dolphins, too.



5

Legal Status of the Deceased Body

- Ecclesiastic Property
- No Property Right in Individual or Family
- Quasi Property Right in Certain Survivors
- Disposition Right of Individual, if Exercised Pre-Mortem

6

Uniform Anatomical Gift Act

- Answers:
  - Who May Give
  - How
  - For What Purpose
  - To Whom

7

What is the Uniform Law Commission ?

- 125 Year Old Body of Commissioners appointed from each state, to draft laws where uniformity across states is desirable
- Among the Laws they've drafted are - Uniform Anatomical Gift Act, Uniform Commercial code, and the Uniform Determination of Death Act (UDDA)
- UDDA in early 1980s, has been adopted in whole or in part in 40 states. UAGA , in 1968, adopted in one form or another in all fifty states, Puerto Rico and U.S. Virgin Islands.

8

8

UAGA: Who may make a gift PRIOR to death (Section 4)

- Anyone 18 years or older
  - Or an emancipated minor
  - Authorized by state law to apply for a license
- An agent of the donor (unless prohibited by power of attorney)
- Parent
- Guardian

9

UAGA: Manner of Making the Gift PRIOR(Section 5)

- Statement or symbol on license/ID card, donor card
- Will/Advanced Directive
- During terminal illness, communication to two individuals (one disinterested)
- Process for those physically unable to sign
- Revocation, suspension, expiration or cancellation of license or ID does not cancel document of gift

10

UAGA Preclusive Effect (Section 8)

- Complete bar to changing donor's wishes, unless donor does it expressly, himself.
- **Revocation** is not **Refusal**
- Gift of One Part is not Refusal of Others
- Parent May Revoke Gift or Refusal of Minor decedent.

11

Health Care Decisions Act Donor Form

You may mark or initial one item.

( ) I donate my organs, tissues, and other body parts after I die, even if it requires maintaining treatments that conflict with other instructions I have put in this form, EXCEPT for those I list below (list any body parts you do NOT want to donate):

12

UAGA: Who may make gift AFTER death (Section 9)

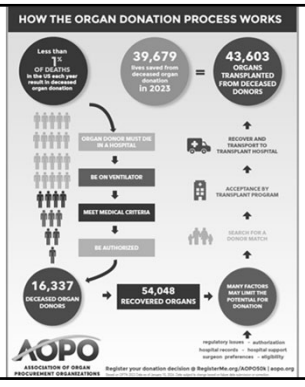
- Agent
- Spouse
- Adult Children
- Parents
- Siblings
- Grandchildren
- Adult who exhibited special care and concern
- Acting Guardian
- Authority to Dispose

13

UAGA: Rights/Duties of Procurement Organizations

- Includes examination of all medical records
- Must search for parents of an unemancipated minor
- Search the statutory hierarchy
- Advise any and all parties of a document of gift, amended document or revocation

14



15

Donation Process

- All deceased or imminently deceased patients in a hospital referred to OPO for initial assessment
- If found initially suitable they are a “Prospective Donor”
- Prospective Donors are assessed for authorization, either as registered donors, or through statutorily authorized persons
- All Prospective Organ Donors are maintained on ventilation to perfuse organs
- If the patient appears to be deceased, they will be assessed for neurological death. If ‘brain dead’ organs may be recovered.
- If the patient is given a grave prognosis, family may opt to remove ventilation; if the patient then passes, their organs may be recovered

16

UAGA: Immunity
(Section 18)

- “Good Faith” immunity
- Who is not liable, including donor’s estate
- Rely on representation

17

How Death is Declared: Uniform Declaration of Death Act (UDDA)

- A product of the ULC- Circa 1980s
- Recently revisited without conclusion

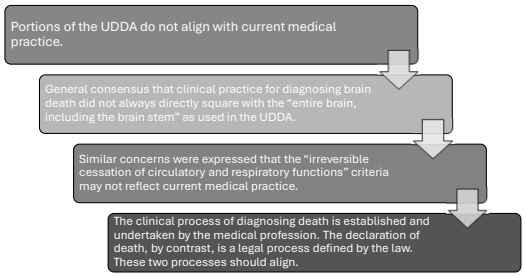
18

Existing UDDA language and Hot Spots

...An individual who has sustained **either*** (1) **irreversible*** cessation of circulatory and respiratory functions, or (2) **irreversible** cessation of all functions of the entire brain, including the **brain stem***, is dead. A determination of death must be made in accordance with **accepted medical standards***...

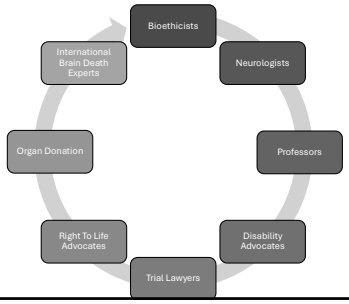
19

Findings of UDDA Study Committee



20

Who was around the table?



21

Result

- Sufficient Consensus was not reached on:
  - Need for Change
  - Nature of Change

22

The Legal Importance of Death

- Estate Disposition, Estate Planning Civil Litigation, Criminal Liability,… death is a *sine qua non*—the jumping-off point for all that comes next.
- Without a death, there's no gift of a transplantable heart; no estate to haggle over; and no wrongful death, homicide, or manslaughter to pay for or prosecute.
- Getting death right is almost as important to our system of laws as it is to our health care system. And at present, the importance of the topic seems to be the only thing doctors, lawyers, judges, bioethicists, and patient advocates can agree on.

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Considerations for the Trustee

- From the onset of service, the trustee is considering the life and eventual death of the beneficiary.
  - Budgeting
  - How a person's diagnosis may impact their life
  - A disbursement's potential impact on remainder beneficiaries (including Medicaid in first party trusts)

24

End of Life Plans

- Why it's important to ask early about End of life plans
- Importance of religious, cultural and individual considerations for each beneficiary
- Treatment of the decedent's body (and the costs that come with it) is deeply rooted in religious and family tradition
- Exploration of various different service providers for End of Life that serve different cultures, religions, disciplines
- Consider an irrevocable, pre-paid plan that is not tied to any particular service (Ex: Special Considerations)

25

Disbursements near end of life

- Hospice Care
- Additional Caregiving or Medical support
- Comforts such as massage, music therapy, flowers, visits from family/friends (POMS: SI 01120.201.F.3.b)
- Medical Aid in Dying (See Discretionary Distributions in Today's Political Climate, Stetson10/2023, Brand and Tedford-Coles)

26

Transactional trust considerations at time of death

For First Party Trusts POMS SI 01120.203.E states as follows:

E. Allowable and prohibited expenses for special needs and pooled trusts established under section 1917(d)(4)(A) and (C) of the Act

The following instructions about trust expenses and payments apply to Medicaid special needs trusts and to Medicaid pooled trusts.

1. Allowable administrative expenses

Upon the death of the trust beneficiary, **the trust may pay** the following types of administrative expenses from the trust prior to reimbursement to the State(s) for medical assistance:

- 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.

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Transactional trust considerations at time of death, cont.

2. Prohibited expenses and payments

Upon the death of the trust beneficiary, the following are examples of some of the types of expenses and payments **not permitted** prior to reimbursement to the State(s) for medical assistance:

- Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- Inheritance taxes due for residual beneficiaries;
- Payment of debts owed to third parties;
- Funeral expenses; and
- Payments to residual beneficiaries.

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Final considerations in trust administration following death

- Some States may be even more restrictive than the POMS
  - In Colorado, not even taxes or fees may be paid
- Some third party trust documents do not allow for burial or other expenses post death or are silent on the issue
  - Consider gaining permission from remainder beneficiaries in these circumstances
- Pre-need end of life plans are recommended
- Consider a close-out fee to pay for final expenses (such as services incurred prior to death, final taxes, trustee fees, etc.)

Note: There are multiple other considerations re: notification to Medicaid, remainder beneficiaries, final taxes, releases, etc.

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November 22, 2024

Using Pooled Special Needs Trusts as a Safety Net in Estate Planning

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Using Pooled Trusts as a Safety Net When Drafting Estate Plans

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Counsel and Director of New Client Services at Commonwealth Community Trust

I. Introduction

Pooled special needs trusts can provide an essential safety net in estate plans. Attorneys who draft estate plans must anticipate the unexpected—a client's unforeseen disability, a fiduciary who becomes ill, a contentious relationship between the beneficiary and the fiduciary, or assets that are depleted below the corporate fiduciary's minimum. By including additional authorities in documents, attorneys-in-fact, executors, and trustees can react to unforeseen circumstances and create and fund pooled special needs trusts for clients and their loved ones without the need for court involvement. After giving an overview of pooled special needs trusts, this paper will cover powers that should be considered for inclusion in trusts, wills, and powers of attorney to utilize pooled special needs trusts as a safety net.[1]

II. Overview of Pooled Special Needs Trusts

There are two types of special needs trusts—standalone special needs trusts created under a trust document or will, and pooled special needs trusts. Fundamentally, both types of special needs trust allow assets to be set aside for the benefit of a beneficiary with a disability without those assets being considered resources that might impact the beneficiary's eligibility for Supplemental Security Income (SSI) and Medicaid.

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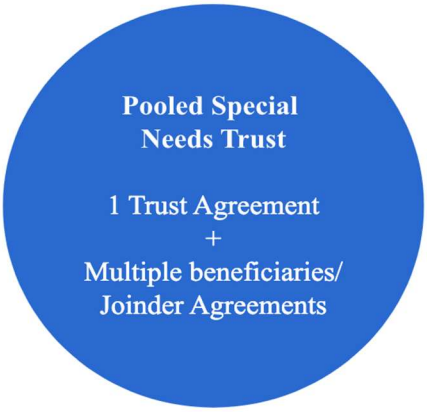
[1] While there are examples of language that can be included in estate planning documents throughout this paper, they are not intended as legal advice. Any provisions included in estate planning documents should be reviewed and edited by the drafting attorney to meet the needs of their clients and to ensure compliance with their state's law.

Attached as an appendix is an overview of corollary powers to create and fund an ABLE account.



Pooled special needs trusts are different than standalone special needs trusts in several ways. First, while a standalone special needs trust generally has one beneficiary[2], pooled special needs trusts can have hundreds or thousands of beneficiaries. A standalone special needs trust is drafted for a particular beneficiary and contains all the necessary terms, including the identity of the beneficiary, the identity of the person who is establishing the trust, and the remainder beneficiaries. A pooled special needs trust master trust agreement provides the basic terms of administration, but the joinder agreement signed by the beneficiary or an authorized person to join the pooled special needs trust fills in missing pieces of the master trust agreement with the details of (1) the beneficiary, (2) the identity of the person signing the joinder agreement, and (3) the remainder beneficiaries (if that particular pooled trust allows remainder beneficiaries to be named).

Second, pooled special needs trusts are established and managed by a non-profit organization.[3] In order to be allowed to administer first-party pooled special needs trusts, the Social Security

[2] While standalone first-party special needs trusts can only have one beneficiary, some standalone or testamentary third-party special needs trusts may be drafted to have multiple beneficiaries.

[3] 42 U.S.C. § 1396p(d)(4)(C)(i).

The non-profit organization should be overseen by a fully independent board of directors comprised of qualified individuals to ensure proper governance.

Administration requires not only that the pooled trust must be set up by the non-profit organization, but the non-profit organization must maintain managerial control.[4] This managerial control is a distinct role from the role as trustee. While some pooled trust non-profit organizations, which are commonly referred to as "pooled trust administrators" or "pooled trust managers," also serve as trustee, other non-profit organizations employ a trust company, bank, or other professional to serve as trustee for the pooled special needs trust. In a pooled special needs trust, there are three unique roles played by (1) the trustee, (2) the non-profit trust administrator, and the (3) financial advisor. There can be some entities that will fill multiple roles, like a trustee that also serves as financial advisor or a non-profit organization that also serves as trustee, but these three roles exist in every pooled special needs trust. Whereas for a standalone special needs trust, the client must find a trustee and financial advisor.

Third, separate accounts, also referred to as a sub-accounts, are maintained for each beneficiary, but the funds in all the accounts are pooled together for investment and management purposes.[5] This structure is similar to an attorney's Interest on Lawyer's Trust Account (IOLTA); the clients' funds are held in one account but accounted for separately. Due to the term "pooled" in "pooled trust," there can be a misconception that the funds that an individual beneficiary puts into a pooled trust will be used for other beneficiaries. However, funds placed into a beneficiary's sub-account

[4] Social Security POMS SI 01120.225.

[5] For first-party pooled special needs trusts, this organizational structure is required by 42 U.S.C. § 1396p(d)(4)(C)(ii).

can only be used for that beneficiary during his or her lifetime. Because the funds are pooled, this increases the capital available for investment and can lead to lower investment fees and the access to greater investment opportunities.[6] It is also important to note that due to the pooled structure, some pooled trusts will not accept unique assets, like inherited individual retirement accounts (IRAs) or homes.

Fourth, pooled special needs trusts each have differing policies on how they administer the remaining funds after a beneficiary passes away. All first-party special needs trusts, both standalone and pooled, are prohibited from distributing funds to remainder beneficiaries unless Medicaid is fully reimbursed for all payments made for the beneficiary during their lifetime.[7] However, federal law permits the pooled trust to retain the remaining funds in lieu of repaying Medicaid.[8] For first-party pooled trusts, some non-profit organizations retain all the remaining funds in lieu of repaying Medicaid, which means that their joinder agreement might not include the ability to list remainder beneficiaries. Other pooled trusts only retain a percentage of the remainder or only when there are insufficient funds to repay Medicaid fully, which would give remainder beneficiaries a chance to receive funds if there are sufficient funds to repay Medicaid. For third-party pooled special needs trusts, some pooled trusts do not retain any part of the

[6] Due to the funds being invested, there is never any guarantee of returns.

[7] 42 U.S.C. §§ 1396p(d)(4)(A), (d)(4)(C)(iv).

[8] 42 U.S.C. § 1396p(d)(4)(C)(iv); Social Security POMS SI 01120.203(D)(8).

Despite the federal allowance, some states have set limitations on what percentage the pooled trust may retain. Examples include North Carolina (N.C.G.S. § 36D-6) and Georgia (Georgia DFCS Medicaid Policy Manual Section 2337-2).

remainder funds, while some may keep a percentage. It is critical that the attorney and their clients understand this policy before choosing a pooled special needs trust.[9]

Fifth, first-party pooled special needs trust sub-accounts may be established for beneficiaries who are sixty-five years of age or older, whereas federal law prohibits standalone first-party pooled special needs trusts from being established once the beneficiary reaches the age of sixty-five.[10] It is still necessary to consider whether the state in which the beneficiary lives may impose a transfer of assets penalty. However, for beneficiaries who have reached the age of sixty-five, first-party pooled special needs trusts are their only option.

III. Drafting Standalone or Testamentary Special Needs Trusts

Serving as trustee of a special needs trust requires specialized knowledge regarding applicable federal and state statutes and rules, in addition to the regular duties of a trustee. At times a trustee will be unable or unwilling to serve or to continue to serve as trustee. Family members may lack the time or expertise, they might have health problems, or their role as trustee may compromise their relationship with the beneficiary. Individual attorneys can leave the practice of law and corporate trustees may struggle to maintain a special needs trust once the balance falls below their minimum requirements. In those cases, even though a pooled special needs trust was not Plan A, it can be an excellent Plan B.

When setting up a standalone or testamentary special needs trust, if the trustee is given proper authority, then trust assets can be transferred to a pooled special needs trust sub-account if the

[9] The pooled special needs trust's remainder policy should be easily available on their website and included in their joinder agreements.

[10] 42 U.S.C. § 1396p(d)(4)(A).

trustee becomes unable or unwilling to serve. The assets in the standalone or testamentary special needs trust can be transferred to a pooled special needs trust sub-account if (1) the original trust gives authority to transfer assets to the pooled special needs trust sub-account, (2) decanting is permitted under state law[11] in the state where the original trust is sitused (after the decanting process is completed), or (3) a court of appropriate jurisdiction approves the transfer of assets. Of these three options, the first option—where the drafting attorney has included a provision to authorize the trustee to transfer assets to the pooled special needs trust sub-account—is the simplest process. Decanting is a formal and technical process that requires attorneys to draft notices and decanting agreements. Even if decanting is permitted, it may still be necessary or prudent to seek court approval in some circumstances. And, for those where decanting is not feasible or permitted by state law, then petitioning the court for permission can be an expensive and time-consuming prospect.

Drafting attorneys should include language that gives the trustee of a special needs trust the discretion to transfer assets from an individual special needs trust to a pooled special needs trust sub-account. After a transfer, the funds will be governed by the terms of the pooled trust master trust agreement and, if applicable, the original trustee will wind down the original trust.

> Example: *My Trustee may at any time, exercising sole discretion, distribute any income or principal held in [name of special needs trust], up to the entire value of the trust corpus, to the Trustee of the Commonwealth Community Trust [Third-Party OR First-Party] Pooled Special Needs Trust for the benefit of [insert Beneficiary name] or a similar pooled special needs trust. I authorize my Trustee to sign all joinders and other documents and take all steps necessary to establish*

[11] According to the Uniform Law Commission, as of September 2024, eighteen states have enacted the 2015 Uniform Decanting Act, and it has been introduced in two additional states. https://www.uniformlaws.org/committees/community-home?communitykey=5b248bac-9251-47fb-bad8-57a23f3df540
In addition, many other states have their own decanting statutes that were enacted prior to the Uniform Law Commission proposing the Uniform Decanting Act in 2015.

the sub-account and to facilitate the transfer of the trust assets to the [third-party OR first-party] sub-account for the benefit of [insert Beneficiary name].

