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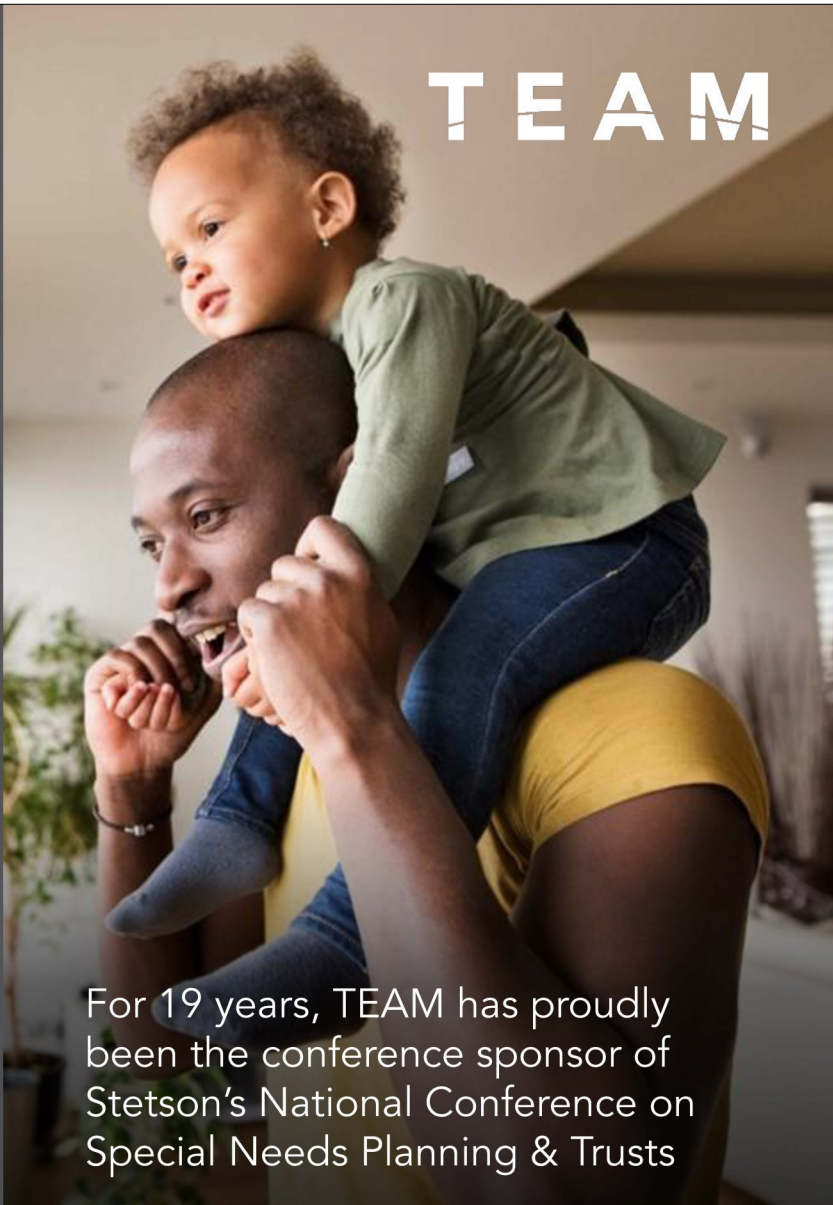
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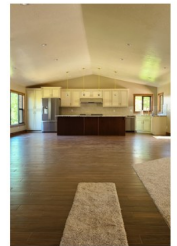


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GUIDELINES FOR POOLED TRUST ORGANIZATIONS

GUIDELINES FOR POOLED TRUST ORGANIZATIONS Version 4 October 2025

Preamble: How to Read and Understand these Guidelines

The Guidelines for Pooled Trust Organizations were initially developed in 2016 to support quality service delivery and develop standards for consistency in Pooled Special Needs Trust administration and management. They identify key factors to benchmark development of quality Pooled Special Needs Trust (PSNT) programs. These Guidelines reflect views freely offered by many pooled trust organization executive directors with volunteer technical assistance offered by attorneys who have in some cases represented pooled trust programs for many years.

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

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

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

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

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

1) PURPOSE

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

2) CHARITABLE STATUS

- a) A pooled trust program must be a **nonprofit association**. All money earned through pursuing the organization's mission should be used to benefit people with disabilities and to further the mission of the organization.
- b) Organizations should provide charitable services and seek donations and grants as needed in keeping with their charitable non-profit status.

3) COMPETENCE

- a) Organizations should hire competent staff and provide staff with ongoing training.
- b) Organization staff should possess or know where to obtain knowledge of trust laws specific to the applicable state, Medicaid laws and regulations specific to the applicable state; Social

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Security laws and regulations; HUD Section 8 laws and regulations; laws pertaining to other major programs; and law changes.

- c) Staff should possess or know where to obtain knowledge of the population served and receive ongoing training regarding the population served and changes in disability services.
- d) Organizations should conduct regular evaluations of staff *including Board of Directors review of compensation of key staff using metrics related to position, responsibilities and locale.*
- e) At times it may be helpful to have a Certified Public Accountant, physician, Certified Financial Planner or attorney, or others with relevant skills to serve on the Board of Directors.

4) POLICIES / INTERNAL OPERATIONS / FINANCIAL INTEGRITY

a) Board of Directors

- i. Non-profit board members should comply with applicable laws, regulations and the organizations' governing documents. Important Board considerations should include financial oversight, transparency and accountability, due diligence, seeking legal advice, liability protection and collegiality.
- ii. Organizational policies should be approved by the board of directors.
- iii. The Pooled Trust Program should have a conflict-of-interest policy that is signed by Board members and key staff annually. All board members and key staff must disclose any real or potential conflict of interest at the time it arises and should annually disclose any real or potential conflicts. Overlapping board members and staff members of non-profit organizations who are Directors of for-profit Boards with whom the non-profit has a relationship have an obligation to disclose their roles. The Board of Directors should determine if a conflict exists. When a conflict of interest is identified, the board should take appropriate steps to protect the pooled trust organization from injury or undue influence arising from the conflict.
- iv. Board members and officers should serve without compensation (other than expense reimbursement) except to the extent they are employees of the pooled trust organization.
- v. No board member or officer should receive compensation or any other remuneration from any entity doing business with the pooled trust organization.
- vi. This does not preclude a board member or officer from being paid out of an individual trust account for work on behalf of that beneficiary, or on behalf of the organization if approved by a disinterested member of the Board of Directors.

b) Organization Policies

- i. The organization should have policies for the confidentiality of information and the privacy of beneficiaries.
- ii. Organizations and their boards of directors should actively and regularly evaluate their operating reserves.
- iii. Organizations should have regular audits of the organization, including internal financial operations, trust activity and Information Technology (IT) security.
- iv. The Board of Directors must review the findings of the independent auditor and vote on its acceptance.
- v. The Board of Directors must review the organization's IRS Form 990 prior to submission and vote on its acceptance.
- vi. The organization should hold directors and officers and professional liability insurance.
- vii. The organization should have systems for tracking information and processes for accurate and timely availability of needed information.

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c) Trust Administration Policies

- i. The organization's program trust operations should be reasonably transparent for a beneficiary or that beneficiary's representative as applicable for that beneficiary's account.
- ii. Organizations should have a brief trust summary of each trust under management which could include names and contact information for grantors, trustees, beneficiaries and remainder beneficiaries, unusual provisions, financial restrictions, and examples of permissible purchases.
- iii. Individual trust accountings should be provided on a regular schedule.
- iv. When trusts are Court supervised, the organization should account to the Court for such trusts as required or upon request.
- v. Lateral transfers to and from another similar pooled trust should not be unreasonably denied to promote choice and options for beneficiaries, as appropriate.
- vi. The organization may refuse appointment as trustee, resign as trustee, name a disinterested co-trustee or other fiduciary to make a decision, make application to a Court for instructions or do trust modification as appropriate.

5) PRACTICES/ FIDUCIARY DUTY

- a) The pooled trust program should follow the terms of the trust instrument and applicable law.
- b) Subject to applicable law, the trustee / trust administrator shall act to benefit the beneficiary rather than themselves or the organization.
- c) Internal Controls: The organization should implement internal control policies and procedures for records, assets, data, financial and accounting information. The organization demonstrates a commitment to competence, oversight, responsibility, adherence to laws and regulations and fraud prevention. Controls may include segregation of duties; authorization; access controls; physical audits; standardized financial documents; periodic trial balances, periodic reconciliations, approval authority and others. No single person should have unchecked control over critical processes. Non-profit organizations may contract to receive the services of a for-profit person or entity such as an auditor or investment advisor but should not be owned or controlled by a for-profit organization or diverted from its non-profit purposes.
- d) Upon request, the organization should make the most recent audited financial statements and IRS Form 990s available.
- e) The organization, with permission from the beneficiary or that person's representative as applicable, should provide public benefits authorities with an individual financial accounting upon request to avoid public benefits disqualification.
- f) The organization should not make a warranty of eligibility for public benefits.
- g) The organization should make supplemental support services such as case management and advocacy available to enhance fiduciary services and quality of life, either by direct service provision or referral or purchase of service. Services should be individualized, and person-centered.

6) TRUST CREATION TRANSPARENCY

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

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agencies and retention of remaining funds by the organization pursuant to 42 USC 1396p (d)(4)(C).

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

7) DISTRIBUTIONS TO BENEFICIARIES FROM POOLED TRUST ACCOUNTS

- a) The pooled trust program should maintain a professional relationship with the beneficiary and that person's representative as applicable, consider the needs of the beneficiary and respond to requests for trust distributions. Distribution decisions should be based on the terms of the trust and organization policy.
- b) Organizations should provide options for appealing distribution decisions. Information for this process should be made available to beneficiaries and representatives.
- c) The pooled trust program should have full discretion to decide if a beneficiary should have a written spending plan for each beneficiary that is provided to each beneficiary and that person's representative as applicable. This may include review of prior year spending, anticipated life of the trust, and considerations of principal and interest spending.
- d) The pooled trust program must not take retention by the organization into consideration when making distributions.

8) INVESTMENTS

- a) Pooled trust programs should develop or approve written investment policy statements and consider prudent investments and risk tolerance.
- b) Investment managers should comply with the organization's investment policy statement.
- c) Pooled trust programs should conduct regular investment performance reviews of the performance of the investment manager and should provide a written report of the findings of such reviews to the organization's Board of Directors.
- d) Pooled trust programs should, upon request, make written investment policy statements available to each beneficiary or that person's representative as applicable.
- e) Pooled trust programs should, upon request, provide information to each beneficiary or that person's representative as applicable regarding who manages investments.
- f) It is the trustee's duty to make the investment selection option. The Trustee may obtain and consider relevant information on beneficiary preference and risk tolerance.
- g) Roles should be clearly delineated between trustee and investment manager.

9) FEES/EXPENSES

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

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accounts should be approved by the organization's Board of Directors. A particular matter might impact just a group within a pooled trust or just one person, or all the pooled trust beneficiaries.

- e) The pooled trust organization should monitor and consider all fees associated with investment management of trust accounts.

10) RETAINED FUNDS

- a) Funds retained by the organization upon the death of a pooled trust beneficiary should be used to benefit people with disabilities and to further the mission of the organization.
- b) Distribution decisions shall be based on the needs of the beneficiary not the needs of the organization.
- c) The pooled trust organization should chart the use of charitable remainder funds and make that information available upon request.
- d) The pooled trust program must not take retention by the organization into consideration when making distributions.

11) QUALITY CONTROL

- a) The organization should adopt procedures to evaluate its processes including customer feedback and adjust its procedures accordingly.
- b) Organizations should adopt a grievance policy and procedure. This information should be made available to beneficiaries and representatives.

GUIDELINES FOR POOLED TRUST ORGANIZATIONS

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

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Ellen Ball Nalven, M.Ed.
Executive Director

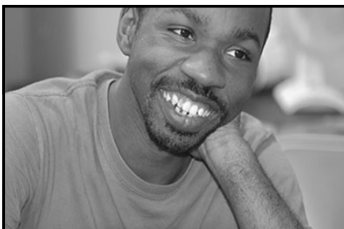
1

Agenda

- Serving people with disabilities: shared mission, purpose, values
- Lifetime support services: who needs them? Should PSNT's offer them?
- Quality Services: Do PSNT priorities differ from other service providers for people with disabilities?
- Standards for quality service provision



2



About PLANINJ

- Statewide non-profit organization
- Established in 1988
- Member of the National PLAN Alliance (NPA) and Alliance for Pooled Trusts (APT)

THE PLANINJ MISSION is to help families answer the question:

“Who will care for my loved one when I’m gone?”



3

Advocacy: Removing Societal Barriers

"Disability only becomes a tragedy for me when society fails to provide the things we need to lead our lives—job opportunities or barrier-free buildings, for example. It is not a tragedy to me that I'm living in a wheelchair."

Judith Heumann

Disability is not a health problem but a complex interaction between individuals and social/environmental barriers: World Health Organization (WHO) World Health Report on Disability 2011



4

What is Quality of Life?

- Vision: Center for Disability Rights New York (cdrny.org) (also a PSNT) - A society in which people with disabilities enjoy full integration, independence, and civil rights.
- PLAN/NJ envisions that all people with disabilities have
 - A safe and appropriate place to call home
 - Financial stability and security
 - Suitable and appropriate education
 - A challenging and rewarding place of employment
 - A fulfilling network of support
 - Participation as a contributing member of the community
 - The ability to have choices and personal control



5

Service Time Frame: Life of the Trust or Life of the Beneficiary?

• PARTNER SHARE

- What services does your PSNT offer in addition to trust administration?
- Why do you offer these – or why not?
- How do you assist clients to access needed services?



6

Mission, Vision and Values Define Quality Services

- **Mission and Purpose:** why the organization exists; clear intent and focus
 - What the organization does; for whom; how; what needs are addressed
- **Vision:** unity, inspiration, organization culture
 - Grounds the work in meaning · builds trust, accountability, credibility
 - Guides decision making and strategy
 - Promotes advocacy and education



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Medical Model vs Social Model

Person has special needs	Person has human needs
Person should adjust to fit into society	Society should adjust biases/ barriers
Person needs to be cured/fixed	Person has equal rights- is not broken
Person is an object of charity	Person is empowered
Person has little say in decisions made for them	Person has right to autonomy, choice, consent
Does not take a holistic approach	Takes a holistic approach

8

Personal Choice and Quality of Life

“Independent Living is a psychological idea much more than a physical concept. I’m paralyzed from the neck down, but I am completely in control of my own life. I make decisions about what I want. And when you begin to believe that it is very empowering and powerful.”

Ed Roberts: Activist, pioneer in disability rights and independent living movement



9

Disability is Not Temporary: Lifelong vs Time Limited Services

- Recognizing the roles of families and caregivers; promoting planning and stability
- Reducing gaps and system failures
- Advocating for equity and human rights:
 - Promoting self-determination
 - Affirming opportunity, support, inclusion
 - Empowering people to lead meaningful lives



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The Quality Movement

*"Customers may forget what you said but
they'll never forget how you made them feel"*

Maya Angelou



11

Service Length: Life of Beneficiary or Life of Trust?

PARTNER SHARE:

- Who employs case managers / social workers?
- Who offers future life planning services by in-house staff?
- Who uses pooled trust reminder funds to pay for social service and advocacy needs?



12

Staff Are Key In Quality Service Delivery

- Retention strategies
 - Salary, benefits
 - Acknowledgement, performance reviews
 - Team building activities



13

The Quality Movement

- *“Quality in a service or product is not what you put into it. It’s what the customer gets out of it”* Peter Drucker
- *“You can’t improve what you don’t measure”* W. Edwards Deming



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Standards of Practice: Metrics to Measure

- Guidelines for Pooled Trusts v4: 2025
<https://nationalplanalliance.org/resources/>
- Life Passages PSNT Best Practice Guidelines <https://Stetson/elder-justice/media>
- National Guardian Association Standards of Practice
<https://www.guardianship.org/standards/>



15

Quality Indicators: Use Measurable Benchmarks

- Efficiency, Effectiveness, Impact, Outcomes
- Staff training and performance
 - Staff to beneficiary ratio
- Quality service delivery
 - Timeliness, accuracy, professionalism
 - Continuous Improvement
- Transparency, Accountability, Compliance
- Risk Mitigation



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FOR MORE INFORMATION CONTACT: Planned Lifetime Assistance Network of New Jersey

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Pooled Trusts Intensive

October 22, 2025

Trust-Owned Housing: Key Considerations for Trustees



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Trust-Owned Housing: Key Considerations for Trustees

Presented by: Chuck Goffey, MBA, CAPS

Integrity, Service, Excellence!

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Introduction & Overview

There is no simple "yes or no" answer to whether an SNT should own a home – each situation demands detailed consideration

In this session, we will cover:

- **Trust Ownership vs. Individual Ownership:** Who should own the home?
- **Budget Considerations:** Funding purchase and upkeep without jeopardizing the trust's longevity
- **Considerations in Selecting the Right Home:** Location, Safety, Education, Accessibility
- **Long-Term Strategy:** Occupancy and eviction issues, and compliance with trust/benefit regulations (Forever Home)
- **Case Study:** Chicago residential ADA remodel

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Trust Ownership vs. Individual Ownership

Who Should Own the Home – Trust or Beneficiary? This foundational question affects many downstream decisions.



- **Medicaid Payback (First-Party SNT):** If funded with the beneficiary's own assets, buys a home, that house is subject to Medicaid payback provision within the SNT when the beneficiary dies
 - The home may need to be sold to repay Medicaid, potentially displacing family
- **Medicaid Payback (Third-Party SNT):** Wealth funded by others has no Medicaid payback, allowing the home's value to pass to remaining beneficiaries
- **Beneficiary Ownership to Avoid Payback:** One strategy in some cases is for the beneficiary to own the home outright, with the trust distributing funds to purchase it (Possible state-dependent Medicaid estate recovery)
 - When trust funds are utilized to purchase a home, ensure a security interest
- **Capacity and Management:** Consider the beneficiary's legal capacity to hold title. Minors cannot hold real estate directly, and adults with significant cognitive impairments may need a guardian or conservator to manage an individually owned home.

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Trust Ownership vs. Individual Ownership



Bottom Line: Choosing whether to hold title (trust vs. beneficiary) involves balancing Medicaid recovery risks, the beneficiary's ability to manage a home, and the family's long-term plans. Each option has pros and cons, and the final decision is made in consultation with a knowledgeable estate planning attorney.

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Budget Considerations

Budgeting for the initial purchase and long-term maintenance costs are as critical as buying the right home for the beneficiary and their needs:



- **Purchase Budget:**
 - *Percent of trust* (20-25%)—includes modification and closing costs
 - *Taxes*—normally go up year-over-year
 - *Insurance*—homeowner's policies or improved/valid policies, umbrella policy
 - *Maintenance/Repair*—approximate 1-4% of home value, per year
 - Increases to maintenance (pool/elevator/igmerator)
 - *HOA Fees*—\$2.00 to \$55.55 per month
 - *Condo Fees*—replaces responsibility for maintenance, but fees are normally high
- **Maintenance and Repair:**
 - Who will oversee maintenance/improvement/specification of home?
 - Internal program or outside?

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Budget Considerations



Bottom Line: It is in the best interest of the trustee to perform this budgetary planning exercise to avoid overpaying or buying a problematic property.

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Considerations in Selecting the Right Home

When selecting a suitable house for the trust to purchase or for the beneficiary to live in, the trustee must exercise due diligence and keep the beneficiary's needs at the forefront.



Accessibility and Layout:

- Beneficiary? Caregiver? Does not always take this into consideration, because they've always made do, and this house is better than where they came from.
- ADA: Ramps, Doorways, Flooring, Baths, Personal Space, Caregiver's Quarters, Medical Supply Storage.

Location and Community:

- Safety, Security, Hospitals, Fire Dept., Educational/Therapy Facilities, Caregiver/Guardian location.

Size and Shared Housing Needs:

- Number of family members, Caregiver's Quarters, etc., 2-story vs ranch style.

Due Diligence:

- Inspections are essential, but having expert with ability to read and implement repairs is crucial.
- Environmental, Flood Zone, Permits, Deed.

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Considerations in Selecting the Right Home



Bottom Line: Selecting the right home for the beneficiary and their family involves planning and careful consideration for the best interest of the beneficiary.

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Case Study

Why would a SNT purchase a 12K sq. ft. home for a family of 5?



Complete ADA renovation:

- Home was purchased for \$899K in 2019.
- School district was a reason for purchase.
- Explored alternative options.
- Three court appearances.



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Setting Expectations: House Rules



Rule #1 – Trust Ownership of the Home

The home is provided by the Trust for the beneficiary's benefit, with the understanding that it may need to be sold if living there is no longer safe or after the beneficiary's passing.