Unless otherwise specified in the original trust or permitted by court order or state law, the remainder beneficiaries listed in the pooled special needs trust sub-account should mirror the remainder beneficiaries for the special needs trust in the original trust to avoid shifting beneficial interests.[12]

It is also important to note that depending on the type of special needs trust (first-party or third-party) and the terms of the pooled special needs trust master trust agreement, the pooled special needs trust may be unable to honor powers of appointment that are not exercised prior to the transfer. Further, first-party pooled special needs trusts are prohibited from paying for funeral expenses unless Medicaid has been fully repaid, so those should be pre-paid using sub-account funds during the beneficiary's lifetime if possible.[13]

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[12] Except as it relates to the beneficiary with a disability, the second special needs trust receiving assets from the first trust "must grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficiary's beneficial interests in the first trust." Uniform Trust Decanting Act, Section 13(c)(3).
"'Beneficiary' means a person that: (A) has a present or future, vested or contingent, beneficial interest in a trust; (B) holds a power of appointment over trust property; or (C) is an identified charitable organization that will or may receive distributions under the terms of the trust." Uniform Trust Decanting Act, Section 2(4).
https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a2373e59-2d11-ec52-5e7d-2a22f10677c7&forceDialog=1

[13] Social Security POMS SI 01120.203(E)(2).

Some third-party pooled special needs trusts may also not be permitted by their master trust agreement or policy to pay funeral expenses after the beneficiary passes away. In these cases, the funeral expenses should be pre-paid from the sub-account before the beneficiary passes away.

IV. Drafting Other Types of Trusts or Wills

Most wills and trusts drafted by estate planning attorneys will include a list of alternate methods of distribution that give the fiduciaries flexibility in case of unexpected disability or minority. Alongside those authorities, drafters should give fiduciaries the authority and discretion to make distributions to a pooled special needs trust sub-account in lieu of an outright distribution to a beneficiary.

> Example: *At any time that my [Executor / Trustee] is directed or authorized to make a distribution of interest or principal to a beneficiary, my [Executor / Trustee] may, exercising sole discretion and without the necessity of a court order, pay such income or principal to Trustee of the Commonwealth Community Trust Pooled Special Needs Trust for the benefit of the beneficiary, or a similar pooled special needs trust sub-account, in lieu of making a distribution to the beneficiary.*

Please note that this provision does not specify whether the funds should be deposited into a first-party or third-party pooled special needs trust sub-account. This determination should be made by the attorney at the time that funds are to be transferred, and the answer will depend on state law and whether the funds are determined to have vested in the beneficiary. If the bequest has vested in the beneficiary, then the funds will likely be considered "assets of an individual who is disabled"[14] and should be placed into a first-party pooled special needs trust.[15] This provision should allow fiduciaries to distribute funds without the need for a costly court order.

V. Drafting Powers of Attorney

Powers of attorney are the most powerful and underutilized documents in the estate planning toolkit. By incorporating the necessary authorities, agents (more traditionally referred to as

[14] 42 U.S.C. § 1396p(d)(4)(C).

[15] Even with the authority to transfer the funds into a first-party pooled special needs trust, the joinder agreement must still be signed by the beneficiary, either themselves or by their agent under a power of attorney with the necessary authorities; the beneficiary's parent, grandparent, or legal guardian; or a court. 42 U.S.C. § 1396p(d)(4)(C)(iii); Social Security POMS SI 01120.203(D)(6).

attorneys-in-fact) can be given the ability to plan on behalf of the principal and to complete any plans the principal began. The entire estate plan of a client can be strengthened by giving fiduciaries the authority to create, fund, and manage pooled special needs trust sub-accounts.

While the law differs from state to state,[16] generally the ability to establish a trust, including a special needs trust, is a power that must be explicitly granted in the power of attorney.[17] If this authority is not given in the power of attorney or state law, then the agent lacks the power to establish a special needs trust. In addition, if the power is given, but limited to establishing revocable trusts, then the agent lacks the power to establish a first-party special needs trust, whether standalone or pooled, because they are irrevocable trusts.

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[16] According to the Uniform Law Commission, as of September 2024, thirty-two states/jurisdictions have enacted the 2006 Uniform Power of Attorney Act, and it has been introduced in two additional states. In addition, eight states/jurisdictions have enacted a previous version of the Uniform Power of Attorney Act.
https://www.uniformlaws.org/committees/community-home?communitykey=b1975254-8370-4a7c-947f-e5af0d6cb07c

[17] Uniform Power of Attorney Act, Section 201(a)(1) only permits the agent to create an *inter vivos* trust is if authority is explicitly given in the power of attorney document.
https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=035bcb2c-b21c-e96d-f80f-5bfa14c2d604

A 2022 Massachusetts Supreme Court decision raised doubts as to whether a principal can delegate the authority to create a trust to their agent under current Massachusetts law. *Barbetti v. Stempniewicz,* 490 Mass. 98 (2022).
In 2023, the Uniform Power of Act legislation was introduced to the Massachusetts legislature, which includes the authority to create an *inter vivos* trust. Bill H.1523.

In addition, the power of attorney should give the authority to transfer the principal's assets into an irrevocable or simply any *inter vivos* trust.[18] Limitations on funding irrevocable trusts will prevent the agent from being able to fund a first-party special needs trust for the beneficiary.[19]

Finally, the attorney should carefully consider terms limiting the agent from using the principal's property to benefit the agent. If this term is placed in the power of attorney instrument, then this could be interpreted to prohibit the agent from being listed as a remainder beneficiary, even if they are a beneficiary of the principal's estate plan.[20]

Drafting attorneys should consider adding the following authorities to powers of attorney to allow the agent to do emergency planning for both the principal and their loved ones.[21]

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[18] "Attempting to establish a [pooled trust sub-account] with the assets of another individual without proper legal authority to act with respect to the assets of that individual will generally result in an invalid trust under State law." Social Security POMS SI 01120.203(D)(6)(b).

[19] Uniform Power of Attorney Act, Section 211(b)(7) only permits the transfer of the principal's assets into a revocable trust.
https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=035bcb2c-b21c-e96d-f80f-5bfa14c2d604

[20] Uniform Power of Attorney Act, Section 201(b) includes the term: "An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions." In this case, it would be important to consider the principal's entire estate plan when deciding whether to include terms in the Special Instructions to allow the agent who is not an ancestor, descendant, or spouse to list themselves as a remainder beneficiary.
https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=035bcb2c-b21c-e96d-f80f-5bfa14c2d604

[21] However, if state law does not permit a principal to delegate the authority to create a trust to an agent, then these authorities will not have full effect.

1. Establishing and funding a first-party pooled special needs trust sub-account for the principal.

Federal law permits an agent under a valid power of attorney to establish a first-party pooled special needs trust for the principal on behalf of the principal.[22]

> Example: *My Agent is authorized to (1) execute a pooled trust sub-account joinder agreement with Commonwealth Community Trust or another pooled special needs trust on my behalf, pursuant to 42 U.S.C. 1396p(d)(4)(c); (2) assign, transfer, deliver, and convey any and all of my assets, including any rights to receive income or assets from any source, to the Trustee of the pooled special needs trust sub-account for my sole benefit; (3) designate the remainder beneficiaries for the sub-account [or specify remainder beneficiaries]; and (4) make requests for disbursements and receive and use the disbursements on my behalf.*

2. Establishing a third-party pooled special needs trust sub-account for the principal's loved ones.

Giving the authority to establish and fund a third-party pooled special needs trust will allow an agent to do special needs planning for the principal's loved ones.

> Example: *My Agent is authorized to (1) execute a pooled third-party trust sub-account joinder agreement with Commonwealth Community Trust or another pooled special needs trust for [insert names or class description]; (2) designate the remainder beneficiaries for the sub-account [or specify remainder beneficiaries] ; (3) assign, transfer, deliver, and convey any and all of my assets, including any rights to receive income or assets from any source, in keeping with my Agent's authority to make gifts to the Beneficiary of the sub-account, to the Trustee of the pooled special needs trust sub-account; (4) update pay on death, transfer on death, and other beneficiary designations that listed the Beneficiary of the sub-account to list the Trustee of the pooled special needs trust sub-account; (5) amend any trusts that I might have to update any bequests to the beneficiary of the sub-account to list the Trustee of the pooled special needs trust sub-account and (6) make requests for disbursements from the sub-account and receive and use the disbursements on the Beneficiary's behalf.*

3. Establishing and funding a first-party pooled special needs trust sub-account for the principal's child or grandchild.

Federal law permits an agent under a valid power of attorney to establish a first-party pooled special needs trust for the principal's child or grandchild on behalf of the principal.[22]

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[22] Social Security POMS SI 01120.203(D)(6).

Example: *My Agent is authorized to (1) execute a 42 U.S.C. 1396p(d)(4)(c) pooled trust sub-account joinder agreement with Commonwealth Community Trust or another pooled special needs trust on behalf of my child or grandchild [or insert names], (2) designate the remainder beneficiaries for the sub-account, and (3) make requests for disbursements and receive and use the disbursements for the Beneficiary.*

4. Establishing and funding a first-party pooled special needs trust sub-account for the principal's loved ones other than a child or grandchild.

Giving authority to use the principal's funds will allow the agent to petition the court to establish and permit funding of a first-party pooled special needs trust for a loved one of the principal other than a child or grandchild, like a spouse or parent.[23]

Example: *My Agent is authorized to use my funds to petition a court to create and fund a 42 U.S.C. 1396p(d)(4)(c) pooled trust sub-account with Commonwealth Community Trust or another pooled special needs trust on behalf of [insert names or class description].*

VI. Conclusion

Giving fiduciaries the authority to utilize pooled special needs trusts can save the client thousands of dollars in attorneys bills and weeks or months in unnecessary delays as the fiduciaries respond to unexpected circumstances. Empowering fiduciaries with the flexibility to use pooled special needs trusts as a safety net will result in more robust estate plans that better protect clients and their families.

[23] A first-party pooled special needs trust joinder agreement must be signed by the beneficiary, either themselves or by their agent under a power of attorney with the necessary authorities; the beneficiary's parent, grandparent, or legal guardian; or a court. 42 U.S.C. § 1396p(d)(4)(C)(iii); Social Security POMS SI 01120.203(D)(6).

Appendix: Corollary Powers for ABLE Accounts

In addition to and in conjunction with pooled special needs trusts, ABLE accounts are a beneficial tool to set aside funds for individuals whose disability began before the age of twenty-six without impacting their eligibility for Supplemental Security Income (SSI) and Medicaid.[24] Further, starting January 1, 2026, the eligibility criteria will change so that individuals whose disability began before the age of forty-six can open an ABLE account, which will allow far more people to qualify. In 2024, up to $18,000 can be put into an ABLE account for each beneficiary per year.[25]

1. Authority to transfer funds from a special needs trust to an ABLE account.

Drafters can give the trustee of a special needs trust the authority and discretion to make distributions to an ABLE account for the beneficiary. This authority can be particularly useful since ABLE accounts can be used to pay shelter expenses, which are considered qualified disability expenses, without reducing the beneficiary's SSI payment.[26]

> Example: *The Trustee may, exercising sole discretion, transfer funds to an ABLE account established for the Beneficiary, up to the annual ABLE contribution limit.*

2. Authority to transfer funds from a will or trust to an ABLE account.

Drafters should give the fiduciaries (whether executors or trustees) the authority and discretion to make distributions to an ABLE account in lieu of an outright distribution to the beneficiary.

> Example: *At any time that my [Executor / Trustee] is directed or authorized to make a distribution of interest or principal to a beneficiary, my [Executor / Trustee]*

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[24] Although after the balance of the ABLE account reaches $100,000.00, then the beneficiary's SSI payments will be suspended until the balance falls below $100,000.00. Letter from Centers for Medicaid and Medicare Services, Re: Implications of the ABLE Act for State Medicaid Programs, footnote 5.
https://www.medicaid.gov/federal-policy-guidance/downloads/smd17002.pdf

[25] This contribution limit is tied to the federal annual exclusion for gifts. 26 USC § 529A(b)(2).

[26] 26 U.S.C. § 529A(e)(5).

may, exercising sole discretion and without the necessity of a court order, pay such income or principal to an ABLE account established for the Beneficiary.

3. Authority to set up and fund an ABLE account for the principal.

   Example: *My Agent shall have the power to: (1) open an ABLE account for me; (2) transfer and deposit any of my assets into my ABLE account; (3) withdraw, now or in the future, any funds from my ABLE account; (4) select the investment option(s) in accordance with the terms provided by the ABLE account; (5) change the beneficiary of my ABLE account in accordance with Section 529A of the Internal Revenue Code; (6) transfer funds from a 529 college savings plan to my ABLE account, as permitted by federal and state law; and (7) make representations and certifications on my behalf and to otherwise manage and enter into all other lawful transactions with respect to my ABLE account that I could perform if present.*[27]

4. Authority to set an ABLE account for the principal's spouse, descendants, or siblings.

   Example: *My Agent is authorized to open an ABLE account and designate my spouse, my descendants, or my siblings as the beneficiary.*[28]

5. Authority to contribute from the principal's assets into an ABLE account for any person to whom the agent can make gifts.

   Example: *My Agent is authorized to contribute my funds, up to the annual ABLE contribution limit, to any ABLE account for any person to whom my Agent is authorized to make gifts. Further, my Agent is authorized to transfer funds from a 529 college savings plan to an ABLE account, as permitted by federal and state law.*

[27] This provision is adapted from the Virginia ABLEnow Durable Limited Power of Attorney form. https://www.ablenow.com/uploads/documents/ABLEnow_Durable_Limited_POA_Form.pdf

[28] The ABLE Act was far more expansive in its list of persons who can establish an ABLE Account for the beneficiary: the beneficiary themselves; their agent under a power of attorney; their guardian or conservator; their spouse, parent, sibling, or grandparent; or their Social Security representative payee. 26 CFR 1.529A-2(c)(1)(i)(C).

Using Pooled Special Needs Trusts As a Safety Net

Presented by Rachel Baer, Esq.

October 18, 2024

www.trustCCT.org

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Prior to joining CCT, Ms. Baer was a partner at Family First Law Group, PLLC, in Alexandria, Virginia, and her practice focused on estate planning, estate and trust administration, and guardianship and conservatorship.

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Purpose of Presentation:

The information provided in this presentation does not, and is not intended to, constitute legal advice; instead, all information available in this presentation is for educational purposes only. Sample language should be modified by any estate planning attorney to reflect their clients' circumstances and the state and federal laws in effect at that time.

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Part I:

Overview

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Special Needs Trusts: Two Types

A special needs trust is a trust arrangement for disabled individuals – often receiving means-tested benefits – that provides trust administration and preserves eligibility for means-tested government benefits.

Standalone Special Needs Trust

1 Trust Agreement
+
1 beneficiary

Pooled Special Needs Trust

1 Trust Agreement
+
Multiple beneficiaries/
Joinder Agreements

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Disability

Disability as defined by the Social Security Administration (SSA)
42 U.S.C. 1382c(3)(A), (C)

Adult

To be disabled within the meaning of the Social Security Act:

1. the individual must have a medically determinable physical or mental impairment; and
2. the impairment has lasted or is expected to last for at least one year, or to result in death; and
3. the impairment must make the individual unable to engage in "substantial gainful activity."

Minor (under 18)

To be disabled within the meaning of the Social Security Act:

1. The child must have a physical or mental condition(s) that very seriously limits his or her activities; and
2. the condition(s) must have lasted, or be expected to last, at least one year or result in death.

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What is a Pooled Special Needs Trust (PSNT)?

- A PSNT is a type of special needs trust
- A non-profit organization establishes the Master Trust Agreement and administers the sub-accounts.
- Clients "join" by signing a Joinder Agreement.
  1. Who is the Beneficiary?
     - What is their disability?
     - What benefits do they receive?
  2. Who is setting up the sub-account?
  3. Who are the remainder beneficiaries?

Pooled Special Needs Trust

1 Trust Agreement
1 Trustee
1 Trust Administrator
1 Financial Advisor

Multiple beneficiaries/ Joinder Agreements

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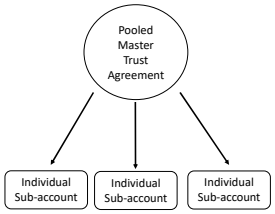
What is a Pooled Special Needs Trust (PSNT)?, cont.

- Separate accounts are maintained for each beneficiary, but assets are pooled for investing and management purposes
- Lower fees and lower minimum funding requirements than many financial institutions and professional fiduciary options.



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Client Checklist

✓ Is the Beneficiary **disabled** as defined by the Social Security Administration?
✓ Does the Beneficiary currently receive **means-tested benefits** such as Supplemental Security Income (SSI) and/or Medicaid or might he/she apply in the future?
✓ Will these assets **jeopardize his/her benefit eligibility**?
✓ Is the Beneficiary **vulnerable** or **not able to manage his/her own finances**?

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Paul

Paul is 12 years old. His disability is a result of a birth injury. He is receiving services under a Medicaid waiver. His parents, Jim and Carolyn, plan to apply for SSI when her turns 18 years old.

His parents meet with an estate planning attorney to set up their estate plan. Their goal is to ensure that Paul is provided for after their passing.

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David

David is 30 years old and lives in a community-based group home. He has Down's Syndrome and cannot live independently or support himself. David receives SSI and Medicaid.

David's grandmother, Joan, wants to ensure that David is provided for and leaves him a $50,000 specific bequest in her will. David's grandmother has just died.

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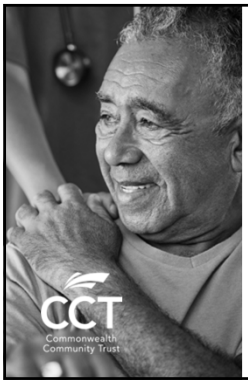

Part II:

Government Benefits

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Categories of Benefits:

Means-tested:

- Supplemental Security Income (SSI)
- Medicaid

Earned/Entitled:

- Social Security Disability Insurance (SSDI)
- Medicare

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Supplemental Security Income (SSI) Means-Tested Benefit

Monthly monetary allowance that is intended to pay for <u>food & shelter</u>.

Adults are eligible if they are:

- Disabled, blind, or aged
  AND
- Have limited countable resources
  AND
- Have limited countable income

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Social Security Disability Insurance (SSDI) Entitlement Benefit

- SSDI is a monthly benefit from SSA for people with a disability (the government version of disability insurance).
- Who may be eligible:
  1. **Worker** (if disabled)
  2. **Worker's adult disabled child**
     - Child was disabled before 22 years of age
     - Worker is disabled, retired, or has passed away
  3. **Worker's disabled spouse or former spouse**
     - Worker has passed away
     - Spouse or former spouse is between 50-60 years of age and was disabled starting at least 7 years before the worker passed away
- Benefit amount is based on the work record and withholdings of the worker or, under specific circumstances, the work record of their parent or spouse.

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Medicaid
Means-Tested Benefit

- A means-tested federal health insurance program for aged, blind, disabled and impoverished people.
- There are different programs, including long-term care (LTC) Medicaid.
- When determining eligibility, some programs consider income and assets, and some consider only income.
- Administered by the States – some states have different eligibility requirements.
- Administered through the local Department of Social Services.

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Medicare
Entitlement Benefit

Federal health insurance program for:

- People who are 65+

AND

- People who have received SSDI for the past 24 months and are continuing to receive it

(there are some additional groups as well)

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Dual Eligibility

- **SSDI** benefit is below Federal Benefit Rate, so **SSI** makes up the difference
  - *Example*: Adult disabled child receives $500 in SSDI, then SSI will pay the remaining funds
- **Medicaid** covers costs of medical care for non-**Medicare** expenses (long-term care, waivered services)
  - *Example*: Adult disabled child who is receiving Medicare and also Medicaid waiver services

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Part III:

In Depth Review of Pooled Special Needs Trusts

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Comparison of 1st and 3rd Party Special Needs Trusts:

Third-Party	First-Party
Grantor can be any third-party individual, such as a parent, family member or friend.	Federal law requires it must be established by the Beneficiary; the Beneficiary's legal guardian, parent, grandparent; or Court. The Beneficiary's Agent under a power of attorney can sign if the Agent has proper authority.
Funded by anyone other than the Beneficiary; family estate plans, life insurance, investments, retirement accounts or other assets.	Funds belong to the Beneficiary, usually from a personal injury or workers' compensation award, direct inheritance, the Beneficiary's own funds, Social Security back payment, alimony, child support.
Revocable or Irrevocable prior to Grantor's death	Irrevocable
NOT subject to Medicaid payback	Subject to Medicaid payback
No age limitation for Beneficiary	A transfer of assets penalty may apply if the Beneficiary is 65 years old or older (varies by state and by benefit received).

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Power of Attorney Checklist

- ✓ Is the POA valid under state law? (ie: notarized, signed, etc.)
- ✓ If multiple agents, do they have separate authority or will they both sign?
- ✓ Is the POA currently in effect? If the authority is "springing", then has the "springing event" been documented?
- ✓ Does the POA grant the authority to establish a pooled special needs trust sub-account or an irrevocable trust?
- ✓ Does the POA grant the authority to transfer assets into an irrevocable trust set up by the POA agent?
- ✓ Does the POA allow or place any limitations on the authority to establish beneficiaries?
- ✓ Has the POA agent signed an Agent Certification affidavit?

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Maria

Maria is 64 years old and has Parkinson's disease. She is receiving long-term care Medicaid and residing in a skilled nursing facility. In addition, she has been receiving SSDI and Medicare. As her daughter is driving Maria to a doctor's appointment, their car is struck by another driver, who is at fault and properly insured. Maria is injured and hospitalized for several days.

Maria and her daughter engage a personal injury attorney to assist them in filing a claim against the other driver's insurance company. The insurance company offers a settlement.

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Establishing and Funding 1st Party PSNT for Principal Using a Power of Attorney

POMS SI 01120.203(D)(6) allows an Agent under a valid power of attorney to establish a first-party pooled special needs trust for the Principal.

Example: *My Agent is authorized to (1) execute a pooled trust sub-account joinder agreement with Commonwealth Community Trust or another pooled special needs trust on my behalf, pursuant to 42 U.S.C. 1396p(d)(4)(c); (2) assign, transfer, deliver, and convey any and all of my assets, including any rights to receive income or assets from any source, to the Trustee of the pooled special needs trust sub-account for my sole benefit; (3) designate the remainder beneficiaries for the sub-account [or specify remainder beneficiaries]; and (4) make requests for disbursements and receive and use the disbursements on my behalf.*

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Types of Special Needs Trusts

Standalone Special Needs Trust	Pooled Special Needs Trust
Trustee can be an individual, like a family member or attorney, or a corporate trustee.	Established and managed by a non-profit organization.
Individual trustees may not be able to serve for the duration of the Beneficiary's life.	Pooled trust administrator provides stability, even if client services staff change.
Corporate and professional trustees usually have a minimum balance above $100,000 or higher.	Low minimum balance requirements.
Investment assets are invested alone.	Assets in sub-accounts are pooled for investment purposes.
If Beneficiary is 65 or over, cannot establish 1st party trust.	Can establish 1st party trust sub-account for beneficiaries 65 or over, but there may be a penalty on a state-by-state basis for Medicaid Long Term Care recipients.
Can hold any type of assets, subject to trustee terms.	May not accept assets that cannot be liquidated and pooled.

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Transfer from SNT to PSNT

Drafters should include language that gives the trustee of a special needs trust the discretion to transfer assets from an individual special needs trust to a pooled trust. After a transfer, the funds will be governed by the terms of the pooled trust master trust agreement.

Example: *My Trustee may at any time, exercising sole discretion, distribute any income or principal held in [name of special needs trust], up to the entire value of the trust corpus, to the Trustee of the Commonwealth Community Trust [Third-Party OR First-Party] Pooled Special Needs Trust for the benefit of [insert Beneficiary name] or a similar pooled special needs trust. I authorize my Trustee to sign all joinders and other documents and take all steps necessary to establish the sub-account and to facilitate the transfer of the trust assets to the [third-party OR first-party] sub-account for the benefit of [insert Beneficiary name].*

**Note: Pooled trusts usually cannot make any distributions after the death of the Beneficiary, not even distributions to pay for the funeral, burial, or cremation of the Beneficiary.*

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Transfers to PSNT from Wills or Trusts

Drafters should give fiduciaries the authority and discretion to make distributions to a PSNT sub-account in lieu of an outright distribution to a beneficiary.

Example: *At any time that my Executor / Trustee is directed or authorized to make a distribution of interest or principal to a beneficiary, my Executor / Trustee may, exercising sole discretion and without the necessity of a court order, pay such income or principal to Trustee of the Commonwealth Community Trust Pooled Special Needs Trust for the benefit of the beneficiary, or a similar pooled special needs trust sub-account, in lieu of making a distribution to the beneficiary.*

*Note: The attorney should determine whether the distribution should be made to a first-party or third-party trust based on state law

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Third-Party PSNT

SSA Program Operation Manual System (POMS) SI01120.200(D)(2)

A pooled third-party trust is NOT a countable resource if:

1. It is funded by the assets of a third-party (anyone besides the Beneficiary);
2. It does not grant the Beneficiary the ability to revoke or terminate it under state law; AND
3. It does not grant the Beneficiary the authority to direct distributions. This power lies with the trust administrator.

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Establishing and Funding 3rd Party PSNT For Loved One Using A Power of Attorney

Drafters can give agents under the power of attorney the authority to set up and fund third-party pooled special needs trust sub-accounts.

Example: *My Agent is authorized to (1) execute a pooled third-party trust sub-account joinder agreement with Commonwealth Community Trust or another pooled special needs trust for [insert names or class description]; (2) designate the remainder beneficiaries for the sub-account [or specify remainder beneficiaries] ; (3) assign, transfer, deliver, and convey any and all of my assets, including any rights to receive income or assets from any source, in keeping with my Agent's authority to make gifts to the Beneficiary of the sub-account, to the Trustee of the pooled special needs trust sub-account; (4) update pay on death, transfer on death, and other beneficiary designations that listed the Beneficiary of the sub-account to list the Trustee of the pooled special needs trust sub-account; (5) amend any trusts that I might have to update any bequests to the beneficiary of the sub-account to list the Trustee of the pooled special needs trust sub-account and (6) make requests for disbursements from the sub-account and receive and use the disbursements on the Beneficiary's behalf.*

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Third-Party PSNT Remainder Policies

- Every pooled trust has a different policy on whether they retain third-party remainders after the passing of the Beneficiary.
- If allowed, remainder beneficiaries can be named on the Joinder Agreement when setting up the sub-account.

***Pre-need burial and funeral expenses should be paid during the Beneficiary's lifetime.**

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First-Party PSNT

SSA Program Operation Manual System (POMS) SI 01120.203(D)

- Omnibus Reconciliation Act of 1993, 42 U.S.C. §1396p(d)(4)(C)
- SSA-POMS-Program Operations Manual System SI 01120.203(D)
- State Laws and Regulations for Medicaid recipients

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First-Party PSNT, Continued

SSA Program Operation Manual System (POMS) SI 01120.203(D)(1)

A pooled first–party trust is NOT a countable resource if:

1. The pooled trust is established and managed by a nonprofit;
2. Separate accounts are maintained, but are pooled for investment;
3. Accounts are solely for the benefit of disabled beneficiaries;
4. Account is established by the Beneficiary, parent, grandparent, legal guardian, or a court (or agent under POA with authority); AND
5. There is a Medicaid payback provision.

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Establishing and Funding 1st Party PSNT for Child or Grandchild Using a Power of Attorney

POMS SI 01120.203(D)(6) allows an agent under a valid power of attorney to establish a first-party pooled special needs trust for the Principal's child or grandchild.

Example: *My Agent is authorized to (1) execute a 42 U.S.C. 1396p(d)(4)(c) pooled trust sub-account joinder agreement with Commonwealth Community Trust or another pooled special needs trust on behalf of my child or grandchild [or insert names], (2) designate the remainder beneficiaries for the sub-account, and (3) make requests for disbursements and receive and use the disbursements for the Beneficiary.*

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Establishing and Funding 1st Party PSNT for Another Loved One

If it is needed to create a first-party pooled special needs trust account for a loved one who is not listed in the POMS, a power of attorney can give the Agent the authority to act for the Principal.

Example: *My Agent is authorized to use my funds to petition a court to create and fund a 42 U.S.C. 1396p(d)(4)(c) pooled trust sub-account with Commonwealth Community Trust or another pooled special needs trust on behalf of [insert names or class description].*

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65 and Over: Transfer of Assets Penalty

Those who are 65 years or older AND receiving or applying for Long-Term Care Medicaid or some other Medicaid programs may face a **transfer of assets penalty** if they transfer assets to a first-party PSNT within the lookback period.

The issues surrounding transfer penalties are complex and vary from state to state. Each situation is different, and it is recommended to be evaluated on a case-by-case basis by an attorney knowledgeable in this area.

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First-Party PSNT Remainder Policies:
Medicaid Recipient Beneficiaries

Medicaid

- Federal statute allows the non-profit trust administrator to retain the remaining funds in lieu of repaying Medicaid.
- Every state has different rules stating what percentage (if any) of funds the PSNT can retain.
- Within the regulations of the individual states, PSNTs may retain the entire balance, a percentage, or only when there is less remaining than Medicaid is owed.
- **IMPORTANT TO NOTE:** Pre-need burial and funeral expenses should be paid during Beneficiary's lifetime; they are not allowed prior to Medicaid repayment.

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Part IV:

Pooled Special Needs Trust Administration

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Roles & Responsibilities of the Pooled Trust

- Disburse the funds prudently and for the sole benefit of the Trust Beneficiary.
- Avoid potential loss of government benefits by inappropriate distributions.
- Maintain accurate accounting.
- Absolute discretion over distributions.
- Invest trust assets prudently.

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How to Evaluate a Pooled Trust

- Review the Joinder Agreement and Master Trust Agreement
- What are the fees?
  - Enrollment fees
  - Ongoing fees
- What is the remainder policy after the Beneficiary passes away?
- Who manages the investments?
  - Is the Investment Policy Statement readily available?
- Is the pooled trust regularly audited by an independent auditor?
  - Financial
  - Internal controls

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How to Evaluate a Pooled Trust

- How long has the organization served as a pooled trust administrator?
- Does the non-profit have managerial control over the pooled trust?
- How many beneficiaries does the organization serve?
- Who is on the Board of Directors?
  - Are they independent?
  - Do they provide active oversight?
- Who are the staff?
- Is the client assigned to a coordinator/trust officer?
- Are phones answered by staff during business hours?
  - Is there a policy on how quickly client calls will be returned?

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How to Evaluate a Pooled Trust

- Can the Beneficiary maintain their sub-account if they move to another state?
  - If not, does the pooled trust's master trust agreement permit transfer to another pooled trust?
- What are their policies for disbursements?
  - Is there a disbursement manual readily available?
  - Are preloaded cards available for making purchases?
- Is there a secure portal or mobile app to access account information, transactions, and statements?
  - Can you easily submit disbursement requests online?
- Is the website easy to navigate and the policies and procedures easily available?

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Guidelines for Disbursements

When considering whether to approve a disbursement request, the following best practices can be used as a guide for decision-making:

Is the request prudent?	Are there adequate funds in the trust to cover the request?	Is the request for the [sole] benefit of the Beneficiary?
Is the request consistent with the Beneficiary's budget and objectives?	For a Third-Party Trust, is the request consistent with the intent of the Grantor(s)?	For a Beneficiary receiving SSI and/or Medicaid, will the request jeopardize benefits?

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"Sole Benefit Rule" Explained

- First-party SNT funds must be used for the **sole benefit** of the Beneficiary. *42 U.S.C. § 1396p(d)(4), POMS SI 01120.203(D)(5)*
- Collateral benefit to a third-party *is acceptable*. *POMS SI 01120.201(F)(3)*
- For example:
  - Household purchases such as furniture that others in the home will benefit from are allowable
  - Beneficiary travel *and* companion travel expenses are allowable if the Beneficiary requires assistance
  - Travel for third party to visit beneficiary allowed if checking on the Beneficiary's well-being
- Items which can be titled should be titled in the Beneficiary's name to avoid benefiting a third party. *POMS SI 01120.201(F)(3)*

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Examples of How Funds Can Be Spent

- ✓ **Medication and Medical Services** – Medication and services that are not paid for by Medicaid, Medicare, or other insurance or government programs.
- ✓ **Daily Living**– Food, toiletries, clothing, furniture, cell phones, cell phone bills, and internet bills.
- ✓ **Devices and Assistive Technology** – Technology such as tablets, computers, and Text-to-Speech (TTS), eyeglasses, hearing aids, prosthetic devices, and expenses for maintenance of these devices.
- ✓ **Transportation** – Purchase of a car titled in the name of the Beneficiary or alternative transportation expenses. A lien is required for vehicles at the time of purchase.
- ✓ **Home modifications** – Home modifications such as ramps and rails to accommodate the Beneficiary.
- ✓ **Travel** – Vacations for the beneficiary and, if needed, a travel companion.

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Funds Can Be Disbursed to the Following:

Directly to retail merchant or service provider

A pre-loaded debit card linked to the sub-account for the purchase of goods and services for the Beneficiary

An Advocate who has purchased goods and services on behalf of the Beneficiary

A credit card company for goods and services purchased for the Beneficiary

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For Beneficiaries Who Receive SSI and/or Medicaid

- Distributing cash to a Beneficiary can impact their SSI and Medicaid benefits, including:
  - Transfer of trust funds to the Beneficiary's bank account or allowing them to withdraw cash from the trust
  - Reimbursing Beneficiaries, even for allowable purchases
  - Disbursements for gift cards or gift certificates

Source: POMS SI 00835.310; 01120.200(E)(1)(a)-(b)

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Part V:

ABLE Accounts

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ABLE Accounts - 26 U.S. Code § 529A

- Participants qualify if onset of disability was prior to age 26. This will increase to age 46 on 1/1/2026.
- Can be established by the Beneficiary; their agent under a power
- of attorney; their guardian or conservator; their spouse, parent, sibling, or grandparent; or their SSA rep payee.
- Can only have one account per Beneficiary.
- Limited to $18,000 in contributions in 2024, with a limited exception for Beneficiaries who are working.
- Subject to Medicaid payback in many states.
- Not a countable resource for the first $100,000. Once the balance goes over $100,000, any SSI cash benefit is suspended until the balance drops below $100,000.

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ABLE Account – *Qualified Disability Expenses*

- Payments from an ABLE account for Qualified Disability Expenses (QDE) do not cause a reduction in benefits or tax consequences.
- Shelter Expenses are considered QDEs. Depending on state rules, this can be coordinated with PSNT.