Rule #2 – Trustee's Right to Inspect

The Trustee may enter and inspect the home as needed to help ensure it remains safe and properly maintained.

Rule #3 – Trustee's Right to Monitor

The Trustee may arrange for professionals to visit the home to observe the beneficiary's well-being and confirm that benefits remain in place.

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Setting Expectations: House Rules



Rule #4 – Trustee's Duty to Maintain

The Trustee will use Trust funds for major repairs and improvements, while everyday living expenses are generally covered by the family or beneficiary.

Rule #5 – Trustee's Duty for Taxes & Insurance

The Trustee is responsible for paying property taxes and insurance with Trust funds, while the family or beneficiary may need separate coverage for personal belongings.

Rule #6 – Trustee's Authority Over Modifications

The Trustee makes the final decision on home modifications, while considering input from the beneficiary, family, and professionals.

Rule #7 – DON'T BREAK THE RULES!

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Long-Term Strategy

Being a trustee for a house-owned by SNT is akin to being a landlord and financial manager rolled into one. Some corporate trustees even have dedicated "real estate asset management" teams or outsource to companies specializing in trust-owned real estate (to handle tasks like home inspections, contractor bids, new builds etc.).



With purchase you must have an exit strategy:

- **Setting Expectations:** Reasonable Living Standard, Funds Depletion, Beneficiary Passing
- **Formal Housing Agreement:** Document that fully outlines parent's (or guardian's) responsibilities of both parties (emotionally difficult to handle)
- **Evictions via Courts:** Normally per state jurisdiction, but necessary if beneficiary status changes
 - **Reasons:** Violation of the agreement, using for illegal purposes, court ordered
- **Compliance:**
 - Corporate trustees are normally held to OCC and/or FDIC...hold yourself to same standard

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Long-Term Strategy



"THE" Bottom line: Setting expectations upfront with the family and the beneficiary is crucial.

The trust is the legal owner, so it has the obligation to ensure the home is a safe environment and durable asset for the life of the beneficiary. Long-term strategy is really a planning exercise in the beginning. Enforcing the standards and evicting unauthorized occupants should be handled with sensitivity and legal counsel advice.

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Questions?



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October 22, 2025

Storms Gathering: Legal Concerns of A Pooled Trust Counsel



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Gathering Storms

Legal Concerns of a Pooled Trust Counsel

Anna Sappington, Esq.

2025 National Conference on Special Needs Planning and Special Needs Trusts

October 21-24, 2025

Introduction

Pooled Special Needs Trusts (SNTs) are designed to protect and manage assets for individuals with disabilities, preserving their eligibility for public benefits while ensuring their financial needs are met. However, recent high-profile cases have exposed significant vulnerabilities in the governance and oversight of these trusts. This paper examines recent cases involving theft, conflicts of interest and private inurement by pooled SNTs by individuals controlling the nonprofits and their affiliated for-profit entities. Through a detailed analysis of three major cases—the Center for Special Needs Trust Administration, the Foundation for Those with Special Needs, and the National Foundation for Special Needs Integrity—this paper highlights patterns of fraud, conflicts of interest, and regulatory gaps that have led to the loss of millions of dollars held in trust for the benefit of vulnerable beneficiaries.

In addition to these case studies, the paper explores the broader policy landscape affecting individuals with disabilities, including recent changes to Medicaid and Social Security operations under the One Big Beautiful Bill Act (OBBBA). These legislative shifts, coupled with administrative restructuring and budget cuts, raise further concerns about the adequacy of protections for disabled individuals relying on public benefits and trust arrangements. This paper aims to inform counsel and advocates about the evolving risks and responsibilities in the administration of pooled SNTs.

Views expressed in this paper are my own. I have tried to be careful and diligent in my research and to provide references for my information. Please use this work as a starting point (not a substitute) for your own research and analysis.

Fraud, Theft, and Mismanagement of Pooled SNTs

The following case studies reveal troubling patterns of misconduct in the administration of pooled special needs trusts (SNTs), where nonprofit organizations entrusted with managing funds for individuals with disabilities engaged in fraudulent practices, self-dealing, and financial mismanagement. Each case—The Center for Special Needs Trust Administration, the Foundation for Those with Special Needs, and the National Foundation for Special Needs Integrity—demonstrates how blurred lines between nonprofit and for-profit entities, lack of transparency, and inadequate oversight can result in the diversion of trust assets and harm to vulnerable beneficiaries. Our industry needs to be able to answer the question of how fraudulent activity in nonprofit pooled trust administration can be detected in real time to prevent beneficiaries from incurring huge losses.

The Center for Special Needs Trust Administration, Inc. (2024-)

“The Center” is a dramatic example of a nonprofit pooled special needs trust being controlled and manipulated for fraudulent purposes, causing the trust’s beneficiaries to lose their trust funds.

Established in 2000 in Florida by Leo J. Govoni, The Center had pooled SNT accounts in almost every state. As of February 2024, The Center managed more than 2,100 SNT accounts with a total balance of approximately \$200 million.

According to the criminal indictment against him and John L. Witeck, an accountant who participated in the fraud,¹ Govani served as an officer of The Center and as a member of its board

¹ United States v. Govoni, No. 8:25-cr-00299-WFJ-NHA (M.D. Fla. filed June 18, 2025), <https://www.justice.gov/usao-mdfl/media/1404291/dl>.

until mid-2009. At that point, Govoni resigned; however, the indictment alleges that he continued to control CSNT until 2022 through oral directives and his relationships with its board members and employees.

In February 2024, The Center filed for bankruptcy² and revealed publicly for the first time that more than \$100 million was missing from beneficiaries' accounts. According to the criminal indictment later filed against Govoni, a series of transfers characterized as "loans" were made by transfers out of beneficiary accounts to Boston Financial Group, a for-profit financial services company established by Govoni in 2008, while he served on The Center's board. The first transfer to BFG occurred in June 2009 and was for \$2.5 million; however, the total amount transferred increased rapidly to a total of \$100 million in January 2012. The indictment alleges that the loan was represented as an investment in BFG which BFG itself would invest. BFG was supposed to repay the loan in full with interest by January 1, 2017. At the time it filed for bankruptcy, The Centers reported it did not have a copy of the loan agreement(s) in its records.

However, BFG was not investing the money it received from the Center. Instead, it distributed it to Govoni and others and to companies Govoni controlled, including:

- Boston Asset Management, inc., a for-profit investment advisory firm founded by Govoni in 1992 and for which he served as CEO;
- Austin Colby Co., an administrative services company founded and largely operated by Govoni that handled HR and IT for The Centers from at least 2009-2022. Austin Colby

² Chamberlin v. Boston Finance Group LLC, Docket No. 8:24-cv-00438 (M.D. Fla.), <https://www.classaction.org/news/class-action-alleges-more-than-100m-in-special-needs-trust-assets-misappropriated-over-a-decade>.

received approximately \$31 million from BFG, which it used to pay overhead and operating costs, including Govoni's salary.

- Fiduciary Tax and Accounting Services, LLC, (FTAS), a for-profit financial services firm co-owned by Govoni and Witeck that purported to provide tax and accounting services to trustees but allegedly was used to funnel beneficiaries' money to Govoni and Witeck;
- BroadLeaf Properties, LLC, a for-profit real estate holding company which allegedly was used to purchase residential properties for Govoni and others;
- BCL Aviation, LLC, a for-profit aviation company that held and operated at least one jet used by Govoni and others for their personal benefit;
- Big Storm Brewery, LLC, a craft brewery and distillery whose president was Leo "LJ" Govoni, Jr. and which never generated net positive returns for The Center's beneficiaries.

According to the indictment, there was never any real intent to repay the loans. Govoni kept questions at bay by strategically making minimal and intermittent interest payments which were significantly less than the loans' terms required. Also, it was alleged that several times money from Center trust accounts was funneled through FTAS to BFG, and then sent by BFG back to the Centers as an "interest payment" on BFG's loan.

Govoni also is alleged to have instructed Center employees to produce fraudulent account statements that indicated beneficiaries' money was still in their Center account, when in fact it had been "loaned" to BFG. If a beneficiary's account had a shortfall and money was needed for a disbursement, Center employees made it up with money from another pooled trust account.

In April 2022, Govoni's daughter, Caitlyn Janicki, resigned from her position as The Center's vice president. Subsequent to her departure, Center staff found an unsigned letter dated

November 2021 that referenced the loan. As it investigated, the Center discovered the loan should already have been repaid. Ultimately, The Center filed for bankruptcy in February 2024, and shortly afterward sent notices to beneficiaries whose funds had been stolen, reportedly telling them that they were unlikely to receive any money back.³

A class action lawsuit⁴ was filed against Govoni, other individuals believed to be involved, five companies controlled by Govani, and American Momentum Bank, the custodian for the Center's accounts, as well as accounts for BFG which received "loan" funds transferred from the Center's trust accounts. The complaint alleges that American Momentum Bank was "asleep at the switch despite numerous red flags that any reasonable bank account would have acted to address a decade ago."

As The Center ceased operations, beneficiaries with money left in their accounts were transferred to CPT Institute, located in Florida, or to another provider of their choice. CPT was selected by the bankruptcy trustee as the default successor trust.

Govoni and Witeck were arrested on June 23, 2025; Govoni currently is being held in custody.⁵ He faces 260 years in prison. His case is set to be tried in January 2026.

³ Brittany Muller, *St. Pete non-profit responds to what happened to missing \$100 million*, Nexstar Media Inc. (March 8, 2024), <https://www.wfla.com/8-on-your-side/st-pete-non-profit-responds-to-what-happened-to-missing-100-million/>.

⁴ Chamberlin v. Boston Finance Group, LLC, No. 24-cv-00428 (M.D. Fla). A copy of the complaint is available at <https://www.classaction.org/news/class-action-alleges-more-than-100m-in-special-needs-trust-assets-misappropriated-over-a-decade#embedded-document>.

⁵ Information about the criminal case's progress can be found at the U.S. Attorney's Office for the Middle District of Florida's website at <https://www.justice.gov/usao-mdfl/Govoni>.

Foundation for Those with Special Needs Inc. (2022-2024)

This case began with a civil lawsuit filed May 2, 2022⁶ by the Securities and Exchange Commission in federal district court against Synergy Settlement Services, Inc. and others.