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Transfers to ABLE Account From Special Needs Trusts

Drafters can give the Trustee of a special needs trust the authority and discretion to make distributions to an ABLE account for the Beneficiary.

Example: *The Trustee may, exercising sole discretion, transfer funds to an ABLE account established for the Beneficiary, up to the annual ABLE contribution limit.*

*Note: Confirm this type of transfer is permitted in your state

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Establishing and Funding an ABLE Account for Principal Using a Power of Attorney

Example: *My Agent shall have the power to: (1) open an ABLE account for me; (2) transfer and deposit any of my assets into my ABLE account; (3) withdraw, now or in the future, any funds from my ABLE account; (4) select the investment option(s) in accordance with the terms provided by the ABLE account; (5) change the beneficiary of my ABLE account in accordance with Section 529A of the Internal Revenue Code; (6) transfer funds from a 529 college savings plan to my ABLE account, as permitted by federal and state law; and (7) make representations and certifications on my behalf and to otherwise manage and enter into all other lawful transactions with respect to my ABLE account that I could perform if present.*

**adapted from Virginia ABLENow Power of Attorney form*

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Transfers to ABLE Accounts from Wills or Trusts

Drafters should give the fiduciaries (whether Executors or Trustees) the authority and discretion to make distributions to an ABLE account in lieu of an outright distribution to the Beneficiary.

Example: *At any time that my [Executor / Trustee] is directed or authorized to make a distribution of interest or principal to a beneficiary, my [Executor / Trustee] may, exercising sole discretion and without the necessity of a court order, pay such income or principal to an ABLE account established for the Beneficiary.*

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Establishing and Funding ABLE Accounts Using a Power of Attorney

Example: *My Agent is authorized to open an ABLE account and designate my spouse, my descendants, or my siblings as the beneficiary.*

Example: *My Agent is authorized to contribute my funds, up to the annual ABLE contribution limit, to any ABLE account for any person to whom my Agent is authorized to make gifts. Further, my Agent is authorized to transfer funds from a 529 college savings plan to an ABLE account, as permitted by federal and state law.*

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Questions?

If you have general questions after today's presentation, please stop by our table or reach out to us by phone or email.

For more information, visit **trustCCT.org**.

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Administering a Special Needs Trust

A Handbook For Trustees (2024 Edition)

SNA
SPECIAL NEEDS ALLIANCE

Attorneys for special needs planning.

Administering a Special Needs Trust
TABLE OF CONTENTS

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Administering a Special Needs Trust: A Handbook for Trustees

Introduction and Definition of Terms

"Special Needs" trusts are complicated and can be hard to understand and administer. They are like other trusts in many respects—the general rules of trust accounting, law and taxation apply—but unlike more familiar trusts in other respects. The very notion of "more familiar" types of trusts will, for many, be amusing—most people have no particular experience dealing with formal trust arrangements, and special needs trusts are often established for the benefit of individuals who would not otherwise expect to have experience with trust concepts.

The essential purpose of a special needs trust is usually to improve the quality of an individual's life without disqualifying him or her from eligibility for public benefits. Therefore, one of the central duties of the trustee of a special needs trust is to understand what public benefits programs might be available to the beneficiary and how receipt of income, or provision of food or shelter, might affect eligibility. Because there are numerous programs, competing (and sometimes even conflicting) eligibility rules, and at least two different types of special needs trusts to contend with, the entire area is fraught with opportunities to make mistakes. Because the stakes are often so high—the public benefits programs may well be providing all the necessities of life to the beneficiary—a good understanding of the rules and programs is critically important.

The essential purpose of a special needs trust is usually to improve the quality of an individual's life without disqualifying him or her from eligibility to receive public benefits.

Before delving into a detailed discussion of special needs trust principles, it might be useful to define a few terms:

GRANTOR (sometimes "Settlor" or "Trustor")—the person who establishes the trust and generally the person whose assets fund the trust. There might be more than one grantor for a given trust. The tax agency may define the term differently than the public benefits agency. Special needs trusts can make this term more confusing than other types of trusts, since the true grantor for some purposes may not be the same as the person signing the trust instrument. If, for example, a parent creates a trust for the benefit of a child with a disability, and the parent's own money funds the trust, the parent is the grantor. In another case, where a parent has established a special needs trust to handle settlement proceeds from a personal injury lawsuit or improperly directed inheritance, the minor child (through a guardian) or an adult child will be the grantor, even though he or she did not decide to establish the trust or sign any trust documents.

TRUSTEE—the person who manages trust assets and administers the trust provisions. Once again, there may be two (or more) trustees acting at the same time. The grantor(s) may also be the trustee(s) in some cases. The trustee may be a professional trustee (such as a bank trust department or a lawyer), or may be a family member or trusted adviser—though it may be difficult to qualify a non-professional to serve as trustee.

BENEFICIARY—the person for whose benefit the trust is established. The beneficiary of a special needs trust will usually (but not always) be disabled. While a beneficiary may also act as trustee in some types of trusts, a special needs trust beneficiary will almost never be able to act as trustee.

DISABILITY—for most purposes involving special needs trusts, "disability" refers to the standard used to determine eligibility for Social Security Disability Insurance or Supplemental Security Income benefits: the inability to perform any substantial gainful employment.

INCAPACITY (sometimes Incompetence)—although "incapacity" and "incompetence" are not interchangeable, for our purposes they may both refer to the inability of a trustee to manage the trust, usually because of mental limitations. Incapacity is usually important when applied to the trustee (rather than the beneficiary), since the trust will ordinarily provide a mechanism for transition of power to a successor trustee if the original trustee becomes unable to manage the trust. Incapacity of a beneficiary may sometimes be important as well. Not every disability will result in a finding of incapacity; it is possible for a special needs trust beneficiary to be disabled, but not mentally incapacitated. Minors are considered to be incapacitated as a matter of law. The age of majority differs slightly from state to state, though it is 18 in all but a handful of states.

REVOCABLE TRUST—refers to any trust which is, by its own terms, revocable and/or amendable, meaning able to be undone, or changed. Many trusts in common use today are revocable, but special needs trusts are usually irrevocable, meaning permanent or irreversible.

IRREVOCABLE TRUST—means any trust which was established as irrevocable (that is, no one reserved the power to revoke the trust) or which has become irrevocable (for example, because of the death of the original grantor).

SOCIAL SECURITY DISABILITY INSURANCE—sometimes referred to as SSDI or SSD, this benefit program is available to individuals with a disability who either have sufficient work history prior to becoming disabled or are entitled to receive benefits by virtue of being a dependent or survivor of a disabled, retired, or deceased insured worker. There is no "means" test for SSDI eligibility, and so special needs trusts may not be necessary for some beneficiaries—they can qualify for entitlements like SSD and Medicare even though they receive income or have available resources. SSDI beneficiaries may also, however, qualify for SSI (see below) and/or Medicaid benefits, requiring protection of their assets and income to maintain eligibility. Of course, just because a beneficiary's benefits are not means-tested, it does not follow that the beneficiary will not benefit from the protection of a trust for other reasons.

SUPPLEMENTAL SECURITY INCOME—better known by the initials "SSI," this benefit program is available to low-income individuals who are disabled, blind or elderly and have limited income and few assets. SSI eligibility rules form the basis for most other government program rules, and so they become the central focus for much special needs trust planning and administration.

MEDICARE—one of the two principal health care programs operated and funded by government—in this case, the federal government. Medicare benefits are available to all those age 65 and over (provided only that they would be entitled to receive Social Security benefits if they chose to retire, whether or not they actually are retired) and those under 65 who have been receiving SSDI for at least two years. Medicare eligibility may forestall the need for or usefulness of a special needs trust. Medicare recipients without substantial assets or income may find that they have a difficult time paying for medications (which historically have not been covered by Medicare but began to be partially covered in 2004) or long-term care (which remains largely outside Medicare's list of benefits).

MEDICAID—the second major government-run health care program. Medicaid differs from Medicare in three important ways: it is run by state governments (though partially funded by federal payments), it is available to those who meet financial eligibility requirements rather than being based on the age of the recipient, and it covers all necessary medical care (though it is easy to argue that Medicaid's definition of "necessary" care is too narrow). Because it is a "means-tested" health care program, its continued availability is often the central focus of special needs trust administration. Because Medicare covers such a small portion of long-term care costs, Medicaid eligibility becomes centrally important for many persons with disabilities.

The Most Important Distinction

Two entirely different types of trusts are usually lumped together as "special needs" trusts. The two trust types will be treated differently for tax purposes, for benefit determinations, and for court involvement. For most of the discussion that follows, it will be necessary to first distinguish between the two types of trusts. The distinction is further complicated by the fact that the grantor (the person establishing the trust, and the easiest way to distinguish between the two trust types) is not always the person who actually signs the trust document.

"Self-Settled" Special Needs Trusts

Some trusts are established by the beneficiary (or by someone acting on his or her behalf) with the beneficiary's funds for the purpose of retaining or obtaining eligibility for public benefits—such a trust is usually referred to as a "self-settled" special needs trust. The beneficiary might, for example, have received an outright inheritance, or won a lottery. By far the most common source of funds for "self-settled" special needs trusts, however, is proceeds from a lawsuit—often (but not always) a lawsuit over the injury that resulted in the disability. Another common scenario requiring a person with a disability to establish a self-settled trust is when they receive a direct inheritance from a well-intentioned, but ill-advised relative.

A given trust may be treated as having been "established" by the beneficiary even if the beneficiary is completely unable to execute documents, and even if a court, family member, or lawyer representing the beneficiary actually signed the trust documents. The key test in determining whether a trust is self-settled is to determine whether the beneficiary had the right to outright possession of the proceeds prior to the act establishing the trust. If so, public benefits eligibility rules will treat the beneficiary as having set up the trust even though the actual implementation may have been undertaken by someone else acting on their behalf. Virtually all special needs trusts established with funds recovered in litigation or through a direct inheritance will be "self-settled" trusts.

Self-settled special needs trusts are different from third-party trusts in two important ways. First, self-settled trusts must include a provision directing the trustee, if the trust contains any funds upon the death of the beneficiary, to pay back anything the state Medicaid program has paid for the beneficiary. Second, in many states, the rules governing permissible distributions for self-settled special needs trusts

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are significantly more restrictive than those controlling third-party special needs trusts.

Because Social Security law specifically describes self-settled special needs trusts, these instruments are sometimes referred to by the statutory section authorizing transfers to such trusts and directing that trust assets will not be treated as available and countable for SSI purposes. That statutory section is 42 U.S.C. §1396p(d)(4)(A), and so self-settled special needs trusts are sometimes called, simply, "d4A" trusts.

"Third-party" Special Needs Trusts

The second type of special needs trust is one established by someone other than the person with disabilities (usually, but not always, a parent) with assets that never belonged to the beneficiary. It is often used, when proper planning is done for a disabled person's family, to hold an inheritance or gift. Without planning, a well-meaning family member might simply leave an inheritance to an individual with a disability. Even though it may be possible to set up a trust after the fact, the funds will have been legally available to the beneficiary. That means that any trust will probably be a "self-settled" special needs trust, even though the funds came from a third party.

> Some trusts are established by the beneficiary for the purpose of retaining or obtaining eligibility for public benefits with the beneficiary's funds. By far the most common source of funds for "self-settled" special needs trusts is proceeds from a lawsuit—often (but not always) a lawsuit over the injury that resulted in the disability.

Parents, grandparents and others with the foresight to leave funds in a third party special needs trust will provide significantly better benefits to the beneficiary who has a disability. This type of trust will not need to include a "payback" provision for Medicaid benefits upon the beneficiary's death. During the beneficiary's life, the kinds of payments the trust can make will usually be more generous and flexible.

The "Sole Benefit" Trust

Although there are two primary types of special needs trusts, there is actually a third type that might be appropriate under certain unusual circumstances. Because Medicaid rules permit applicants to make unlimited gifts to or "for the sole benefit of" disabled children or spouses, some individuals with assets may choose to establish a special needs trust for a child or grandchild with disabilities in hopes of securing eligibility for Medicaid for both themselves as grantor and for the disabled beneficiary. A number of states are very restrictive in their interpretation of the "sole benefit" requirement, so that such trusts are rarely seen. In many ways they look like a hybrid of the two other trust types; they may be taxed and treated as third-party trusts, but require a payback provision like a self-settled trust (at least in some states).

The Second Most Important Distinction

Once the type of trust is determined, the next important issue is discerning the type of government program providing benefits. Some programs (like SSDI and Medicare) do not impose financial eligibility requirements; a beneficiary receiving income and all his or her medical care from those two programs might not need a special needs trust at all, or might benefit from more flexibility given to the trustee. A recipient of SSI and/or Medicaid, however, may need more restrictive language in the trust document and closer attention on the part of the trustee.

SSDI/Medicare Recipients

Neither Social Security Disability Insurance benefits nor Medicare are "means–tested." Consequently, it may be unnecessary to create a special needs trust for someone who receives benefits only from those two programs. After 24 months of SSDI eligibility, the beneficiary will qualify for Medicare benefits as well, so it may be appropriate to provide special needs provisions to get the SSDI recipient through that two-year period, during which he or she may rely on Medicaid for medical care. Restrictive special needs trust language may actually work against an SSDI beneficiary if it prevents distribution of cash to the beneficiary in all circumstances; an SSDI recipient will almost always benefit from broad language giving more discretion to the trustee.

Some SSDI/Medicare recipients may also receive SSI and/or Medicaid benefits. It may be critically important for those individuals to have strict special needs language controlling use of any assets or income that would otherwise be available. As the Medicare prescription drug benefit evolves over the next few years, this concern may be somewhat lessened—but for the moment, it remains true that availability of the drug coverage provided by Medicaid is critically important to many Medicare recipients.

Even an SSDI/Medicare beneficiary who does not receive any SSI or Medicaid benefits may be a good candidate for special needs trust planning. Future developments in public benefits programs, including housing, are uncertain, but constant budget pressure may well make benefits now taken for granted completely or partially indexed to income and/or assets in the future. Medical conditions also change, of course, and some persons with disabilities living in the community who presently receive adequate support from

Medicare may one day become dependent on Medicaid for services not available under Medicare–like long term care.

SSI/Medicaid Recipients

Most special needs trust beneficiaries are eligible for (or seeking eligibility for) Supplemental Security Income payments. In many states, receipt of SSI payments automatically qualifies one for Medicaid eligibility. Many other government programs explicitly rely on SSI eligibility rules as well, so that SSI eligibility rules become the central concern for those charged with administering special needs trusts.

Veterans' Benefits

"Veterans' benefits" is the term used to describe the benefits available to veterans, the surviving spouses, children or parents of a deceased veteran, dependents of disabled veterans, active duty military service members, and members of the Reserves or National Guard. These benefits are administered by the U.S. Department of Veterans Affairs ("VA").

> Parents, grandparents and others with the foresight to leave funds in a third-party special needs trust will provide significantly better benefits to a beneficiary with disabilities.

The benefits available to veterans include monetary compensation (based on individual unemployability or at least ten-percent disability from a service-connected condition), pension (if permanently and totally disabled or over the age of 65 and have limited income and net worth), health care, vocational rehabilitation and employment, education and training, home loans and life insurance. Although the pension is available to low-income veterans, it is important to note that some income, such as child's SSI or wages earned by dependent children, is excluded when determining the veteran's annual income. Also keep in mind that a service-connected disability payment will not offset SSDI, but any VA disability payment will offset SSI.

The benefits available to dependents and survivors of the veteran include Dependency and Indemnity Compensation ("DIC") and, in certain circumstances, home loans.

Transferring a VA recipient's assets into a special needs trust may not be fully effective. According to VA interpretation, the assets of such a trust will be counted as part of the claimant's net worth when calculating an improved pension. It is important to remember that the VA may place a "freeze" on new enrollees in order to manage the rapid influx of new veterans or older veterans who did not previously enroll for services. Therefore, it is important to evaluate current and future need for VA services in order to anticipate and plan for a situation where a person is otherwise eligible for VA benefits but, due to a freeze, cannot receive services. Under a new law, attorneys must become accredited with the VA to advise clients in this area.

Subsidized Housing

FEDERAL SUBSIDIZED HOUSING

The U.S. Department of Housing and Urban Development ("HUD") provides opportunities to low-income individuals and families to rent property at a cost that is lower than the open market. This is especially important to those people who are expected to pay for their shelter costs (rent or mortgage, plus utilities) with their insufficient SSI income. There are two issues to consider when evaluating the role of special needs trusts and subsidized housing: the initial eligibility for subsidized housing and the rent determination.

Eligibility for subsidized housing depends on the family's annual income. Annual income includes earned income, SSI, SSDI, pension, unemployment compensation, alimony, and child support, among other items. Annual income also includes unearned income, which is comprised, in part, of interest generated by assets. If the family has net family assets in excess of $5,000, the annual income includes the greater of the actual income derived from all net family assets or a percentage of the value of such assets based on the current passbook savings rate, as determined by HUD.

Assets that are not included as income upon receipt are lump sums, such as inheritances and insurance settlements for losses (although the income they generate will be countable), reimbursement for medical expenses, PASS set-asides, work training programs funded by HUD and the income of a live-in aide.

In general, to qualify for federal subsidized housing, an individual's countable income may not exceed eighty percent of the median income in the area to be considered "low income", and the individual's income may not exceed fifty percent of the median income to be considered "very low income". The result is a disparity in eligibility depending on where the person resides within the county, state, and region of the country.

There is no asset limit to be eligible for federal subsidized housing, although as described above, if countable assets are greater than $5,000, the interest income generated will be counted towards eligibility. If a person transfers an asset for less than its fair market value, then HUD will treat the asset as if it were still owned by the individual for two years after the transfer. HUD will assume that the asset generates income at the passbook rate and will include that income in calculating the individual's rent. Therefore, it is very likely that HUD will treat transfers to a special needs trust as a transfer for less than fair market value and, for the next two years, will include

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the interest generated by the special needs trust as income to the individual, either at the passbook rate or the actual earnings, whichever is greater.

Special Needs Trusts are excluded from family assets and the income generated by the trust assets is not included once the two-year penalty period has expired. It is important to note that, similar to other programs such as Medicaid and SSI, "regular" distributions from a special needs trust, even if made to a third-party provider, will be treated as countable income, even if used for non-food and shelter items.

> In many states, receipt of SSI payments automatically qualifies one for Medicaid eligibility. Many other government programs explicitly rely on SSI eligibility rules as well, so that SSI eligibility rules become the central concern for those charged with administering special needs trusts.

The second issue relating to subsidized housing and a special needs trust is determining the monthly rent. Generally, an individual/family's rent will be thirty percent of their adjusted gross income. Similar to treatment under the threshold eligibility rules, the special needs trust and the income generated by trust assets are excluded, but "regular" distributions made directly to the beneficiary (as opposed to a third-party provider of goods or services) will be considered as income.

SECTION 8

Section 8 is a voucher program that is administered by HUD but managed by local public housing authorities ("PHA") or metropolitan housing authorities ("MHA"). The tenant pays their rent, typically thirty percent of their net adjusted income, to the landlord. The PHA pays the remaining balance due, which is called the voucher, to the landlord. The rent is based on the market value for the area and established by the PHA according to payment standards issued by HUD.

While a family member generally cannot serve as a Section 8 landlord, it is possible for a special needs trust to do so, even if the trustee is a family member. Although there are special rules applicable to a Section 8 landlord, it can be a beneficial relationship. The trust beneficiary would pay rent to the trustee (using the thirty percent of income rule) and the PHA would pay the remainder to the trustee.

It is important to investigate how your local housing authority's rules differ from the general rules listed above.

Temporary Assistance for Needy Families ("TANF")

TANF provides assistance and work opportunities to needy families. TANF is administered locally by the states, but is overseen by The Office of Family Assistance ("OFA"), which is located in the United States Department of Health and Human Services, Administration for Children and Families. TANF is a result of combining two other programs: Aid to Families with Dependent Children ("AFDC") and Job Opportunities and Basic Skills Training ("JOBS"). Because TANF is administered on a local level, the program and eligibility rules vary greatly from state to state. However, it is safe to assume that distributions directly made to the beneficiary of a special needs trust, or to the beneficiary's family if a minor, may be considered income and will impact eligibility for TANF.

Other Means-Tested Benefits Programs

State supplements to SSI and other government benefit programs, like vocational rehabilitation services, also play important roles in the lives of many individuals with disabilities. Because the welter of eligibility programs is confusing and the reach of most other programs is not as broad as those described in detail here, those other programs are not described in any depth. In analyzing the proper approach to establishment or administration of a special needs trust, however, care should be taken to consider all the available program resources and restrictions on use of trust funds mandated by those programs.

Eligibility Rules for Means- Tested Programs

As previously noted, the primary program with financial eligibility restrictions is SSI, the Supplemental Security Income program. Because the concepts are central to an understanding of other eligibility rules, and because many other programs explicitly utilize SSI standards, the SSI rules become the most important ones to grasp. They are described here in a general way, with a few notations where other programs (particularly long-term care Medicaid) differ from the SSI rules.

Income

SSI eligibility requires limited income and assets. SSI rules have a simple way of distinguishing between income and assets: Money received in a given month is income in that month, and any portion of that income remaining on the first day of the next month becomes an asset. SSI rules also distinguish between what is "countable" or "excluded," "regular" or "irregular," and "unearned" or "earned" income. "Countable" income means that it is used to compute eligibility and benefit amount. "Excluded" means that it is not counted. "Regular" means that it is received on a periodic basis, at least two or more times per quarter or in

consecutive months, and "irregular" or "infrequent" means that it is not periodic or predictable. "Unearned" means that it is passively received, such as SSDI benefits or bank account interest. "Earned" means that work is performed in exchange for the income. An SSI recipient is permitted to receive a small amount of any kind of income ($20 per month) without reducing benefits. That amount is sometimes referred to as the SSI "disregard" amount.

Each classification or grouping has a somewhat different rule, and it is an understatement to call these income rules "confusing." Any unearned income reduces the SSI benefit by the amount of the income, so investment income or gifted money simply reduces the benefit dollar for dollar, less the disregard. Earned income is treated more favorably, only reducing benefits by about half of the earnings. This is designed to encourage SSI recipients to return to the workforce. Keeping in mind that disability is defined as "unable to perform any substantial gainful activity," it is easy to see that any significant amount of earned income will eventually imperil SSI eligibility and, since trust administration does not usually involve earned income in any event, we will not attempt to deal with those issues here.

SSI also has a concept of "in-kind support and maintenance" (ISM) that is central to much understanding of special needs trust administration. Any payment from a third party (including a trust) for necessities of life—food or shelter (note that the federal government deleted "clothing" from the list of necessities in March 2005) to a third party provider of goods or services—will be treated as countable income, albeit subject to special rules for calculating its effect.

The effect of receiving ISM on SSI benefits is different from the receipt of cash distributions. Where as cash payments reduce the SSI payment dollar for dollar, ISM reduces the benefit by the lesser of the presumed maximum value of the items provided or an amount calculated by dividing the maximum SSI benefit by three and adding the $20 disregard amount.

For 2024, the maximum federal SSI benefit for a single person is $943. One third of that amount is $314.33, and so the maximum reduction in benefits caused by ISM (no matter how high the value) is $334.33 per month. The meaning of that confusing collection of information is best illustrated using an example (CAUTION: some states provide SSI supplemental payments that affect this calculation).

Consider John, who is disabled as a result of his serious mental illness. He has no work history, and he does not qualify for SSDI. He is an adult, living on his own. He qualifies for the maximum federal SSI benefit of $943; he lives in a state which does not provide an SSI supplement.

If John's mother gives him $100 cash per month (for food and cigarettes), he is required to report that as countable unearned income each month. Although SSI may take two or three months to accomplish the adjustment, the program will eventually withhold $80 ($100 minus the $20 disregard) from his benefit for each month in which his mother makes a cash gift to him. The same result will obtain if John's mother is trustee of a special needs trust for John and the cash comes from that trust.

If, however, John's mother does not give him the $100 directly, but instead purchases $70 worth of food and $30 worth of video games each month, only the food will affect his SSI payment—reducing it by $50 ($70 minus the $20 disregard). If she purchases $20 worth of food and $80 worth of video games, there will be no effect at all—the food purchase is within the $20 monthly disregard amount. Similarly, if she purchases $20 worth of video games and $30 worth of movie tickets, there will be no effect—provided that the movie tickets cannot be turned in for cash (because if the movie tickets can be converted to cash, John could—even if he does not—convert the movie tickets into payment for food or shelter).

In other words, the effect of John's mother's payments to him or for his benefit changes with the nature of her payments. Any cash she provides to him (over the $20 monthly amount ignored by SSI) reduces his SSI payment directly. Direct purchase of items other than food or shelter does not affect his SSI, so long as the purchased items cannot be converted to food or shelter. Finally, any payment she makes for food or shelter reduces his SSI check as well, but not as harshly as cash payments directly to John.

Now suppose that John's mother decides to give up on trying to work around the strictures of SSI rules, and she simply pays his rent at an adult care facility that provides his meals. Assume that the facility costs her $1500 per month, which she pays from her own pocket. Because of the ISM rules, John's SSI benefit will be reduced by only $334.33 per month, and so his SSI check will be reduced to $608.67. Critically important, however, John will still qualify for Medicaid benefits in most states because he receives some amount of SSI. If the adult care home payment comes from a special needs trust for John's benefit, the same result will occur, assuming that the room and board portion of the payment exceeds $334.33. Incidentally, the same result will also obtain if John's mother simply takes him in and allows him to live and eat with her without charging him rent.

Now assume that John does have a work history before becoming disabled, and that he qualifies to receive $700 per month from SSDI. Because he has been receiving SSDI for more than two years, he also qualifies for Medicare. Because his countable income is less than $943, he continues to receive $263 in SSI benefits ($20 of the SSD is disregarded), and qualifies for Medicaid as well (we will ignore the effect

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of the QMB and SLMB programs for qualified, special low-income Medicare beneficiaries, and the Medicare Part B premium which would ordinarily be withheld from his SSDI check). Now if John's mother pays his rent at the adult care home, or takes him into her own home, he will lose his SSI altogether—since he is receiving less than $334.33 per month from SSI, the effect of the ISM rules will be to knock him off the program. Unless he separately qualifies for Medicaid, he will also lose his coverage under that program. The income strictures are the same or similar for other programs, with one important exception. In some states, but not all, eligibility for community or long-term care Medicaid is also dependent on countable income. The income tests vary. In some, you can "spend down" excess income over the limit to become eligible. In others, if countable income exceeds the benefit "cap" (like SSI), you cannot become eligible at all.

Some states also attempt to limit expenditures from self-settled (and even third-party) special needs trusts, and can require amendments to the language of those trusts in order to allow eligibility. While a good argument can be made that the Medicaid program does not have that ability, as a practical matter, the trustee of the special needs trust will have to either litigate that issue or acquiesce in the Medicaid agency's demands.

Assets

The limitation on assets for SSI eligibility may be somewhat easier to master, or at least to describe. A single person must have no more than $2,000 in available resources in order to qualify for SSI. Some types of assets are not counted as available (called "non-countable"), including the beneficiary's home, one automobile, household furnishings, prepaid burial amounts plus up to $1500 set aside for funeral expenses (or life insurance in that amount), tools of the beneficiary's trade, and a handful of other, less important items. Each of these categories of assets is subject to special rules and exceptions, so it is easy to become tangled in the asset eligibility structure.

Deeming

The SSI program considers portions of the income and assets of non-disabled, ineligible parents of minor disabled children and of an ineligible spouse living with the SSI recipient as available, and countable for eligibility purposes. This is called "deeming". A certain portion of the ineligible person's income and assets is considered as necessary for his or her own living expenses, and therefore is excluded.

As soon as a child reaches age 18, parental deeming no longer occurs, even if the child continues to live in the household. If spouses voluntarily separate and live in different households, then deeming from the separate spouse or parent also ends. However, in both instances, if the separate person continues to provide support or maintenance to the SSI eligible individual, it will still count as income as described above unless a Court orders it to be deposited directly into the trust. There is also a limited exception to all parental deeming for a severely disabled minor child returning home from an institution or whose condition would otherwise qualify them for institutionalization, which is called a waiver.

"I Want to Buy a..." or "I Want to Pay for..."

What do these complicated rules mean for expenditures from a special needs trust? In-kind purchases, meaning purchase of goods or services for the benefit of the beneficiary, only potentially affect the SSI benefit amount, and not Medicaid benefits, although the Medicaid agency may restrict expenditures for approved things. There are a number of specific purchases that frequently recur:

Home, Upkeep and Utilities

Keep in mind that SSI's in-kind support and maintenance (ISM) rules deal specifically with payments for "food and shelter." The Social Security Administration includes only these items as food and shelter:

1. Food
2. Mortgage (including property insurance required by the mortgage holder)
3. Real property taxes (less any tax rebate/credit)
4. Rent
5. Heating fuel
6. Gas
7. Electricity
8. Water
9. Sewer
10. Garbage removal

The rules make special note of the fact that condominium assessments may in some cases be at least partial payments for water, sewer, garbage removal and the like.

In other words, a payment for rent will implicate the ISM rules, as will monthly mortgage payments. The outright purchase of a home, whether in the name of the beneficiary or the trust, will not cause loss of SSI (although it may reduce the beneficiary's SSI benefit for the single month in which the home is purchased). This brings up another consideration. Purchase of a home in the trust's name will subject it to a Medicaid "payback" requirement on the death of the beneficiary, whereas purchase in the name of the beneficiary may allow other planning that will avoid the home becoming part of the payback. This complicated interplay of trust rules, ISM definition, estate-recovery rules, and home ownership

makes this area of special needs trust administration particularly fraught with difficulty.

However, the Medicaid state agency's treatment of distributions from special needs trusts may differ from the Social Security interpretation—especially when the beneficiary of a self-settled trust is eligible for Medicaid benefits. For example, contrary to putting the house in the individual's name, a state may require that any purchase of a home by such a trust would result in title being held in the trust's name, thereby ensuring that the state will at least receive the proceeds from the sale of the residence upon the death of the beneficiary.

Clothing

Until March 7, 2005, purchase of clothing by a trust was considered as ISM for SSI, similar to shelter and food. Since then, a clothing purchase for the beneficiary will not affect the benefit amount or eligibility, whether the clothing in question is special garments related to the disability or just ordinary street clothes and shoes. Not all state Medicaid regulations reflect this change.

Phone, Cable, and Internet Services

Other than those utilities listed above, there is no federal limitation on utility payments. In other words, the trust can pay for cable, telephone, high-speed internet connection, newspaper, and other "utilities" not on the list.

Vehicle, Insurance, Maintenance, Gas

Purchase of a vehicle and maintenance (including gas and insurance) is permitted under federal law. Note that there is a mechanical difficulty in providing gasoline without providing cash that could be converted to food or shelter. One technique which has worked well has been to arrange for the beneficiary to have a gas-company credit card. Because eligibility for such cards is easier to meet, and because the cards cannot be used to purchase groceries, administration of the credit account is easier to set up and monitor, and the card can then be billed directly to the trust.

Some state Medicaid agencies put limitations on the value, type, and title ownership of vehicles, such as only allowing a vehicle valued at up to $5,000, handicapped-equipped, or requiring a lien in favor of the payback trust on the title. The SSI program does not specifically require or monitor such limitations.

Pre-paid Burial/Funeral Arrangements

Nothing in federal law prohibits or restricts use of special needs trust funds for purchase of burial and funeral arrangements during the beneficiary's lifetime— except to the extent that the beneficiary has access to the funds used to pay for the arrangements, and thereby subject to the asset limitations affecting SSI recipients. State Medicaid agencies may limit the value of the burial contract. It is important to ask for an "irrevocable, pre-paid" funeral plan.

Tuition, Books, Tutoring

No limit under either federal or state law. This is an excellent use of special needs trust funds.

Travel and Entertainment

Once again, no limit except that there may be some concern about payment for hotels. When the beneficiary still maintains a residence at home, the hotel stay and restaurant may be considered "shelter" and "food" expenses. Some states may impose limitations on companion travel not found in federal law. These might include not allowing recipients to have the special needs trust pay for more than one traveling companion, the companion must be necessary to provide care, and the companion may not be a person obligated to support the beneficiary such as a minor beneficiary's parent. Note that foreign travel can have two other adverse effects: (1) airline tickets to foreign destinations, if refundable, will be treated as being convertible into food and shelter, and (2) if an SSI recipient is out of the country for more than a month, he or she may lose eligibility until return. For those reasons, foreign travel, unlike domestic travel, usually must be limited in time.

> As soon as a child reaches age 18, parental deeming no longer occurs even if the child continues to live in the household.

Household Furnishings and Furniture

The trust can be used to purchase appliances, furniture, fixtures and the like. Before March 2005, there was a theoretical concern in the SSI program that the value of household furnishings might exceed an arbitrary limit and affect the beneficiary's eligibility; that value limit has now been removed.

Television, Computers and Electronics

There is no specific limitation on purchase of household televisions or other electronic devices, although under SSI rules the individual is only allowed to own "ordinary household goods" that are not kept for collectible value and are used on a regular basis. The trust can also provide a computer for the beneficiary, plus software and upgrades.

Durable Medical Equipment

There is no federal limitation on any medical related equipment, but individual states may limit purchase of some equipment as not being "necessary." Problem areas could be if the equipment could also be considered as recreational, such as a heated swimming pool needed for arthritic or other joint conditions.

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Care Management

No federal limitation, but many states attempt to limit payments for care or management if made to a family member or other relative, especially if there is an obligation of support (e.g., parents of minor children).

Therapy, Medications, Alternative Treatments

Same principle as durable medical equipment, above, so long as the state does not regulate the treatment, there is no federal limitation.

Taxes

No federal limitation, but states may attempt to direct trust language on what taxes can be paid for, such as taxes incurred as a result of trust assets or at the death of the beneficiary. Since it is difficult to imagine an SSI or Medicaid beneficiary having significant non-trust income, it is hard to see how this limitation is so much troublesome as it is quarrelsome.

Legal, Guardianship and Trustee Fees

At least some states allow legal, guardianship, and trustee fees to be paid from the trust, although some federal law indicates that payment of guardian's fees or guardian's attorney fees may really benefit the guardian and not the beneficiary. Payments for trust administration expenses, including the trust's attorney's fees, are clearly permissible under both federal and state law, and are rarely limited beyond reasonableness standards.

> It is generally beneficial for a self-settled special needs trust to be a grantor trust. This is true because the tax rates for non-grantor trusts are tightly compressed, and the highest marginal tax rate on income is reached very quickly for trusts.