According to the complaint⁷ and amended complaint that were filed, the nonprofit at issue was the Foundation for Those with Special Needs, Inc., which was incorporated in Florida in February 2012. Florida attorney Jason D. Lazarus was the Foundation's director and president. Certified Financial Planner Anthony F. Prieto, Jr. was serving as a director at the time the suit was filed. Both Lazarus and Prieto were also named individually as defendants. The Foundation served as trustee for two pooled SNTs: Settlement Solutions National Pooled Trust and Settlement Management National Pooled Trust.

In addition to their roles at the Foundation, Lazarus and Prieto both worked at (and owned interests in) Synergy Settlement Services, Inc., a for-profit Florida company that sold structured financial products used in personal injury cases. Lazarus was Synergy's CEO and largest shareholder, and Prieto was president of Synergy and a minority shareholder. Lazarus also was the sole owner of and attorney at Special Needs Law Firm PLLC, a Florida law firm.

The SEC alleged that the Foundation was a shell corporation with no operations or employees, "or even a single email address[.]" and that Synergy officers and employees were actually the parties operating the trust.⁸ SEC rules exempt charities from having to register under

⁶ SEC v. Synergy Settlement Servs., Inc., No. 6:22-cv-820-WWB-DCI (M.D. Fla.).

⁷ Available at <https://www.sec.gov/files/litigation/complaints/2022/comp-pr2022-76.pdf>.

⁸ Except for 2015-2017, during which time the Amended Complaint alleged Synergy delegated management of the trust to another for-profit company, National Trust and Fiduciary Services Company, Inc. d/b/a Eastern Point Trust Company.

securities laws, but the SEC argued that the Foundation wasn't eligible for the exception because Synergy, a for-profit corporation, actually operated it.

Despite representing that joinder and trustee fees were being paid to the Foundation, the Foundation's share of fees actually was paid to Synergy under "sham" marketing agreements between it and the companies managing the trust's investments (National Trust and Fiduciary Services Company, Inc. d/b/a Eastern Point Trust Company and True Link Financial Advisors, LLC). Synergy was alleged not to have performed any significant marketing under these contracts, but received payments equal to the Foundation's trustee fees as compensation. Additionally, the complaint alleges that National Trust and Fiduciary Services Company, Inc. d/b/a Eastern Point Trust Company, the for-profit investment management company managing the trust from 2015-2017, received a return equal to approximately 1% of the funds it invested through "12b-1 fees" charged on Class C mutual fund shares, which are paid to broker-dealers. Eastern Point wholly owned a broker-dealer which collected these fees and sent them to Eastern Point. Emails indicated that the Eastern Point and Synergy viewed these fees as a way of embedding fees in the expenses of investment funds so that they were hidden from "end client[s]."

Finally, the complaint alleges that funds retained by the pooled trusts were not used to further the trusts' mission of serving people with disabilities, as the Foundation claimed in its 501(c)(3) application and corporate documents. Rather, retained funds were alleged to have been used by Lazarus and Prieto to further their own for-profit interests. The complaint provided the following examples of how retained funds were allegedly used:

- \$132,000 to pay trust administrative expenses, after having collected trustee fees that exceeded the actual cost of these expenses;

- Paying premiums on Synergy’s business insurance policy;
- Donations to organizations “that have nothing to do with assisting disabled persons,” some of which were for-profit, to promote Synergy’s business interests, including sponsoring golf tournaments, parties, and judicial luncheons
- Sponsoring a project involving a trial lawyer for construction activities in a Beber Village in Morocco “unrelated to the disability community.”

The suits against True Link Financial Advisors, LLC and its CEO, were settled in May of 2022 for civil monetary penalties totaling \$220,000.⁹ In its Final Judgment issued March 11, 2024, the court assessed the other parties fines as follows:

- Synergy Settlement Services, Inc was ordered to pay the SEC \$43,743.68 in net profits gained as a result of the alleged conduct, plus \$400,000 as a civil penalty.
- Lazarus was ordered to pay a civil penalty of \$95,000 to the SEC.
- Prieto was ordered to pay a civil penalty of \$85,000 to the SEC.

National Foundation for Special Needs Integrity (2015-2019)

This nonprofit was established in 2007 by then-attorney Kenneth Shane Service. In 2015, the Foundation was sued by the estate of a Missouri beneficiary, Theresa A. Givens; however, this civil suit turned out to be just the tip of the iceberg. Service was subsequently prosecuted for theft from individual special needs trusts for which he served as trustee (and sued civilly in connections with those thefts), and the Foundation was sued for using beneficiaries’ accounts to pay large attorneys’ fees and for charging excess fees.

⁹⁹⁹ Press Release, U.S. Sec. & Exch. Comm’n, *SEC Charges CEO and President of Synergy Settlement Services with Fraudulent Operation of Special Needs Pooled Trusts* (May 2, 2022), <https://www.sec.gov/newsroom/press-releases/2022-76>.

Givens established her Foundation pooled trust account in 2011 with \$250,000. Tragically, she died just a month later. After Givens died, her family called to ask about the trust funds and was told that the money “would go to the State [for payback].”¹⁰ The 7th Circuit Court of Appeals summarized the facts as follows:

The Foundation's internal records indicate that by November 2013, it had not notified the family it intended to retain the money. None of the Foundation's witnesses could recall ever telling the family how they interpreted the agreement, or even reaching a final decision to keep the remaining money. Yet the Foundation began to transfer money out of Givens's sub-account to other Foundation accounts less than two months after her death. By February 2014, the Foundation had spent it all. But it was not until early 2015 that the Foundation told the Estate that the Foundation itself had kept the money and did not intend to pay either Missouri or the Estate.¹¹

Givens’ family argued that the trust agreement was ambiguous, and that its terms should be construed against the interests of the party that drafted it (i.e., the Foundation). During the civil suit, Service testified that he intentionally drafted the trust’s “Distributions upon the Death of a Beneficiary” article to confuse Missouri Medicaid officials. Noting that “the Foundation intentionally drafted the agreement to confuse readers as sophisticated as government officials [,]” the Court of Appeals concluded that the agreement should be construed to provide the remainder should be paid to Givens’ estate and ordered the Foundation to pay \$234,181.23 to Givens’ estate.

¹⁰ Nat’l. Found. For Special Needs Integrity, Inc. v. Reese, 881 F.3d 1023 (7th Cir. 2018).

¹¹ Id.

During the controversy, the Foundation's management by Service became an issue. As reported by The Indiana Lawyer,

Tax records for the organization in the years since show [the Foundation] compensated Service in some years with more than one-quarter of total revenue and spent aggressively on legal fees and management costs. For example, records for the following tax years show:

- In 2010 and prior years, Service reported no compensation, but the organization paid up to 42 percent of revenue in some years to Special Needs Trust Consultants LLC — a Carmel-based entity registered by Service.
- In 2011, Service took no salary. The nonprofit collected \$593,424 in revenue, but costs under the management category were \$289,769, compared with staff wages of \$104,477.
- In 2013, Service took a salary of almost \$238,000 on revenue of almost \$936,000. In addition to other salaries of more than \$451,000, the nonprofit also reported management costs of more than \$134,000, legal expenses of nearly \$124,000, and almost \$66,000 spent on conferences, conventions and meetings.

- In 2014, the nonprofit collected \$1.12 million, and Service was paid \$170,525. Management costs rose to more than \$476,000, and legal fees were listed at more than \$76,000.¹²

At oral argument, the estate argued that the Foundation had spent Givens' money on "completely illicit and inappropriate things such as lavish hotels [and] lavish restaurants[.]"¹³ In 2014, the Foundation fired Service (and filed a lawsuit against him).¹⁴

Service later was charged with theft from several individual special needs trusts for whom he served as trustee¹⁵ and was incarcerated for 7 months in 2002-2023, according to the Indiana Department of Correction.¹⁶ These thefts also resulted in civil suits against him. He was suspended from practicing law in Indiana on June 1, 2017, after failing to cooperate with the Court's Disciplinary Commission regarding a grievance filed against him.¹⁷

In November 2015, a lawsuit seeking class action status was filed against the Foundation in Marion, Indiana by its beneficiary Timothy Todd.¹⁸ According to the suit, thousands of dollars had been withdrawn from Todd's pooled trust account, purportedly as his proportionate share of fees paid to an Indianapolis, Indiana law firm for "various legal services." The lawsuit estimated that the Foundation had paid \$2.4 million to the firm from 2011-2015, although a review of IRS filings by the Indy Star newspaper found payments identified as legal fees in 2011-2014 totaled

¹² *Suspended special needs trust attorney, foundation's legal woes continue*, The Indiana Lawyer (September 28, 2017), <https://www.theindianalawyer.com/articles/44955-suspended-special-needs-trust-attorney-foundations-legal-woes-continue>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Lawyer suspended for alleged trust thefts faces new charges*, The Indiana Lawyer (June 10, 2019), <https://www.theindianalawyer.com/articles/50525-lawyer-suspended-for-alleged-trust-thefts-faces-new-charges>.

¹⁶ See <https://offenderlocator.idoc.in.gov/idoc-ofs-1.0.2/ofc>.

¹⁷ *In re Service*, 84 N.E.3d 629 (Ind. 2017).

¹⁸ Marisa Kwiatkowski, *Special Needs Integrity accused of having none*, IndyStar (Nov. 16, 2015), <https://www.indystar.com/story/news/2015/11/16/nonprofit-accused-taking-millions/75886746/>.

much less than that (about \$420,000). The suit also alleged excessive trustee and annual fees. This case likely settled; no additional information was available.

Changes in Benefits and Agency Funding

Recent legislative and administrative developments have significantly reshaped the landscape of public benefits for individuals with disabilities. The enactment of the One Big Beautiful Bill Act (OBBBA) has introduced sweeping changes to Medicaid, including reductions in retroactive coverage, limitations on provider taxes, and delays in implementing long-awaited regulatory reforms. These changes, driven by efforts to offset the cost of permanent tax cuts and increased federal spending elsewhere, are projected to reduce federal Medicaid funding by hundreds of billions of dollars over the next decade—raising serious concerns about access to care and coverage continuity for vulnerable populations.

Simultaneously, the Social Security Administration (SSA) has undergone a dramatic restructuring, marked by budget cuts, staffing reductions, and a shift toward centralized operations and automation. While SSA claims these changes will improve efficiency and customer service, advocates warn that they may further strain an already overburdened system and jeopardize the timely delivery of benefits. Together, these developments reflect a broader trend of retrenchment in the social safety net, with potentially profound consequences for individuals with disabilities who rely on Medicaid and Social Security programs for essential support.