Loans, Credit, Debit and Gift Cards

Receipt of a "loan" will not count as income for the SSI or Medicaid programs, which means that a trust can make a loan of cash directly to a beneficiary. There are rules that must be followed for loans to be valid and non-countable. There must be an enforceable agreement at the time that the loan is made that the loan will be paid back at some point, which usually means that it should be in writing. The agreement to pay back cannot be based on a future contingency such as, "I only have to pay it back if I win the lottery..." Finally, the loan must be considered as "feasible," meaning that there is a reasonable expectation that the beneficiary will have the means at some point to pay back the loan.

If a loan is forgiven, then it would count as income at that time. Also, if the beneficiary still has the loaned amount in the following month, it will then count as a resource. However, school loans are not countable as income or as a resource so long as the funds are spent for tuition, room and board, and other education-related expenses within nine months of receipt.

Since goods or services purchased with a credit card are actually a "loan" that must be paid back to the credit card company, they are also not considered as income to the beneficiary at time of purchase. As long as the beneficiary doesn't sell the goods for cash, there is also the added advantage that the trust can pay back the credit card company without the payment counting as income, except for purchases that are considered as food or shelter. Food and shelter related purchases use the same ISM countable income rules (and particularly the countable income limits) described above.

Use of a debit card by a beneficiary when purchases are made for payment through a trust-funded bank account is income to the beneficiary for the amount accessed. The total amount in the account available to be accessed could possibly be a countable resource. Is a gift card purchased by a trust and provided to a beneficiary considered to be a distribution of income, a line of credit to a vendor (similar to a credit card), or just access for in-kind purchase of goods or services on behalf of a beneficiary by the trust? SSI rules are not yet clear on this point, and it is probable that different Social Security and Medicaid offices will treat the use of debit and gift cards differently until precise guidelines are provided by the agencies. The safe approach is to use them in a very limited way; if they are to be used at all, keep receipts for all special needs items, and be prepared for adverse treatment.

Trust Administration and Accounting

Actual administration of a special needs trust is in most respects similar to administration of any other trust. A trustee has a general obligation to account to beneficiaries and other interested parties. Tax returns may need to be filed (though not always), and tax filing requirements will be based on the tax rules, not special needs trust rules. Some special needs trusts, but by no means all, will be subject to court supervision and control.

Trustee's Duties

As with general trust law requirements, the trustee of a special needs trust has an obligation not to self-deal, not to delegate the trustee's duties impermissibly, not to favor either

income or remainder beneficiaries over one another, and to invest trust assets prudently. The obligations of a trustee are well-discussed in several centuries of legal precedent, and cannot be taken lightly. Legal counsel (and professional investment, tax and accounting assistance) will be required in administration of almost every special needs trust.

A few cardinal trust rules bear special mention:

NO SELF-DEALING

As with other trusts, the trustee of a special needs trust is prohibited from self-dealing. That means no investment of trust assets in the trustee's business or assets, no mingling of trust and personal assets, no borrowing from the trust, no purchase of goods or services (by the trust) from the trustee (other than, of course, trust administration services), and no sale of trust assets to the trustee. The same strictures also apply to the trustee's immediate family members, and the existence of an appraisal, or the favorable terms of a transaction, do not change these rules.

> A trustee has a general obligation to account to beneficiaries and other interested parties. Tax returns may need to be filed (though not always), and tax filing requirements will be based on the tax rules, not special needs trust rules.

IMPARTIALITY

Because the trust has both an "income" beneficiary (the person with disabilities) and a "remainder" beneficiary (the state, in the case of a Medicaid payback trust, or the individuals who will receive assets when the income beneficiary dies), the trustee has a necessarily divided loyalty. It is important to remain impartial as between the trust's beneficiaries. Thus, investment in assets exclusively designed to maximize income at the expense of growth, or vice versa, may violate the trustee's duty to the negatively affected class of beneficiaries. Note that a trust may, by its terms, make clear that the interests of one or the other class of beneficiaries should be paramount—though such language will probably earn the disapproval of the Medicaid agency in any self-settled trust which must be submitted to Medicaid for approval.

DELEGATION

Generally speaking, a trustee may delegate functions but may not avoid liability by doing so. In other words, while the trustee may hire investment advisers, tax preparers and the like, he or she will remain liable for any failures by such professionals.

Some states do limit the trustee's liability. For example, in states which have adopted the Uniform Prudent Investor Act, delegating investment authority pursuant to the Act will limit the trustee's liability so that he or she will only be required to carefully select and monitor the investment adviser.

INVESTMENT

Any trustee should be familiar with the principles of Modern Portfolio Theory, with its emphasis on risk tolerance and asset diversification. A trustee who holds himself, herself, or itself out as having special expertise in investments or asset management will be held to a higher standard, but any trustee will be required to understand and implement prudent investment practices. Some courts will institute an investment policy that requires a percentage of assets to be held in fixed income investments and the remainder in securities (e.g., a 60/40 split is common).

Bond

A trustee, especially one who administers a special needs trust supervised by a probate court, may need to be bonded. Bond is a type of insurance arrangement whereby the trustee pays a premium in order to guarantee that the trustee manages the trust and carries out his or her fiduciary duties correctly. The bond premium is an acceptable expense of the trust, and need not come out of the trustee's own pocket. If the trustee fails to exercise his or her fiduciary duty and the trust loses money as a result, the insurance company that issued the bond will compensate the trust and take action to collect from the trustee.

The bond premium depends on multiple factors, including the credit history of the trustee and the value of the trust. Most corporate trustees are exempt from posting bond. Individual trustees must "post bond"; that is, provide written documentation to the probate court that the individual is bonded. The bond is typically issued for a set period of time, for example one year, and at the expiration of the time period, the trustee must pay an additional premium or show the bond issuer that bond is no longer required by the probate court.

It is possible in most states, at least when the trust is supervised by a court, to ask the court for permission to deposit the assets in a restricted or "blocked" account with a financial institution rather than posting bond. While this circumvents the issue of being bonded, the financial institution should require a certified copy of the court's order authorizing the expenditure of funds prior to making a distribution from the special needs trust. This can result in frequent in-person trips to the bank by the trustee, although it avoids the sometimes costly bond premium.

Titling Assets

The trust assets should not be titled in the beneficiary's name except in limited circumstances, such as when it is advantageous to title the home in the individual's name. Typically, the trust assets should be titled in the name of the

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trustee. For example, if James Jones is the trustee of the Lisa Martin Special Needs Trust, and that trust was signed on March 15, 2007, then the trust assets should be titled as follows: "James Jones, Trustee of the Lisa Martin Special Needs Trust u/a/d March 15, 2007" ("u/a/d" means "under agreement dated").

It is important that most assets not be held in James Jones's or Lisa Martin's name individually. If the assets are not titled properly, then the assets may be counted as a resource, or the interest earned counted as income, by the agencies that administer means-tested government benefits, which will frustrate the purpose of the special needs trust, as well as contribute to confusion during tax preparation. Additionally, as discussed in further detail below, it may also be important to request a separate Tax ID number for the trust as well as properly title the assets.

Accounting Requirements

A trustee is required to provide adequate accounting information to beneficiaries of the trust. That requirement generally means annual accountings. While there is no specific form required for accountings if the trust is not under court supervision, it is important to provide enough information that a reader could determine the nature and amount of any payment or investment. For some trusts, a simple "check register" accounting may be sufficient, showing interest income and the names of payees, with dates and amounts. Any trust with significant assets or diverse investments, however, should provide a thorough accounting.

> The trustee of a special needs trust is prohibited from self-dealing. That means no investment of trust assets in the trustee's business or assets, no mingling of trust and personal assets, no borrowing from the trust, no purchase of goods or services (by the trust) from the trustee (other than, of course, trust administration services), and no sale of trust assets to the trustee.

Regular, complete accountings are critical. A beneficiary is generally foreclosed from later raising objections to investments or expenditures if he or she received adequate disclosure in the annual accounting at the time. In other words, thorough accounting can limit the trustee's later exposure to claims by beneficiaries, and therefore benefits the trustee.

In addition to the accounting requirements to the beneficiary, the trustee may be required to provide an annual or biennial accounting to the probate court. The trustee should use the county-specific forms available upon request from the court, and may also be required to provide the court with copies of bank statements and cancelled checks or receipts as evidence of trust distributions and deposits. This requires the trustee to be organized or be prepared to pay potentially substantial bank fees for duplicate account statements or cancelled checks.

Reporting to Social Security

The simple term "income" has different meanings in trust accounting, tax preparation, and public benefits eligibility determinations. Trustees sometimes raise concerns that thorough trust accountings (to SSI, especially) may result in suspension of benefits, or that tax return information may be used to terminate SSI or other benefits. While such things undoubtedly do occur, Social Security workers are increasingly likely to be relatively sophisticated about such distinctions, and willing to work through any problems. In a general way, then, it is better to disclose more fully to Social Security rather than withhold any information. Annual accountings of any self-settled trust naming an SSI recipient as beneficiary should be provided to Social Security. Any third-party trust which makes significant distributions for the benefit of an SSI recipient should probably be provided to Social Security, just to prevent later problems that could have been headed off. If distributions disrupt eligibility, the problem is with the distribution, not with the accounting.

If the beneficiary receives only SSDI and not any concurrent SSI, there is no point in providing accounting information to Social Security, because SSDI benefits are not means-tested. If the trust is a third-party trust, the trustee may not have any obligation to provide accounting information, though the beneficiary may (if the beneficiary receives SSI and trust distributions invoke the ISM rules) be required to do so.

Although it no longer occurs as regularly, some Social Security eligibility workers may misunderstand the effect of special needs trust expenditures or terms and reduce or eliminate benefits improperly. When this does occur, it should be possible to remedy the error, but the beneficiary may suffer for months (or years) while the system works out the problem. Far better to head off problems in advance, rather than have to spend substantial resources and time resolving them after the fact. Be aware that fees for a trustee's time spent directly dealing with Social Security on the beneficiary's behalf may be subject to approval by SSA.

Reporting to Medicaid

If the beneficiary resides in a state where the receipt of SSI results in the beneficiary also being automatically enrolled in Medicaid, then no separate accounting requirement need be made to the Medicaid agency. However, if the individual is in a state where SSI and Medicaid are not interrelated, then it

may be necessary to account to both agencies. The Medicaid consumer (or their guardian) is required to notify Medicaid of a change in resources or income within a set period of time, usually as short as ten days. This includes situations where the Medicaid consumer receives an inheritance or settlement and immediately transfers the funds to a special needs trust.

The trustee of a third-party special needs trust may not have the same duty to account, but may choose to provide accounting information to Medicaid rather than risk later disqualification of the beneficiary, even though Medicaid's power to consider trust expenditures may be subject to challenge.

Reporting to the Court

Many self-settled special needs trusts will be treated in essentially the same fashion as a conservatorship or guardianship of the estate. This is so because, typically, the court was initially asked to authorize establishment of the trust. Most courts expect any trust established by the court to remain under court supervision, including bonding, seeking authority to expend funds, and filing periodic accountings.

Even if the trust does not require court accounting, some consideration should be given to seeking court involvement. One great advantage of court supervision of the trust is that each year's accounting is then final as to all items described in that accounting (provided, of course, that the appropriate notice has been given to beneficiaries who might otherwise complain about the trust's administration and other court procedural requirements are followed).

The Court may also have a set fee schedule that governs the amount the trustee can be compensated for providing trust administration services.

Modification of Trust

As explained above, a special needs trust must be irrevocable in order for the trust to be considered an exempt resource. However, that does not preclude the trust itself from permitting the trustee to amend or modify the trust in limited ways, particularly as it relates to program eligibility for the beneficiary. This is particularly important since we cannot predict future changes to the laws governing means-tested benefits. The courts may also be willing to modify or terminate a trust whose purpose has been frustrated by law changes or other factors, such as the trust assets being valued at a nominal amount.

Wrapping up the Trust

If the special needs trust is a self-settled trust with a provision requiring repayment of Medicaid expenses, it will obviously be necessary to determine the "payback" amount upon the death of the beneficiary or termination of the trust. Because Medicaid's historical experience with these trusts is still slight, state agencies may have difficulty providing a reliable and final figure. The prudent trustee will request a written statement of the amount due, including evidence showing how it was calculated and a statement of authority to make the final determination. Once any payback issues have been addressed (and remember that most third-party special needs trusts will have no requirement of repayment to the state), then termination of the trust will follow the usual requirements of tax preparation and filing, final accounting and distribution according to the trust instrument. Remember, because Social Security requires that Medicaid reimbursement and certain tax liabilities must be squared away before the trustee may even pay for the beneficiary's funeral, purchase during the beneficiary's lifetime of an irrevocable pre-paid funeral is critical.

Income Taxation of Special Needs Trusts

Special needs trusts, like other types of trusts, can complicate income tax preparation. The first question to be addressed is whether—for income tax purposes–the trust is a "grantor" trust or not. Tax rules defining "grantor" trusts are neither simple nor intuitive, but fortunately there are some easy rules of thumb to apply, and they will work for most special needs trusts.

"Grantor" Trusts

A "grantor" trust is treated for tax purposes as a transparent entity. In other words, the grantor of a "grantor" trust is treated as having received the income directly, even though the accounts are titled to the trust and all income shows up in the name of the trust.

Generally speaking, a self-settled special needs trust will be a grantor trust if a family member is the trustee. If the trust names an independent trustee it may still be a grantor trust if one of several specific provisions exists in the trust. A qualified accountant or lawyer should be able to tell whether a given trust is a grantor trust at a glance. If it is, it remains a grantor trust for its entire life—or at least until the death of the grantor (when the trust may either terminate or convert into a non-grantor trust as to its new beneficiaries). Until the trust has been reviewed by an expert, assume that it is probably a grantor trust.

It is generally beneficial for a self-settled special needs trust to be a grantor trust. This is true because the tax rates for non-grantor trusts are tightly compressed, and the highest marginal tax rate on income is reached very quickly for trusts. The practical difference will be small if the trust actually makes distributions for the benefit of the beneficiary in excess of its annual taxable income, but the proper tax reporting approach should still be followed.

TAX ID NUMBERS

A grantor trust may, but need not, obtain an Employer Identification Number (an EIN). Some attorneys and accountants choose to secure an EIN in each case, while

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others resist doing so—either approach is defensible. Although banks, brokerage houses and other financial institutions may insist that the trust requires its own EIN, they are simply wrong. There is widespread confusion about the necessity for an EIN for irrevocable trusts, but a confident and well-informed trustee, attorney or accountant should be able to convince the financial institution that no separate EIN is required. Instead, the trustee can simply provide the financial institution with the grantor's Social Security number.

FILING TAX RETURNS

A grantor trust ordinarily will not file a separate tax return. If a grantor trust has been assigned an EIN, it may file an "informational" return. The return can include a paragraph indicating that the trust is a grantor trust, that all income is being reported on the beneficiary's individual return, and that no substantive information will be included in the fiduciary income tax return. Actually, completing the fiduciary income tax return is not an option for a grantor trust, although again there is much confusion on this point, even among some professionals.

Non-Grantor Trusts

Virtually all third-party, and some self-settled, special needs trusts will be non-grantor trusts. Because income will not be treated as having been earned by the beneficiary, a fiduciary income tax return (IRS form 1041) will be required.

TAX ID NUMBERS

A non-grantor trust will need to obtain its own EIN by filing a federal form SS-4. Nearly all third-party special needs trusts will be "complex" trusts—this designation simply means that the trust is not required to distribute all its income to the income beneficiary each year. Although the trust will be listed as "complex" on the SS-4, it may in fact alternate between "complex" and "simple" on each year's 1041.

FILING TAX RETURNS

The non-grantor trust must file a 1041 each year. All distributions for the benefit of the beneficiary are conclusively presumed to be of income first, so any trust expenditures in excess of deductions will result in a Form K-1 showing income imputed to the beneficiary. This should not cause particular concern, since Social Security (and even Medicaid) eligibility workers are increasingly likely to understand that "income" for tax purposes is different from "income" for public benefits eligibility purposes. Any tax liability incurred by the individual beneficiary as a result of this imputation can be paid by the trust, though the trustee may not have the authority to prepare and sign the individual's tax return.

Administrative and other deductible expenses on an individual tax return must reach 2% of the taxpayer's income before being deducted at all. The same is not true of a trust tax return, leading to a modest benefit to treatment as a non-grantor trust in some cases. This benefit may not offset the compressed income tax rates levied against non-grantor trusts, but each case will be different. The difficulty in determining the proper—and the best—income tax treatment is made worse when one adds the confusing option of treatment as a "Qualified Disability Trust."

Qualified Disability Trust

Beginning in 2002, Congress allowed some non-grantor special needs trusts to receive a modest income tax benefit. Trusts qualifying under Internal Revenue Code Section 642(b)(2)(C) receive a special benefit—they are granted a larger and special deduction on their federal income taxes. In tax year 2023 (that is, the taxes that will be paid in April, 2024) for example, a Qualified Disability Trust can deduct $4,700 before any tax payment is due. That figure is slated to increase each year. Once the trust deducts that amount from its income, any remaining income might then be passed through to the beneficiary's tax return; the beneficiary may well pay no tax, or a very low rate of tax.

Coupled with the greater flexibility available to non-grantor trusts in deducting administrative expenses, Qualified Disability Trust treatment may be advantageous in some cases. Typically, the Qualified Disability Trust election will be attractive when there is a fair amount of income on trust assets, and relatively few medical or other expenses incurred on behalf of the beneficiary. Careful review with a qualified income tax professional is usually necessary to determine whether to pursue Qualified Disability Trust treatment.