Changes to Medicaid for Persons with Disabilities Under the One Big Beautiful Bill Act

Introduction

Enacted July 4, 2025, the One Big Beautiful Bill Act (OBBBA) was the culmination of months of work by Congressional Republicans. As finally passed, the Act makes permanent the tax cuts of the Tax Cuts and Jobs Act of 2017 which passed during Trump’s first term.

In addition to making the Tax Cuts and Jobs Act’s tax cuts permanent, OBBBA reduces federal income tax revenues further by allowing significant deductions against income from tips and overtime pay, and by offering a \$6,000 “senior bonus” deduction. These cuts will expire in 2028 unless renewed.

According to the Congressional Budget Office (CBO), the cost of all OBBBA’s tax cuts is approximately \$4.5 trillion over the next 10 years.¹⁹ OBBBA also included spending increases of \$325 billion, mostly attributable to the military and immigration enforcement.²⁰ CBO projects that passage of OBBBA will increase the deficit by \$3.4 trillion over the next 10 years.²¹ For scale, the American Rescue Plan Act enacted March 11, 2021 in response to COVID added \$1.9 trillion to the deficit.²²

¹⁹ Estimated Budgetary Effects of Public Law 119-21, to Provide for Reconciliation Pursuant to Title II of H. Con. Res. 14, Relative to CBO’s January 2025 Baseline, Cong. Budget Off. (July 21, 2025), <https://www.cbo.gov/publication/61570>.

²⁰ Andrew Lautz, *What Does the One Big Beautiful Bill Cost?*, Bipartisan Policy Center (July 23, 2025), <https://bipartisanpolicy.org/explainer/what-does-the-one-big-beautiful-bill-cost/>.

²¹ Estimated Budgetary Effects of Public Law 119-21, to Provide for Reconciliation Pursuant to Title II of H. Con. Res. 14, Relative to CBO’s January 2025 Baseline, Cong. Budget Off. (July 21, 2025), <https://www.cbo.gov/publication/61570>.

²² Estimated Budgetary Effects of H.R. 1319, American Rescue Plan Act of 2021, Cong. Budget Off. (Mar. 6, 2021), <https://www.cbo.gov/publication/57056>.

OBBBA was passed as a budget reconciliation bill. Reconciliation bills were established by the Congressional Budget Act of 1974 and allow for expedited passage of legislation treating spending, revenues, or the debt limit. Unlike legislation passed through “regular order,” the Senate can pass a budget reconciliation bill with a simple majority (51 votes); otherwise, up to 60 votes may be required.²³

While OBBBA was being crafted, legislators considered options to reduce the bill’s cost by cutting federal spending in other areas. House GOP members considered cutting up to \$2.3 trillion from Medicaid, which is a third of its federal budget.²⁴ Most of these savings would have come from the federal government capping the amount it pays for Medicaid coverage.²⁵ Obviously, if the price of health needs remained the same, a large reduction in federal spending would require states to pay a larger share of expenses -- or would require states to cut services.

Ultimately, Medicaid cuts enacted in OBBBA totaled less than \$1 trillion. Congress chose to finance the majority of OBBBA’s cost by borrowing.

The basis of my research into OBBBA’s effect upon disability categories of Medicaid came from “Health Provisions in the 2025 Federal Budget Reconciliation Law” (August 22, 2025), a report produced by the Kaiser Family Foundation available online at <https://www.kff.org/medicaid/health-provisions-in-the-2025-federal-budget-reconciliation-law/#68484706-46ba-4731-9eca-ed01d7a86899>.

²³ Budget reconciliation process in U.S. Congress, Ballotpedia, https://ballotpedia.org/Budget_reconciliation_in_U.S._Congress.

²⁴ House GOP Eyeing Cuts of Nearly One-Third in Projected Federal Medicaid Spending, KFF Quick Takes, <https://www.kff.org/quick-take/house-gop-eyeing-cuts-of-nearly-one-third-in-projected-medicaid-spending/>.

²⁵ House GOP Eyeing Cuts of Nearly One-Third in Projected Federal Medicaid Spending, KFF Quick Takes, <https://www.kff.org/quick-take/house-gop-eyeing-cuts-of-nearly-one-third-in-projected-medicaid-spending/>; Elizabeth Williams et al., *A Medicaid Per Capita Cap: State by State Estimates*, KFF (Feb. 26, 2025), <https://www.kff.org/medicaid/a-medicaid-per-capita-cap-state-by-state-estimates/>.

Changes to Medicaid under OBBBA

Preventing adopted rules from taking effect

OBBBA prevents the CMS secretary from implementing, administering, or enforcing until October 1, 2034 all provisions of its Eligibility and Enrollment Final Rule dated April 2, 2024 that had not yet taken effect. The purpose of the rule as adopted was to simplify the eligibility and enrollment processes for Medicaid, CHIP, and the Basic Health Program (BHP) by:

- aligning enrollment and renewal requirements for most individuals in Medicaid;
- establishing beneficiary protections related to returned mail;
- creating timeliness requirements for redeterminations of eligibility;
- facilitating transitions between programs;
- prohibiting premium lock-out periods, benefit limitations, and waiting periods for children enrolled in CHIP; and
- modernizes recordkeeping requirements to ensure proper documentation of eligibility determinations.²⁶

OBBBA also similarly delayed implementation of CMS' Medicare Savings Plan final rule, adopted September 21, 2023 to simplify the processes for individuals to enroll and retain eligibility in Medicare Savings Plans (MSPs), which pay or subsidize low-income MA beneficiaries' premiums for Medicare. According to CMS, the rule

²⁶ Medicaid Program; Streamlining the Medicaid, Children's Health Insurance Program, and Basic Health Program Application, Eligibility Determination, Enrollment, and Renewal Processes, 89 Fed. Reg. 22780 (Apr. 2, 2024), <https://www.federalregister.gov/documents/2024/04/02/2024-06566/medicaid-program-streamlining-the-medicaid-childrens-health-insurance-program-and-basic-health>.

- better aligns enrollment into the MSPs with the requirements and processes for other public programs; and
- reduces the complexity of applications and reenrollment for eligible individuals.²⁷

OBBBA also delayed implementation of MCS' and HHS' long-awaited staffing rule for long-term care facilities, adopted May 10, 2024. The purposes of this rule were to ensure safe and quality care in long-term care facilities and to require states to report the percentage of Medicaid payments spent on compensation for direct care workers and support staff. Among other provisions, the rule required a registered nurse be present in a long-term facility 24/7, and also required that staff be scheduled so as to provide a minimum of 3.48 total nurse staffing hours per resident day (0.55 from registered nurses, and 2.45 from nurse aids). This OBBBA provision is estimated to reduce federal Medicaid spending by \$23 billion over 10 years.²⁸

Reduced Retroactive Medicaid Coverage

Current law provides that states are required to provide Medicaid coverage for qualified medical expenses incurred up to 90 days prior to date of a recipient's Medicaid application. Effective January 1, 2027, retroactive coverage is limited to 30 days for Medicaid expansion program participants and 60 days for recipients of other Medicaid programs. This provision is expected to reduce federal spending by \$4 billion over 10 years.

²⁷ Streamlining Medicaid; Medicare Savings Program Eligibility Determination and Enrollment, 88 Fed. Reg. 65230 (Sept. 21, 2023), <https://www.federalregister.gov/documents/2023/09/21/2023-20382/streamlining-medicaid-medicare-savings-program-eligibility-determination-and-enrollment>.

²⁸ Medicare and Medicaid Programs; Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting, 89 Fed. Reg. 40876 (May 10, 2024), <https://www.federalregister.gov/documents/2024/05/10/2024-08273/medicare-and-medicaid-programs-minimum-staffing-standards-for-long-term-care-facilities-and-medicaid>.

Limiting States' Ability to Raise Money for Medicaid Through Provider Taxes

Provider taxes are one available means by which states raise money to finance their share of Medicaid spending. States tax medical providers and use the revenue to fund Medicaid. Because the federal government currently matches State Medicaid program expenditures, using taxes to increase state Medicaid funding also results in a larger match from federal Medicaid dollars.²⁹ Tax revenue then is used to pay providers serving Medicaid recipients. States may not guarantee that providers receive their money back in payments, unless their tax is 6% or less of net patient revenues (this is called the “safe harbor”). Provider taxes must be broad-based and uniform (i.e., it cannot apply only to Medicaid providers).

OBBBA prohibits states from establishing any new provider taxes or increasing rates of existing taxes. It also revises waiver processes in a way that will eliminate some taxes that were previously allowed.

Additionally, for states that adopted Medicaid expansion, the safe harbor tax rate is reduced by 0.5% annually, beginning FY 2028, until 2032, when the limit is reduced to 3.5%. The affected states are Arizona, California, Connecticut, Illinois, Indiana, Iowa, Louisiana, Michigan, Missouri, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, and Virginia. Payments to skilled nursing and intermediate care facilities are not subject to the reduced safe harbor.

These changes are estimated to reduce federal spending by \$191 billion over 10 years and increase the number of uninsured by 1.1 million during the same period.

²⁹ See Andrew Patzman and Andrew Loutz, *Paying the 2025 Tax Bill: Medicaid Provider Taxes*, Bipartisan Policy Center (April 11, 2025), <https://bipartisanpolicy.org/explainer/paying-the-2025-tax-bill-medicaid-provider-taxes/>.

Penalties for States that Make Erroneous Medicaid Payments

Under current law, CMS must recoup from the State federal funds for erroneous payments if the state's eligibility error rate exceeds 3%, but may waive recoupment if a state Medicaid agency demonstrates good faith efforts to get below the 3% threshold. Effective October 1, 2029, the definition of "improper payments" is expanded to include payments where insufficient information is available to confirm eligibility. OBBBA also reduces federal financial participation to states for improper payment errors. These changes are projected to save \$8 billion and increase the number of uninsured by 100,000 in the next ten years.

HCBS Expansion

Under OBBBA, state Medicaid programs may propose new home and community-based service programs for people who do not qualify as needing an "institutional level of care." State submissions for waivers must demonstrate that the new waivers will not increase the average amount of time that people who require an institutional level of care will wait for services. This change is projected to save \$7 billion over the next 10 years.

Rural Health Transformation Program

This grant program for fiscal years 2026-2030 provides payments to rural health providers. Adopted amid legislators' concerns that rural hospitals would close due to cuts imposed by OBBBA, the \$50 billion program is about 37% of the estimated loss of federal Medicaid funding in rural areas. As adopted, CMS will have broad discretion in how it allocates funds among states, and the law does not direct transparency by CMS or states regarding how funds are allocated or used.

Expansion of ABLE Accounts

The Tax Cuts and Jobs Act of 2017 included legislation introduced earlier in the year as the “ABLE to Work Act.”³⁰ These provisions allow ABLE accountholders with earned income who do not participate in employer-sponsored retirement plans to make contributions in excess of the limit that usually applies (\$19,000 in 2025). The additional amount that can be contributed is the accountholder’s earned income or \$15,060 (in 2025), whichever is less.³¹ Under the Tax Cuts and Jobs Act, the change would have expired December 31, 2025; OBBBA made it permanent. Tax-free rollovers to ABLE accounts from 529 educational savings accounts were also set to expire in 2025; OBBBA made these permanent.³²

Beginning January 1, 2026, the ABLE Age Adjustment Act, enacted as part of the Consolidated Appropriations Act of 2023,³³ dramatically expands class of people eligible for ABLE accounts. Currently, only people with qualifying disabilities which onset prior to age 26 are eligible for ABLE accounts. Next year, the deadline for onset of disability will be raised to age 46, allowing many more people access to these accounts.³⁴

Other OBBBA Provisions Less Relevant to Persons with Disabilities

OBBBA eats around the edges of Medicaid programs for the disabled. Changes to other Medicaid programs include:

- Work requirements for persons age 19-64 receiving MA or MA expansion who are not disabled

³⁰ H.R. 1896, 115th Congress, <https://www.congress.gov/bill/115th-congress/house-bill/1896> (2017).

³¹ “ABLE to Work Act,” ABLE National Resource Center, <https://www.ablenrc.org/able-to-work-act/>.

³² Public Law No. 119-21 § 70117.

³³ Pub. L. 117-328 (2022).

³⁴ See “The ABLE Age Adjustment Act Fact Sheet,” ABLE National Resource Center, <https://www.ablenrc.org/the-able-age-adjustment-act-fact-sheet/>.

- Reducing the maximum home equity limit to \$1 million, regardless of inflation (homes located on farms are treated differently)
- Changes to Medicaid expansion categories of MA
 - Mandatory biannual recertifications (rather than annual) This change is estimated to save \$63 billion and cause 700,000 people to become uninsured over 10 years
 - Requiring states to impose cost-sharing of up to \$35 per service (with exemptions for primary care, mental health, addiction treatment, rural health clinics). This provision will be effective October 1, 2028.
 - Beginning October 1, 2028, States may allow providers to deny services for a patient's failure to pay cost sharing
 - Work requirements
- Cuts applicable solely to MA expansion states
 - American Rescue Plan Act (P.L. 117-2; 3/11/2021) increased the share the federal government pays of Medicaid expenditures for states that adopted MA expansion for 2 years. OBBBA eliminates this incentive.
 - Discussions *were* to reduce base FMAP from 90% to 50%!!! If all states that had expanded MA dropped it as a result of this funding cliff, 20 million people would have lost medical coverage.
 - Reduced FMAP for emergency Medicaid for persons who would be eligible for MA under MA expansion, but for immigration status, to 50% from 90%. This means emergency care providers and the states will bear more costs of treatments.

Conclusion

OBBBA's cuts to the social safety net are likely not the last. In August, it was reported³⁵ that SSA was considering proposing a rule to change SSI's definition of "public assistance household" to exclude households receiving SNAP. The effect of the change meant that SSI recipients living with others receiving food stamps would be subject to ISM rules and required to provide detailed information about each household member's income and payment of household expenses.

(Currently, as public assistance households, families receiving SNAP are presumed to be unable to provide ISM, avoiding this analysis.) In a 2024 analysis, SSA estimated that the change would reduce SSI benefits for 275,000 people and result in eligibility loss for over 100,000 more.³⁶

Changes to Social Security Operations

SSA's Proposed 2026 Budget

In July 2025, SSA published its annual report³⁷ presenting the President's request for funding for fiscal year 2026. The proposed budget for SSA in 2026 totals \$14.793 billion. This represents a decrease from President Biden's request for fiscal year 2025 (\$15.402 billion).

The report set out three goals for next fiscal year: improving customer service, fighting fraud and waste, and optimizing and empowering SSA's workforce.

³⁵ Kathleen Romig and Devin O'Connor, *Trump Administration Poised to Cut SSI Benefits for Nearly 400,000 Low-Income Disabled and Older People*, Center on Budget and Policy Priorities (August 7, 2025), <https://www.cbpp.org/research/social-security/trump-administration-poised-to-cut-ssi-benefits-for-nearly-400000-low>.

³⁶ Id. (citing Cong. Budget Office, *Estimated Budgetary Effects of Public Law 119-21, to Provide for Reconciliation Pursuant to Title II of H. Con. Res. 14, Relative to CBO's January 2025 Baseline* (July 21, 2025), <https://www.cbo.gov/publication/61570>.)

³⁷ Soc. Sec. Admin., *Justification of Estimates for Appropriations Committees for Fiscal Year 2026* (2025), <https://www.ssa.gov/budget/assets/materials/2026/FY26-JEAC.pdf>.

Improving Customer Service

On the one hand, SSA says it is improving customer service by “large-scale restructuring” to focus on direct service, consolidating support functions performed by headquarters and regional staff and increasing the number of employees in frontline service delivery positions (field offices).³⁸ It reports that it is

placing highly qualified professionals in direct-service positions and providing them the necessary tools to serve the public effectively. Many of these employees have years of experience in different types of positions across the agency, making them a tremendous asset in direct-service positions. These efforts will increase the number of staff on the frontlines, despite an overall reduction in the SSA staff headcount.³⁹

However, SSA also mentions efforts to centralize SSA’s work, even as headquarters and regional staff are reassigned to local offices. SSA says the President’s proposed budget will be used to “create and align new centralized Federal disability processing units and disability processing branches, staffed with reassigned employees” to assist states with large disability case backlogs and to “address inconsistencies among the States.”⁴⁰ SSA believes this change, along with providing additional staff and improving technology, will reduce disability decision wait times from the current time of 230 days to 190 days by the end of 2026.⁴¹ Additionally, the report says SSA “will shift

³⁸ Id. at 11.

³⁹ Id. at 11.

⁴⁰ Id. at 10.

⁴¹ Id. at 10.

from localized workloads to portable, national workloads[,]”⁴² but does not describe these plans.

SSA reported that in 2025 it began to expand its use of a new telecommunications platform to field offices, and in 2026 will roll out the platform to processing centers, hearing centers, and state Disability Determination Service offices.⁴³ Once the platform is fully implemented, SSA says it will provide callers more self-service options and will optimize use of Call Back Assist and Estimated Wait Time.⁴⁴

Fighting Fraud and Waste

Beginning in April 2025, SSA increased the default rate withheld to recoup overpayments from 10% to 50% for retirement, SSDI, and survivor payments. Other efforts to fight fraud and waste include expanding SSA’s federal fraud prosecution program, issuing civil monetary penalties, and using the Treasury Offset Program to claw back debts owed to SSA from tax refunds or other payments.⁴⁵

In fiscal year 2026, SSA plans to retire “the majority” of its “maintenance-heavy legacy anti-fraud processes.”⁴⁶ Instead, SSA will use “enhanced technology, data analysis, and fraud-prevention tools” to improve payment accuracy and prevent improper payments.⁴⁷ SSA also mentioned continued use of the U.S. Treasury’s Account

⁴² Id. at 8.

⁴³ Id. at 9.

⁴⁴ Id. at 9.

⁴⁵ Id. at 10.

⁴⁶ Id. at 11.

⁴⁷ Id. at 10.

Verification Service to check bank information provided by SSA claimants against Treasury records “to provide real-time feedback on transactions.”⁴⁸

Optimizing and Empowering SSA’s Workforce

In the report, references to optimizing SSA’s work force included discussions of this year’s large-scale restructuring, elimination of remote work, and reassignments staff from headquarters and regional offices to direct service positions in field offices.⁴⁹ SSA says that these efforts will increase staff “on the frontlines” despite SSA having fewer employees.⁵⁰ SSA also stated it would add additional employees in direct service positions, “particularly in hard-to-fill remote areas throughout the country.”⁵¹

In 2025, SSA introduced a generative AI chatbot for SSA employees to use to assist with “content creation, content summarization, and research tasks.” SSA expects to continue increase employee efficiency in 2026 through automating workloads, IT improvements, and “accelerated investment in AI.”

SSA also said it plans to identify “the most error-prone workloads” and create cohorts with special training to handle those workloads nationally.⁵²

Concerns Regarding SSA Operations

Many stakeholders continue to express concern regarding the changes made to SSA this year.

⁴⁸ Id. at 11.

⁴⁹ Id. at 11.

⁵⁰ Id. at 11.

⁵¹ Id. at 11.

⁵² Id. at 11.

Reductions in Staff

In February 2025, SSA announced it planned to reduce its workforce, which it characterized as “bloated [,]” to 50,000 from 57,000.⁵³ To reach this target, it offered SSA employees incentives to retire or resign and told employees that “significant workforce reductions” were imminent.⁵⁴

Previously, the largest staffing cut to SSA was a cut of 4,430 staff (6 %) in 1987.⁵⁵ According to the Center on Budget and Policy Priorities, “The last time SSA had this few employees was 1967, when the agency served 480 beneficiaries for every staff member. In 2025, SSA would be attempting to serve 1,480 beneficiaries for every staff member.”⁵⁶ In April 2025, Social Security News reported 40 field offices were losing 25% percent or more of their staff due to staff accepting separation incentives.⁵⁷ The number of administrative law judges has dropped 14%.⁵⁸

Early in the year, SSA proposed several plans to limit phone support, requiring the public to access it online or in person at field offices.⁵⁹ These plans were later abandoned. In response to long wait times on SSA’s 1-800 number caused by staff shortages, SSA is reported to have sent 4% of its field office workers to help staff the phone line in late July.⁶⁰ While SSA reports the

⁵³ *Social Security Announces Workforce and Organization Plans*, Soc. Sec. Admin. Blog (Feb. 28, 2025; updated Apr. 18, 2025), <https://blog.ssa.gov/social-security-announces-workforce-and-organization-plans/>.

⁵⁴ Id.

⁵⁵ Kathleen Romig and Devin O’Connor, *Reassignment Won’t Fix the Largest-Ever Social Security Staffing Cut*, Center of Budget and Policy Priorities (June 23, 2025), <https://www.cbpp.org/research/social-security/reassignment-wont-fix-the-largest-ever-social-security-staffing-cut>.

⁵⁶ Id.

⁵⁷ *Field Office Losses Under VSIP*, Social Security News (April 4, 2025), <https://socsecnews.blogspot.com/2025/04/field-office-losses-under-vsip.html>.