Seeking Professional Tax Advice

It should be apparent from this brief discussion of taxation of special needs trusts that professional tax preparation and advice are essential. Although most accountants are qualified to prepare fiduciary (trust) income tax returns, most do not have much experience in the field. A first question to ask a prospective accountant might be "How many 1041s do you typically prepare in a year?" Follow that with "Could you please explain the concept of Qualified Disability Trusts to me?" and you will quickly locate any truly proficient practitioner. You probably will not want to automatically reject an accountant who cannot tell you about Qualified Disability Trusts immediately, unless you are prepared to deal with an accountant in another city—there are simply not very many accountants or tax preparers who have ever had occasion to claim that status on any fiduciary income tax return. As always, you can get some assistance in complicated special needs trust issues from the attorney who prepared the document, or the attorney who advises you as trustee. Members of the Special Needs Alliance® are usually among the very few who are familiar with these concepts, and your attorney may have worked with an accountant in your area who is familiar with the special tax treatment of these trusts.

For Further Reading

There are a handful of books and articles, and a growing number of websites, available to aid trustees of special needs trusts. Among our favorites:

Special Needs Trust Administration Manual: A Guide for Trustees, by Jackins, Blank, Macy and Shulman—this guide is among the best available. It was written by four Massachusetts lawyers, and is frankly focused on Massachusetts law and practice. Much of what the authors have to say, however, is applicable to special needs trusts in every state.

Special People, Special Planning: Creating a Safe Legal Haven for Families with Special Needs, by Hoyt and Pollock—provides some general advice and direction, but is more conversational than detailed. This volume also tends to focus on the "why" more than the "how", which is an important message but not as useful to someone who is already administering a special needs trust.

Special Needs Trusts: Protect Your Child's Financial Future, by Elias—this recent addition to the literature comes from Nolo Press, an organization that many lawyers find annoying at best. We disagree. This is a plain-language, straightforward explanation of special needs trusts from a lawyer who doesn't even practice in the area (his previous books for Nolo Press include explanations of bankruptcy, trademark and other areas of law).

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What You Need to Know About Being an Adult with Disabilities

A HANDBOOK FOR SELF-ADVOCATES, PARENTS, GUARDIANS, AND THEIR LOVED ONES

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1 Introduction and Definition of Terms

INTRODUCTION

Supportive services and legal arrangements are only part of a person's transition to adulthood. Relationships, school, and housing involve additional perspectives that require coordination and understanding. Legal services should foster independence. Often, when the parents are the attorney's clients, it is easy to jump to the most protective arrangements that give the parents maximum control (e.g., guardianship, etc.). However, finding the best balance between autonomy and protection is important. For parents of children who are 16, 17, or 18 years old, legal and social services professionals can assist in achieving an appropriate balance between protection and independence.

The intent of this handbook is to explain some of the terms related to services and supports for people with disabilities, to introduce the process of transitioning from child services to adult services, and to provide guidance on options and resources that may be available to young adults with disabilities.

Because many laws are state specific, such as statutes regarding powers of attorney and guardianship, the reader is advised to seek legal counsel in their state. In some cases, this guide refers to uniform laws prepared by the Uniform Law Commission, and those uniform laws may be adopted by various states, often with additional state-specific amendments.

LEGAL DEFINITIONS

1. **Disability:** According to the federal Americans with Disabilities Act (ADA), a person with a disability is defined as "an individual having physical or mental impairment that substantially limits one or more major life activities."
2. **Incapacity:** A lack of physical, mental, or cognitive ability that results in a person's inability to manage their own personal care, property, or finances; a lack of ability to understand one's actions when making a will or other legal document.
3. **Testamentary Capacity:** The mental or cognitive ability to understand and execute estate planning documents such as a will, trust, or power of attorney. In most states this is a low standard, and even a person who is subject to guardianship or conservatorship may have testamentary capacity. The requirements of testamentary capacity can vary from state to state, but generally testamentary capacity means the person must understand the following:
    a. What they are doing (i.e., that a power of attorney allows someone else to make decisions for them, or that a will tells who the person would like to get their assets when they die);
    b. Who they are appointing (i.e., be able to express why they want a certain person to be the decision maker);
    c. What they are directing (that someone else gets to make decisions for them or that specific people will get their assets when they die); and,
    d. What they are giving (the authority to make decisions or identify the assets they will be devising in their will).
4. **Agent:** The person who is authorized by another person (the principal) to deal with third parties and has the power to make decisions or take actions on behalf of the principal.
5. **Principal:** The main person who directs another person to act on their behalf or delegates their own decision-making to another person.
6. **Rights of Survivorship:** A feature of one type of joint ownership between two or more owners of an asset, such as a bank account or land. When the first owner dies, the remaining owner(s) own the decedent's portion without taking any legal action.
    - For example, if John and Mary own a house as joint tenants with rights of survivorship and John dies, Mary becomes the sole owner. She doesn't need a court ruling or a deed to establish her ownership.
7. **Public Benefits:** Public benefits are forms of assistance from the government, usually for individuals and families with limited resources and income.
8. **Medicaid:** A joint federal and state program that helps cover medical costs for some people with limited income and resources.
9. **Medicare:** The federal health insurance program for people who are 65 or older, certain younger people with disabilities, and people with End-Stage Renal Disease (permanent kidney failure requiring dialysis or a transplant, sometimes called ESRD).
10. **Supplemental Security Income (SSI):** A federal program funded by U.S. Treasury general funds. The U.S. Social Security Administration (SSA) administers the program, but SSI is not paid for by Social Security taxes. SSI provides financial help to disabled adults and children who have limited income and resources.

11. Social Security Disability Insurance (SSDI): A federal government program that pays a cash benefit to individuals who have a sufficient work history prior to becoming disabled or are a dependent or survivor of a disabled, retired, or deceased insured worker. There is no resource limit for SSDI eligibility. Recipients of SSDI will also qualify for Medicare benefits after two years regardless of their age.

12. Intellectual/Developmental Disability Waiver: Often referred to as the "I/DD Waiver," this is a Medicaid program that provides services to individuals with a qualifying intellectual or developmental disability. These services can include housing, caregiving, day services, supported employment and therapies. Because it is a Medicaid program, the services provided to those receiving this benefit will differ from state to state.

13. Guardian *ad Litem*: Also referred to as a "GAL," an attorney appointed by the court to evaluate a case and report its findings and recommendations to the court. The evaluation, report, and recommendations are based upon the best interests of the protected person.

14. Protective Arrangements:

- **Guardianship:** The legal role given to an individual to manage the personal decisions or resources of another person who cannot properly do so on their own. A child may need a legal guardian in situations where a parent is not available. An adult may need a guardian (also called a conservatorship in some states) when a court determines they have a disability that prevents them from exercising judgment or if the person becomes overly reckless or harmful to their welfare.
- **Conservatorship:** The legal role given to an individual to manage the financial affairs of a person who is unable to handle them due to their incapacity. Some states use the term "guardian of the estate" for a court-appointed party to manage someone's financial matters.
- **Power of Attorney:** A document that gives legal authorization for a designated person to make decisions about another person's property, finances, or medical care. The requirements for such will vary from state to state.
- **Surrogate Decision Maker:** A decision maker for a patient who is unable to speak for themselves and has no legally authorized representative.

2 Decision-Making Options

There may be times when an individual with disabilities needs help making decisions about finances, healthcare, housing, and other life choices. Therefore, it is important to understand the various decision-making options that range from support from others to full guardianship.

Supported Decision-Making

Supported decision-making is a concept where an individual, who is presupposed to have capacity, maintains full decision-making authority and includes others to assist in gathering and evaluating information to make decisions about healthcare, living arrangements, and money matters. Supported decision-making arrangements can be informal, like when many of us seek advice from family and friends. In addition, a growing number of states have adopted statutes to formalize supported decision-making with written agreements.

In general, a written supported decision-making agreement includes the following:

- The individual's name and the name of the supporter;
- The duration of the agreement, which can be for a limited period or with no end date;
- The types of information the supporter can access, such as financial, educational, or medical; and,
- Any other documents to authorize the release of information, such as the Family Educational Rights and Privacy Act (FERPA) release for educational information or Health Insurance Portability and Accountability Act (HIPAA) release for medical information.

In addition to a supported decision-making agreement, it is a good idea for an individual to have power of attorney for healthcare and a financial power of attorney, in case the individual ever becomes incapacitated.

Powers of Attorney (Uniform Power of Attorney Act)

- Requirements for a Power of Attorney (POA) to be valid:
  - **i.** The principal must have capacity;
  - **ii.** It must be in writing;
  - **iii.** It must be signed by the principal; and,
  - **iv.** It must be notarized and may also need to be witnessed.
- Durable Power of Attorney
  - **i.** If a POA is "durable," it continues to be valid even if the principal becomes partially or fully incapacitated.

ii. If the POA is not durable, it only authorizes the agent to make decisions for the principal when the principal has the capacity to direct or authorize the agent's action. If the principal becomes incapacitated, the agent loses authority to make decisions for the principal.

iii. In many cases, a POA is effective immediately so that the agent may begin acting on behalf of the principal as soon as the POA is executed.

iv. Alternatively, a "springing" POA does not allow an agent to make decisions for the principal unless and until the principal is determined incapacitated. Usually this requires written documentation of incapacity by two healthcare providers, one of whom generally needs to be the principal's primary care provider.

- Duties, Responsibilities, and Limitations of a Financial POA

  i. Typically, a financial POA describes the agent's authority to make decisions regarding the principal's assets. This can include accessing bank accounts, paying bills and taxes, selling or transferring real property, managing a business, and managing investment accounts.

  ii. The POA must contain language specifically outlining the authority delegated to the agent. Without express language granting authority to do so, the agent CANNOT do any of the following:

    1. Create or change beneficiaries;
    2. Alter rights of survivorship;
    3. Give gifts;
    4. Make changes to an inter vivos (living) trust;
    5. Further delegate the authority created by the POA;
    6. Control the principal's electronic communications; or
    7. Waive certain entitlements for the principal.

  iii. An agent owes the principal certain mandatory duties. These include:

    1. Acting in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
    2. Acting in good faith; and
    3. Acting only within the scope of authority granted in the POA.

  iv. Except as otherwise provided in the POA, an agent that has accepted appointment shall:

    1. Act loyally for the principal's benefit;
    2. Act without creating a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
    3. Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
    4. Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
    5. Cooperate with a person that has authority to make healthcare decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and otherwise act in the principal's best interest; and
    6. Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:
       - The value and nature of the principal's property;
       - The principal's foreseeable obligations and need for maintenance;
       - Minimization of income, estate, inheritance, generation-skipping transfer and gift taxes; and,
       - Eligibility for a benefit, a program, or assistance under a statute or regulation.

- Duties, Responsibilities, and Limitations of a Healthcare POA:
  - **i.** Typically, an agent under a healthcare POA is responsible for making decisions regarding the agent's care including consenting or to medical treatment, medical testing, medical procedures, and surgical procedures. The agent may be responsible for making decisions regarding medications, residential placement, social activities, and interactions with family and friends.
  - **ii.** If the document includes an end-of-life directive, the agent may also have the responsibility to enact the principal's wishes.
  - **iii.** Unless related to the principal by blood, marriage or adoption, an agent typically may not be an owner, operator, or employee of a healthcare institution at which the principal is receiving care.
  - **iv.** An agent shall make healthcare decisions in accordance with the principal's individual instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent's determination of the principal's best interest. In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.
  - **v.** A written advance healthcare directive may also include the principal's nomination of a guardian of the person.

Surrogate Healthcare Decision Makers

- Some states, with significant variation across the country, have laws that provide a process and priority for the designation of surrogate healthcare decision makers.
- In the absence of a designated healthcare agent for an incapacitated person, a surrogate healthcare decision maker may be appointed to look out for the best interest of the patient. For that surrogate to be designated, pursuant to the Uniform Healthcare Decisions Act, two qualified healthcare professionals must determine that the patient lacks capacity to make their own healthcare decisions. One of these professionals shall be the primary care physician.
- For individuals with developmental disabilities, the second professional shall be a person whose training and expertise aid in the assessment of functional impairment (physician, physician assistant, social worker, psychologist, nurse). In the event an individual is assessed to lack capacity to make healthcare decisions, a surrogate healthcare decision maker may be required if there is no agent (i.e., no POA) or court-appointed guardian in place, or if the agent or guardian is not reasonably available.
- The Uniform Health Care Decisions Act contains specific provisions identifying who may or may not serve as a surrogate. At any time, an individual for whom a surrogate is designated may challenge the determination of the need for a surrogate or the designation of a specific person to act as surrogate, by a signed writing or by telling their healthcare provider (i.e., their doctor) that they do not agree with the designation of a healthcare surrogate. A challenge regarding an individual's capacity will prevail unless otherwise ordered by court proceedings.

The role of a surrogate healthcare decision maker is generally intended:

- To be short term;
- To address a current medical issue; and,
- To be without any long-term oversight of such an arrangement.

Therefore, it is suggested that guardianship be sought for someone whose lack of capacity is clinically determined to be long-term.

Generally, surrogate decision-making laws authorize surrogates to make decisions regarding:

- The selection and discharge of healthcare providers and institutions;
- Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate;
- Directions relating to life-sustaining treatment, including withholding or withdrawing life-sustaining treatment, and termination of life support; and,
- Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of healthcare.

Guardianship (as it pertains to incapacitated adults, not minor children)

Typically, guardianship is a protective arrangement ordered by a court granting a third party the legal authority to make healthcare or person-centered decisions for an individual who has been determined to lack capacity to make healthcare decisions in their own best interests.

- Guardians often make decisions similar to those that a healthcare power of attorney would make such as consent to or refusal of medical treatment, medical testing, medical procedures, and surgical procedures. The guardian may be responsible for making decisions regarding medications, residential placement, social activities, and interactions with family and friends.
- Guardians are often monitored by the court through regular written reporting or hearings.
- A guardian can be a family member, friend, or an independent third-party.
- In many states, before a person can be found incapacitated by the court in a guardianship proceeding, there must be medical evidence to support the medical reason for the lack of capacity (i.e., dementia, traumatic brain injury, stroke, developmental disability, mental illness, or substance abuse).
- In many states, the alleged incapacitated person may also be represented in the guardianship proceeding by a Guardian *ad Litem* or by an attorney of their choosing or as appointed by the court.

Conservatorship/Guardian of the Estate

Typically, conservatorship is a protective arrangement ordered by a court granting a third party the legal authority to make financial decisions for an individual who has been determined to lack capacity to make financial decisions in their own best interests.

- Conservators often make decisions similar to those that a financial power of attorney would make, such as dealing with bank accounts, bill paying, real property, business decisions, investments, and taxes.
- Conservators are often monitored by the court through regular written reporting or hearings, and often are required to be bonded.
- A conservator can be a family member, friend, or an independent third-party.
- In many states before a person can be found incapacitated by the court in a conservatorship proceeding, there must be medical evidence to support the medical reason for the lack of capacity (i.e., dementia, traumatic brain injury, stroke, developmental disability, mental illness, or substance abuse).
- In many states, the alleged incapacitated person may also be represented in a conservatorship proceeding by a Guardian *ad Litem* or by an attorney of their choosing or as appointed by the court.
- Some states use the term "guardian of the estate" for a party appointed by the court to manage someone's financial matters.

3 Benefits and Services

Medicaid Waivers

Medicaid benefits are administered by each state, based on a combination of federal and state funding and federal and state laws for administering the programs. Some states request exceptions to federal rules (called "waivers") to allow flexibility in the design of programs and use of federal funds. This allows each state to make its own decisions about eligibility and services provided for the waiver. Medicaid waiver programs are usually administered through a state's department of health, department of human services, or a similar agency.

To apply for a waiver program, an application must be filed with the state agency that administers the program. Often supporting documentation will be required such as medical records to prove the disability and financial records to prove financial eligibility.

- **Intellectual/Developmental Disability Waiver (I/DD Waiver)**
  - May be part of the Home and Community Based Waivers system;
  - Usually under the state's Medicaid umbrella so benefits may be dramatically different from state to state;
  - Usually provides supports to individuals with a qualifying intellectual or developmental disability;
  - Supports may include:
    1. Physical therapy;
    2. Occupational therapy;
    3. Speech therapy;
    4. Assistive technology;
    5. Home modifications;
    6. Home healthcare;
    7. Case management services;
    8. Supported living; family living; independent living;
    9. Community supports services (sometimes known as "day hab"); and
    10. Supported employment services.
  - The I/DD Waiver may also provide necessary items such as incontinence supplies, oxygen, feeding supplies;
  - The I/DD Waiver is typically not a cash program;
  - Those eligible for the I/DD Waiver usually will also receive Medicaid as their health insurance program to cover the costs of doctor's visits, hospitalizations, and medications;
  - Many states have waiting lists of months or years for the allocation of services; and
  - Eligibility is typically based upon the Social Security standard for "disability" along with a financial eligibility requirement.

Social Security: SSI and SSDI

These benefits are received directly from the federal government through the Social Security Administration. If an individual is under the age of 18, the income of the entire household (i.e., the parents or guardians) is counted toward determining financial eligibility through a concept called "deeming." If an individual is 18 years or older, only their income is counted toward determining financial eligibility.

Applications for these benefits are submitted through the Social Security Administration's website. Documentation to prove the disability and financial eligibility will be required.