⁵⁸ Id.

⁵⁹ Jory Heckman, *SSA will get call wait times down to ‘single digits’ using AI, commissioner tells employees*, Federal News Network (May 30, 2025 10:12 a.m.), <https://federalnewsnetwork.com/it-modernization/2025/05/ssa-will-get-call-wait-times-down-to-single-digits-using-ai-commissioner-tells-employees/>

⁶⁰ Elaine Silvestrini, *Need to Call Social Security? Be Ready to Hold*, Kiplinger (August 26, 2025), <https://www.kiplinger.com/retirement/social-security/need-to-call-social-security-be-ready-to-hold>.

average speed of answer on its 800 number as 13 minutes, advocacy organizations allege that SSA has changed its data metrics to prevent direct comparisons.⁶¹ According to statistics last published by SSA in early August, most callers then were waiting over two hours on hold to speak to an employee.⁶²

As part of the reorganization, staff at regional offices and headquarters have been gutted. Regional offices, which traditionally provided support to field offices, have been lost 78% of their staff.⁶³ SSA headquarters has lost 45% of its staff.⁶⁴ The Office of Legislation and Congressional Affairs, responsible for providing technical assistance to lawmakers regarding Social Security Legislation and helping legislators resolve issues with their constituents' benefits, had its staff cut 94%, from 50 to 3.⁶⁵

SSA's proposed 2026 budget would extend a freeze on SSA's customer service budget for a third year.⁶⁶

Use of AI

SSA introduced two new generative AI tools in 2025 to assist with the daily tasks of its administration. The "Agency Support Companion" chatbot was released to enhance employee

⁶¹ Id.

⁶² Kathleen Romig and Devin O'Connor, *Congress Needs to Address the Trump Administration Turmoil at the Social Security Administration*, Center of Budget and Policy Priorities (September 11, 2025), <https://www.cbpp.org/research/social-security/congress-needs-to-address-the-trump-administration-turmoil-at-the-social>.

⁶³ Kathleen Romig and Devin O'Connor, *Reassignment Won't Fix the Largest-Ever Social Security Staffing Cut*, Center of Budget and Policy Priorities, (June 23, 2025), <https://www.cbpp.org/research/social-security/reassignment-wont-fix-the-largest-ever-social-security-staffing-cut>.

⁶⁴ Id.

⁶⁵ Dana George, *Will Massive Cuts to This Social Security Service Impact You?*, The Motley Fool (September 24, 2025), <https://www.fool.com/retirement/2025/09/24/will-massive-cuts-to-this-social-security-service/?msockid=2b88af9aa3d7618e1444ba76a27f6095>.

⁶⁶ Kathleen Romig and Devin O'Connor, *Congress Needs to Address the Trump Administration Turmoil at the Social Security Administration*, Center of Budget and Policy Priorities (September 11, 2025), <https://www.cbpp.org/research/social-security/congress-needs-to-address-the-trump-administration-turmoil-at-the-social>.

efficiency, and an AI-powered phone-based chatbot was introduced to streamline phone inquiries on the national telephone number, which now manages 41% of incoming calls.⁶⁷ The deployment of these technologies, developed but not implemented during the Biden administration, was thought to be used to compensate for SSA's diminished staff.⁶⁸ SSA praises the new Chatbot, but both AI tools have been found to be insufficient in meeting the needs of their users.

The release of the “Agency Support Companion” chatbot for agents included a training video that was meant to educate employees on the integration of the technology into their daily work.⁶⁹ This training video raised immediate concerns as it did not provide critical information and featured simplistic videos and outdated graphics.⁷⁰ When utilized, many agents found the chatbot's responses to be vague or inaccurate.⁷¹

Most users who call the Social Security 1-800 number find the bot unhelpful and frustrating as it provided only canned responses to complex or nuanced questions.⁷² The bot is known to have issues with accessibility, making it more difficult for users who need American Sign Language interpreters or translators.⁷³

⁶⁷ Darius Tahir, *Social Security Praises Its New Chatbot. Ex-Officials Say It Was Tested but Shelved Under Biden*, KFF Health News (Sept. 2, 2025), <https://kffhealthnews.org/news/article/social-security-chatbot-customer-complaints-glitches/>.

⁶⁸ Id.

⁶⁹ *Introducing the Social Security Administration's New AI Training Video: A Deep Dive into Innovation!*, IT Magazine (Apr. 26, 2025), <https://itmagazine.com/2025/04/26/introducing-the-social-security-administrations-new-ai-training-video-a-deep-dive-into-innovation>.

⁷⁰ Id.

⁷¹ Id.

⁷² Darius Tahir, *Social Security Praises Its New Chatbot. Ex-Officials Say It Was Tested but Shelved Under Biden*, KFF Health News (Sept. 2, 2025), <https://kffhealthnews.org/news/article/social-security-chatbot-customer-complaints-glitches/>.

⁷³ Id.

Lawmakers expressed concerns at difficulties constituents may have accessing benefits. Critics argue that SSA has removed key performance metrics from its website to obscure the impact and effectiveness of the chatbot in daily SSA activity.⁷⁴

SSA Operations and Data Security

Allegations are coming to light that the Trump Administration, through DOGE, largely ignored SSA's systems and processes to protect confidential beneficiary information in a rush to grant unprecedented access to government data to DOGE and others.⁷⁵

In February, the American Federation of State, County & Municipal Employees, AFL-CIO and the American Federation of Teachers sued SSA over data practices used by the Trump Administration.⁷⁶ The Alliance for Retired Americans (an advocacy organization founded by the AFL-CIO) also joined as a plaintiff. A declaration filed in the suit by Tiffany Flick, then acting chief of staff, recounts the deviation from procedure and law taken early this year to meet DOGE employees' demands for near-immediate access to all of SSA's data, and details concerns raised by SSA leadership, who were not advised of how the data would be used or who would have access to it.⁷⁷

⁷⁴ Id.

⁷⁵ Jacob Leibenluft, Devin O'Connor & Kathleen Romig, *Trump Administration, DOGE Activities Risk SSA Operations and Security of Personal Data*, Ctr. on Budget & Pol'y Priorities (Apr. 1, 2025), <https://www.cbpp.org/research/social-security/trump-administration-doge-activities-risk-ssa-operations-and-security-of>.

⁷⁶ *American Federation of State, County and Municipal Employees, AFL-CIO v. Social Security Administration*, No. 1:25-cv-00596-ELH (D. Md. Feb. 21, 2025), https://storage.courtlistener.com/recap/gov.uscourts.mdd.577321/gov.uscourts.mdd.577321.1.0_1.pdf.

⁷⁷ See *Exhibit J: Declaration of Tiffany Flick, American Federation of State, County and Municipal Employees, AFL-CIO v. Social Security Administration*, No. 1:25-cv-00596 (D. Md.), <https://storage.courtlistener.com/recap/gov.uscourts.mdd.577321/gov.uscourts.mdd.577321.22.10.pdf>

Additionally, SSA's Chief Data Officer, Charles Borges, filed a whistleblower disclosure in August,⁷⁸ alleging that the SSA faced significant risks due to unauthorized access and potential misuse of sensitive data by DOGE officials. Allegations included abuse of authority, gross mismanagement, and violations of federal privacy laws by DOGE personnel.⁷⁹ Mr. Borges claimed that DOGE officials sought hasty, improper access to sensitive Social Security data under the pretext of investigating fraud and outlined how specific individuals within DOGE created an unmonitored copy of SSA's data, raising serious security vulnerabilities and violating multiple laws. If compromised, this data could lead to widespread identity theft and loss of vital benefits for Americans.⁸⁰

Congress initiated investigations and oversight actions in response to the disclosures.⁸¹ The lawsuit mentioned above resulted in a temporary restraining order (TRO) preventing DOGE from accessing SSA's personally identifiable information and also prohibited SSA from granting DOGE access to sensitive data, requiring the deletion of non-anonymized personally identifiable information.⁸²

Conclusion

Recent cases illustrate a troubling and recurring pattern of misconduct in the administration of a number of pooled special needs trusts. Individuals have been able to exploit pooled trusts and nonprofits operating them for personal gain at the expense of the beneficiaries

⁷⁸ Dana L. Gold & Andrea Meza, *Letter to U.S. Congressional Committees and the Office of Special Counsel, Gov't Accountability Project* (Aug. 25, 2025), <https://whistleblower.org/wp-content/uploads/2025/08/08-26-2025-Borges-Disclosure-Sanitized.pdf>.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

the trusts were meant to protect. As an industry, we should consider our suggestions for how bad actors can be more readily detected and stopped so that impacts to beneficiaries are avoided.

Sweeping policy changes under the One Big Beautiful Bill Act and restructuring within the Social Security Administration have introduced new risks to the public benefits system. Cuts to Medicaid funding, delays in implementing protective regulations, and reductions in SSA staffing and support services easily could threaten the stability and accessibility of essential benefits for individuals with disabilities. These developments reflect a broader retrenchment in the social safety net, raising urgent questions about the future of disability support in the United States.

Circumstances demand a renewed commitment to transparency, accountability, and advocacy on behalf of our constituents.

10/6/2025

GATHERING STORMS: LEGAL CONCERNS OF A POOLED TRUST COUNSEL

by Anna Sappington, Esq., of Anna Sappington, P.C., Jenkintown, Pennsylvania
for Stetson's National Conference on Special Needs Planning and Special Needs Trusts
Pooled Trust Intensive
October 22, 2025

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10/6/2025

INTRODUCTION

2

ABOUT ME

- Pennsylvania attorney with a small practice in Pennsylvania
- Recruited in 2014 to replace counsel for a nonprofit regarding its administration of its trusts
- Author of the Pennsylvania Special Needs Planning Guide: A Handbook for Attorneys and Trustees of Special Needs Trusts
- Provide help to trustees regarding:
 - Amending trust documents
 - Representing beneficiaries before SSA in matters regarding trust documents
 - Advising regarding distributions



10/6/2025

3

OVERVIEW OF CONCERNS



Ongoing Issues with Fraud, Theft, and Mismanagement of Pooled SNTs

We will examine three recent cases of trustee misconduct and analyze patterns.



Medicaid Cuts

Our constituents will be affected by cuts under OBBA, with more cuts likely to come.



Changes in SSA Operations

Huge reductions in staff are likely to affect our clients and make issues with benefits much harder to resolve. SSA appears to view AI as a major answer to staff reductions. SSA officials are raising alarms about how sensitive data was accessed, stored, and used.