Supplemental Security Income (SSI)

SSI is a cash program. Every eligible individual receives the same amount of money each month regardless of the nature of the qualifying disability, the level of their needs, and the city and state in which they reside. Eligibility for SSI:

- Over age 65; or blind or disabled;
- Limited income and resources;
- U.S. citizen or national, or in one of certain categories of aliens;
- Resident of one of the 50 states, the District of Columbia, or the Northern Mariana Islands; and
- Is not confined to an institution (such as a hospital or prison) at the government's expense.

What does "disabled" mean for SSI purposes?

- For those under age 18, there must be a medically determinable physical or mental impairment, (including an emotional or learning problem) that:
  - results in marked and severe functional limitations; and
  - can be expected to result in death; or
  - has lasted or can be expected to last for a continuous period of not less than 12 months.
- For those over age 18, there must be a medically determinable physical or mental impairment (including an emotional or learning problem) that:
  - results in the inability to engage in substantial gainful activity; and
  - can be expected to result in death; or
  - has lasted or can be expected to last for a continuous period of not less than 12 months.
- What is considered "income"?
  - Money earned from work;
  - Money received from other sources, such as Social Security benefits, workers compensation, unemployment benefits, the Department of Veterans Affairs, friends, or relatives; and
  - Free food or shelter.
- What is considered a "resource"?
  - Cash;
  - Bank accounts;
  - Stocks, mutual funds, and U.S. savings bonds;
  - Land;
  - Vehicles;
  - Personal property;
  - Life insurance; and
  - Anything else that the applicant owns that could be converted to cash and used for food or shelter.

Social Security Disability Income (SSDI)

The SSDI program pays cash benefits to the eligible worker and certain family members if the worker is "insured." This means that the worker worked enough quarters – and recently enough – and paid Social Security taxes on their earnings. The amount is based upon the number of "work credits" the worker has prior to becoming disabled. Eligibility for SSDI:

- Have worked in jobs covered by Social Security; and
- Have a medical condition that meets Social Security's definition of disability.
- There is no resource limit for receiving SSDI.

Disabled Adult Child (DAC):

Another type of SSDI benefit is called Disabled Adult Child benefits. An adult who has a disability that began before age 22 may be eligible for benefits if their parent is deceased or starts receiving retirement or disability benefits. Social Security considers this a "child's" benefit because it is paid on a parent's Social Security earnings record.

For any type of Social Security benefit, a Representative Payee may be appointed to manage the benefits if the Social Security Administration determined that the beneficiary is not able to do so themselves. See Section 6 below for more information about Representative Payees.

Vocational Rehabilitation ("Vocational Rehab" or "VR")

What Is VR?

- Vocational Rehabilitation is the primary public program to support people with disabilities to achieve competitive employment outcomes.
- This program is usually run through the state government and may be a part of the state's education department, human services department employment division, or social services department.
- Often this service can be started when a person is in high school and by contacting the state vocational rehabilitation office.

Who is Eligible?

- An individual who has a physical, mental, emotional, or learning disability that is a barrier to the individual getting and keeping a job, including services to prepare the individual to get, keep, or regain employment.

Is VR Required for Everyone with a Disability?

- Before a VR agency can determine that an individual cannot benefit from VR services, it must explore the individual's work potential through a variety of assessments and trial work experiences. Trial work experiences might include supported employment or on-the-job training in realistic work situations. The trial work experiences must:
  - Be in competitive, integrated employment settings to the maximum extent appropriate;
  - Be of sufficient variety and over a sufficient length of time to determine whether the individual can benefit from services; and,
  - Provide support (such as assistive technology and personal assistance services).

VR for Students

- Additional school-to-work transition services called "Pre-Employment Transition Services" (Pre-ETS) are provided by VR agencies to students with disabilities while they are still in secondary school. Pre-ETS do not require VR eligibility determination.

Care Management for the Special Needs Child Whether a Minor or Adult

Ensuring proper in-home support is critical. This includes the following:

- Support that is properly trained for the child's needs so that parents have the personal and physical assistance they need to maintain full-time care;
- Ensuring all eligible waivers are applied for to facilitate funding for support; and,
- Additional activities, such as day programs, classes, and other resources are available.

It's important to create a transition plan for the adult child who lives at home but will need a new arrangement once parents are no longer able to provide the care, due to their own disability or death.

- If the hope is that the child moves in with another family member, is that plan feasible? Who will pay for it? How will the move happen logistically? Who will provide care in the interim until the move can occur?
- If a group home or assisted living facility is necessary, how will it be paid for? Have parents or guardians toured and selected a facility? Is the child on waitlists in the appropriate state?
- What support does the child need – emotionally, mentally, and physically – while the plan is being implemented?
- In what state is all this happening? If the child is moving to a new state, what benefits will be maintained, what will need to be applied for, and how long is the transition or waiting period in between?
- Also, see Section 5, below/Living Arrangements.

4 Transitions for School and Work

Extended Education/School Year ("ESY")

What is ESY?

Extended school year (ESY) services are special education and related services that are provided to a student with a disability beyond the regular school year in accordance with the child's Individualized Education Program (IEP). The need for ESY services must be determined annually on an individual basis by the individualized education program (IEP) team.

Who is eligible?

Eligibility for ESY services is assessed by a student's IEP team. An IEP or special education services in school do not automatically make the child eligible for ESY. Eligibility varies by school district and/or state and must be determined by the child's IEP team annually. Parents can request an ESY program through the child's school district or at the next IEP meeting. Similar to other decisions made by the school district, if a child is denied ESY services, the parent can appeal.

The two most common factors reviewed for determining eligibility for ESY are regression and recoupment. Is the child at risk of regressing – losing skills and knowledge – during a break from school? The IEP team will also look at recoupment – how long it might take for the child to regain the skills and knowledge they may have lost over the break. If the summer break or school vacation is likely to lead to a significant regression in the progress the child has been making, and/or if the child's progress will be significantly delayed when the break is over, the school will determine what services may be required to prevent that from happening.

Other factors may include:

- If the student is close to a breakthrough in learning;
- If progress has stalled toward a specific IEP goal; and,
- If the child needs to continue learning a critical skill related to self-sufficiency and independence.

Supported Employment

What is Supported Employment?

Supported employment refers to services for obtaining and maintaining employment for people with disabilities, including intellectual disabilities, mental health, and traumatic brain injury, among others. Supported employment is considered to be one form of employment in which wages are expected, together with benefits from an employer in a competitive workplace, though some versions refer to disability agency paid employment.

What are the key features of Supported Employment?

- Lend competence to the individual with disabilities until they learn the job.
- Be accountable for facilitating job opportunities.
- Target jobs that individuals with disabilities may not otherwise have knowledge of access.

What else is important to know?

- A supported employee can be the only employee with a disability in an organization.
- A supported employment setting cannot have more than six employees using supported employment services.
- A supported employee can be self-employed in their own business.

How does it work?

A vocational rehabilitation counselor works with the individual to formulate a plan for supported employment. As part of the planning process, the individual can select a community-based service provider from those available in the community. Services provided by the selected community-based service provider included a vocational evaluation, job development, and job coaching. Funding begins with the vocational rehabilitation program and then is picked up by the state developmental disability agency at the time period designated in the supported employment plan.

What is Day Habilitation?

Day Habilitation is a service that supports individuals with intellectual and developmental disabilities who need help acquiring, retaining, or improving socialization and adaptive skills to improve their community experience, as well as the experience of other members of the community. Day habilitation participants learn new skills and achieve greater independence.

5 Living Arrangements

Finding suitable housing and living arrangements for an individual with disabilities is often a high priority for the individual and their family. Yet, finding an appropriate and affordable arrangement can be a significant challenge, especially if the individual needs on-site support and financial assistance from government programs or private funds. Many of the aspects of living arrangements, such as decision-making authority and public assistance programs are discussed in prior sections of this handbook.

Types of housing and living arrangements available to individuals with disabilities include the following:

- **Supported Living/Group Homes:** Supported Living Services (SLS) provides people with developmental disabilities with support in home and in the communities where they live. With this service, people live in a home with other individuals who have intellectual or developmental disabilities. The home has around-the-clock staff to provide assistance, support, and safety for the residents.
- **Independent Living**: Provides support and services for individuals with I/DD so that they can live independently in their own home without 24/7 support.
- **Family Living**: Provides the opportunity to live in a typical family setting when residential habilitation is needed. Services and support are provided by a natural family member, host family member, or companion.

6 Financial Arrangements

SNT

- A special needs trust (SNT) is a trust that will preserve the beneficiary's eligibility for needs-based government benefits, such as Medicaid and Supplemental Security Income (SSI). Because the beneficiary does not own the assets in the trust, he or she will be eligible for benefit programs that have an asset limit. As a general rule, the trustee will use trust assets to supplement the beneficiary's government benefits but not replace them. Examples of supplemental needs are costs for sitters, companions, and dental or medical expenses not covered by Medicare or Medicaid. In many cases, the SNT will provide for payment of activities and expenses that provide a better quality of life for the beneficiary, such as paying for social events, leisure travel, and hobbies.
- A complete description of the types, features, and uses of SNTs is beyond the scope of this handbook, so please refer to other numerous resources regarding special needs trusts offered by the Special Needs Alliance and consult with a Special Needs Alliance member attorney for advice about your particular circumstances.

ABLE

What is an ABLE account?

- Created by the 2014 ABLE Act (Achieving a Better Life Experience Act), ABLE accounts are tax-advantaged savings accounts for individuals with disabilities and their families. The beneficiary of the account is the account owner, and income earned by the account is not taxed.
- Contributions to the account, which can be made by any person (the account beneficiary, family, friends, special needs trust) must be made using post-tax dollars and will not be tax deductible for purposes of federal taxes; however, some states may allow for state income tax deductions for contributions made to an ABLE account.

Why are ABLE accounts needed?

- Individuals with disabilities and their families often depend on a wide variety of public benefits for income, healthcare, and food and housing assistance. Financial eligibility for many of these public benefits restricts individuals to $2,000 in countable resources, such as non-ABLE checking and savings accounts and some retirement accounts.
- To maintain eligibility for these public benefits, an individual must remain under the resource limit. The ABLE Act recognizes the extra and significant costs of living with a disability, including accessible housing and transportation, personal assistance services, assistive technology, and healthcare not covered by insurance, Medicaid, or Medicare.
- Eligible individuals and their families can establish ABLE accounts that will not affect their eligibility for SSI, Medicaid, and means-tested programs.

Who is eligible for an ABLE account?

- An individual is eligible for an ABLE account if their disability begins before age 26. Effective January 1, 2026, an individual whose disability began before age 46 can establish an ABLE account. If someone meets this age requirement and is also receiving benefits under SSI and/or SSDI, they are automatically eligible to establish an ABLE account.
- If the beneficiary is not a recipient of SSI and/or SSDI but still meets the age of onset disability requirement, they are eligible if they meet Social Security's definition and criteria regarding functional limitations and receive a letter of disability certification from a qualified healthcare provider, such as a licensed physician.
- To establish an ABLE account, the beneficiary does not need to be younger than the eligibility age at the time the account is created. Rather, the eligibility age relates to the onset of the disability, even if the ABLE account is established years, or even decades, after the disability began.

What are the limits on an ABLE account?

- The total annual contributions to an ABLE account from all sources are limited to the annual gift tax exclusion amount. (For 2023, that amount is $17,000.) Certain additional amounts may be deposited if the account beneficiary has earned income.
- The total lifetime limit is the state's limit for education-related 529 savings accounts, which range from approximately $250,000 to $550,000. However, for individuals who receive SSI, the ABLE Act limit is $100,000.
    - If an ABLE account balance, when combined with other resources, exceeds $100,000, the beneficiary's SSI cash benefit is suspended. When resources return below $100,000, benefits are reinstated without a time limit.
    - While the beneficiary's eligibility for the SSI cash benefit is suspended, they remain eligible for medical assistance through Medicaid.

What else do I need to know about ABLE accounts?

- Each eligible beneficiary is limited to only one ABLE account.
- An ABLE account may be used for a "qualified disability expense," which may include education, food, housing, transportation, employment training and support, assistive technology, personal support services, healthcare expenses, financial management and administrative services and other expenses which help improve health, independence, and/or quality of life.
- Any funds remaining in an ABLE account at the beneficiary's death may be subject to reimbursement to states' Medicaid programs as payback for Medicaid benefits the beneficiary received after establishment of the ABLE account. This payback requirement is an important consideration for individuals other than the beneficiary who wish to contribute to an ABLE account. (Although payback or recovery from a beneficiary's trust or estate is common in most state's Medicaid programs, some states currently do not seek payback from ABLE accounts.)
- An eligible beneficiary may open an ABLE account in any state that has an ABLE program, so long as the program accepts out-of-state beneficiaries.
- An ABLE account may provide more choice and control for the beneficiary and their family than a special needs trust. The cost of establishing an account will likely be considerably less than establishing a special needs trust. The ABLE account owner controls the account, versus a trustee managing a special needs trust. In many cases, an ABLE account is a significant and viable option in addition to, rather than instead of, a special needs trust. Determining which options and combinations are most appropriate will depend upon individual circumstances.

Social Security Representative Payee

For any type of Social Security benefit, the Social Security Administration may appoint a Representative Payee to manage the beneficiary's Social Security benefits, if the Social Security Administration determined that the beneficiary is not able to do so themselves.

Who may be the Payee?

- A representative payee can be a person or an organization.

How does someone get appointed as a Rep Payee?

- The Social Security Administration appoints a payee to receive the Social Security or SSI benefits for anyone who can't manage or direct the management of his or her benefits.

What are the duties of a Rep payee?

- A payee's main duties are to use the benefits to pay for the current and future needs of the beneficiary, and properly save any benefits not needed to meet current needs. A payee must also keep records of expenses. A Rep Payee must provide an annual accounting to the Social Security Administration of how he or she used or saved the benefits.

Is a Rep Payee the same as a POA?

- Being an authorized representative, having power of attorney, or a joint bank account with the beneficiary is not the same as being a payee. These arrangements do not give legal authority to negotiate and manage a beneficiary's Social Security and/or SSI benefits. To be a Pre Payee, an individual must apply for and be appointed by the Social Security Administration.

7 Additional Resources

Special Needs Alliance: **www.specialneedsalliance.org**

Social Security Administration: **www.ssa.gov**

National Guardianship Association: **www.guardianship.org**

ABLE National Resource Center: **www.ablenrc.org**

US Department of Education: **www.ed.gov**

Local Department of Health, Medicaid Services Department

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Best Practices in Special Needs Planning

1

Ava

- John and Kate Rivera, both 68 years old with two grown children.
- Rob, 40 years old, a successful surgeon in California, married with 2 children.
- Ava, 38, has suffered from mental illness since her teens and is unable to hold a job. She lives at home with John and Kate. Ava receives Medicaid and services though the state's mental health program. She also recently became eligible for a SSDI benefit through her father and receives $1,800/month.
- John and Kate recently retired and are concerned about their expenses in retirement they need to continue working to provide for Ava. Their primary concern is providing for Ava for her lifetime.
- John and Kate's assets consist of a primary home valued at $1MM, retirement accounts valued at $2MM and other investments valued at $500k.
- They come to you to establish their estate and special needs plan.

2

Ben

- Ben is 17 years old and is diagnosed with moderate developmental disabilities. Ben's parents are divorced, and mom is the custodial parent. Mom wants to apply for guardianship and public benefits for Ben. Ben has $35,000 in a 529 account. Dad pays $1,500 per month in child support that will continue until Ben is 21 years old. While dad wants to protect Ben, he is not comfortable with the possible restrictions of guardianship.
- Mom retains you to assist with guardianship and public benefits.
- How does your advice change, if at all, if you represent dad?

3

Chris

- Chris is 12 years old and has significant disabilities resulting from birth trauma for which he received a $5MM net recovery. It is expected Chris will require 24/7 care for his entire life. Personal injury attorney promised family they could purchase a house, van, and have a trip to Disney World each year and a stipend for mom.
- What can the Trust pay for and for whom?
- How does your advice change if Chris is 22 years old?

4

Dani

- Dani is 25 years old. She has intellectual disabilities and is not able to live on her own. Dani lives under the care of her parents in their family home. She receives SSI and Medicaid and is the beneficiary of a first party trust funded with an inheritance from her grandmother.
- Dani's parents have temporarily fallen behind on household bills – they are behind on rent and are facing impending utility shutoff. Dani's mother, her guardian, requests a disbursement from the trust to cover the rent and past due utility bills.
- Should the trust pay these bills? What is the impact on Dani's benefits? Is there a work-around? Does the decision-making change if it is a third-party trust?

5

Eric

- Grandma Fern is legal guardian for her grandson Eric and has cared for him since he was a baby. Grandma Fern never legally adopted Eric but cared for him as if he was her own child. Eric is diagnosed with autism and receives SSI and Medicaid. The family comes to you as Grandma Fern recently suffered a stroke and is in nursing home and not expected to come home. She owns a house, where she lived with Eric and has life savings of $200,000. As Fern's nursing home costs are expected to be quite substantial, the family wishes to protect Fern's assets for Eric, as intended in Fern's Will.
- What recommendations do you have?
- Would your recommendations change if Grandma engaged you several years ago for elder law planning?

6

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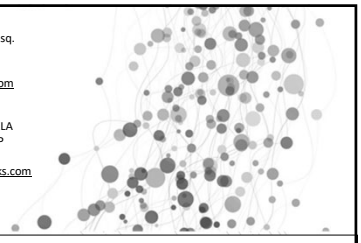

Thank you!

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