4

4

CASE STUDIES

5

5

THE CENTER FOR SPECIAL NEEDS TRUST ADMINISTRATION (2024-)



Overview

- The Center managed over 2,100 accounts with assets totaling around \$200 million, serving special needs beneficiaries.
- In November 2024, it filed for bankruptcy and revealed publicly that more than \$100 million was missing from beneficiary accounts. The Center says the thefts first came to light when a key staff member left, and left behind a letter referring to a loan made by the Center to a for-profit company controlled by the Center's founder, Leo J. Govoni.
- Govoni and the Center's accountant were arrested and face federal criminal charges including multiple counts of fraud and conspiracy.

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6

2

THE CENTER FOR SPECIAL NEEDS TRUST ADMINISTRATION (2024-)



Lowlights

- Although Govoni left The Center in mid-2009, he is alleged to have controlled it until 2022 through oral directives and relationships with Board members and employees.
- Money was transferred directly out of beneficiary accounts to a for-profit financial services company established by Govoni while he was on The Center's Board.
- Though transfers were referred to as loans, no one has produced the loan document. The Center says it doesn't have it.
- The financial services company then distributed it out to Govani and others, and to companies Govani controlled.
- The Center was receiving administrative services, tax, and accounting services through for-profit companies owned by Govoni, which helped conceal the scheme.
- Govoni also allegedly instructed Center employees to produce fraudulent account statements indicating their money was still in their subaccounts.
- "Excess" money was transferred out of accounts. Money was transferred between subaccounts to meet distribution requests.

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THE CENTER FOR SPECIAL NEEDS TRUST ADMINISTRATION (2024-)



Vulnerabilities

- Mismanagement of nonprofit
 - Conflicts of interest
 - Self-dealing
 - Vendor controlling the company and providing subject-matter "expertise"
- Sophisticated use of shell companies to hide fraud
- Catastrophic failure of staff to recognize their participation

8

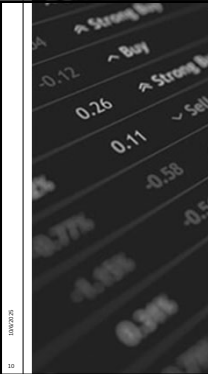
FOUNDATION FOR THOSE WITH SPECIAL NEEDS (22-24)



Overview

- On May 2, 2022, the Securities and Exchange Commission filed a lawsuit in federal district court against Synergy Settlement Services, Inc. and others for violating federal securities laws requiring registration by noncharities who operate investments
- FL attorney Jason D. Lazarus, one of the Foundation's directors and its president, and CFP Anthony F. Prieto, also a director, also were named
- The SEC said two pooled SNTs nominally operated by the Foundation for Those With Special Needs Inc., a 501(c)(3), were actually being operated by Synergy, a settlement broker that referred cases to the pooled trusts. Lazarus was Synergy's CEO and largest shareholder; Prieto was Synergy's president and a minority shareholder.
- Suit ended in 2024 with civil verdicts against Synergy, Lazarus, and Prieto.

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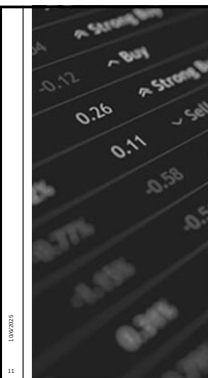


FOUNDATION FOR THOSE WITH SPECIAL NEEDS (22-24)

Lowlights

- SEC's complaint alleged that Lazarus and Prieto purposely concealed Synergy's operation of the trusts and consistently set the Foundation forward as the trustee.
- Joinder and trustee fees were paid to Synergy from beneficiary accounts, under sham marketing agreements between the investment advisor/custodian and Synergy
- The trust invested in a type of mutual fund with imbedded costs as a way of hiding investment management fees from "end clients"
- Money retained by the trust was used to further Lazarus and Prieto's business interests, including:
 - \$132,000 in trustee administration expenses – after already having collected fees sufficient to pay them
 - Paying premiums on Synergy's business insurance company
 - Promoting Synergy by sponsoring golf tournaments, parties, and judicial luncheons

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FOUNDATION FOR THOSE WITH SPECIAL NEEDS (22-24)

Vulnerabilities

- A second case of a bad actor founder
- How can we prevent bad actors from establishing pooled SNTs?
- Hiding fee information from beneficiaries
- Theft of retained remainder

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NATIONAL FOUNDATION FOR SPECIAL NEEDS INTEGRITY (2015-2019)

Overview

- The Foundation was sued in 2015 by the estate of a beneficiary who died a month after her trust was created. The family alleged that the Foundation led it to believe the trust's balance would be repaid to Medicaid. Instead, it was transferred to the Foundation, which informed the family in 2015, after all the money had been spent.
- The beneficiary had listed herself as the remainder beneficiary. Under the trust agreement, if a remainder beneficiary was not living at the time the trust terminated, the trust retained the remainder.
- The trust's founder and the drafter of the trust, attorney Kenneth Shane Service, testified that he intentionally drafted the trust to confuse Medicaid officials.

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NATIONAL FOUNDATION FOR SPECIAL NEEDS INTEGRITY (2015-2019)

Overview (continued)

- During the civil suit, Service's management of the Foundation came under criticism. Tax records showed that:
 - Service likely received excessive compensation
 - The trust spent aggressively on legal fees and management costs
 - The Foundation paid up to 42% of its revenue some years to Special Needs Consultants, LLC, a for-profit entity registered by Service.
- A second beneficiary filed a lawsuit seeking class action status in 2015, claiming that thousands of dollars had been withdrawn from the beneficiary's account, purportedly as his proportionate share of legal fees paid to a law firm that had received \$2.4 million from the Foundation between 2011-2015.
- Service was later found to have stolen from trusts for whom he served as trustee.

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NATIONAL FOUNDATION FOR SPECIAL NEEDS INTEGRITY (2015-2019)

Vulnerabilities

- A third founder/bad actor who established a nonprofit and a trust and then used it for profit.
- Misleading beneficiaries to conceal the nonprofit's bad behavior.

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POLICY CHANGES AFFECTING BENEFITS

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MEDICAID UNDER THE "ONE BIG BEAUTIFUL BILL ACT" (OBBA)

Goals

- Make permanent the tax cuts from the Tax Cuts and Jobs Act enacted Trump's first term
- Spending increases mostly attributable to the military and immigration enforcement

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MEDICAID UNDER THE "ONE BIG BEAUTIFUL BILL ACT" (OBBA)

Cost

- Cost of tax cuts is approximately \$4.5 trillion over the next 10 years.
- Adds \$3.4 trillion to the deficit.
- House GOP members considered cutting up to \$2.3 trillion from Medicaid (a third of its federal budget), mostly by capping the amount the federal government pays under Medicaid. Ultimately, OBBA's cuts to Medicaid totaled less than \$1 trillion
- American Rescue Plan Act enacted March 11, 2021 in response to COVID cost \$1.9 trillion (which was added to the deficit)

17



MEDICAID UNDER THE "ONE BIG BEAUTIFUL BILL ACT" (OBBA)

Reconciliation

- Allows expedited passage of legislation treating spending, revenues, or the debt limit
- Unlike legislation passed through "regular order," a reconciliation bill needs only 51 votes to pass the Senate (vs. needing up to 60)

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MEDICAID UNDER THE "ONE BIG BEAUTIFUL BILL ACT" (OBBBA)

Change: OBBBA makes permanent ABLE program enhancements from in the Tax Cuts and Jobs Act

- "ABLE to Work Act": allows additional ABLE contributions for accountholders with earned income (up to \$15,060 in 2025)
- Rollovers from 529 accounts to ABLE accounts will continue to be tax free

Another bright spot: The ABLE Age Adjustment Act, enacted as part of the Consolidated Appropriations Act of 2023, opens ABLE accounts to people with qualifying disabilities occurring prior to age 46 effective January 1, 2026

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MEDICAID UNDER THE "ONE BIG BEAUTIFUL BILL ACT" (OBBBA)

Change: HCBS expansion

- States may propose HCBS service programs for people who do not need an institutional level of care.
- The submitting state must demonstrate the new waiver program will not increase the average amount of time that people who require an institutional level of care will wait for HCBS services
- Projected savings of \$7 billion

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MEDICAID UNDER THE "ONE BIG BEAUTIFUL BILL ACT" (OBBBA)

Change: Work Requirements for nondisabled Medicaid participants

- Largest source of cost savings for Medicaid
- CBO estimates that this change will reduce federal expenditures by \$326 billion in the next 10 years, with up to 5.3 million people losing coverage
- Savings will be due to lost coverage rather than increased employment

21



MEDICAID UNDER THE "ONE BIG BEAUTIFUL BILL ACT" (OBBBA)

Change: Changes to Medicaid expansion programs

- Biannual certifications
- Estimated to save \$63 billion over next 10 years
- Required cost-sharing of up to \$35 per service beginning October 1, 2028, with exceptions for primary care, mental health, addiction treatment, and rural health clinics
- States may allow providers to deny services for a patient's failure to pay cost sharing
- Savings will be due to lost coverage rather than increased employment

22



MEDICAID UNDER THE "ONE BIG BEAUTIFUL BILL ACT" (OBBBA)

Change: OBBBA limits states' ability to raise money for Medicaid through "provider taxes"

- OBBBA prohibits states from establishing any new provider taxes or increasing rates of existing taxes.
- For Medicaid expansion states, reduces the "safe harbor" which allowed states to guarantee providers would receive their tax payments back if the state tax is 6% or less of net patient revenues
 - -0.5% annually to a floor of 3.5%
- Estimated to reduce federal spending by \$191 billion and increase the number of people without insurance by 1.1 million

23



MEDICAID UNDER THE "ONE BIG BEAUTIFUL BILL ACT" (OBBBA)

Change: Increased recoupment for states that make payments erroneously due to not having information needed to confirm eligibility

- Currently, CMS requires states to pay back federal funds paid erroneously if the state's eligibility error rate is less than 3%
- Beginning October 1, 2029, funds paid in error based on lack of documentation needed to confirm eligibility will now also be included in error rate
- Estimated to reduce federal spending by \$4 billion

24



MEDICAID UNDER THE "ONE BIG BEAUTIFUL BILL ACT" (OBBBA)

Change: Retroactive Medicaid coverage reduced

- Effective January 1, 2027, retroactive coverage is limited to
 - 30 days for Medicaid expansion program participants
 - 60 days for other Medicaid program participants
- Estimated to reduce federal spending by \$4 billion

25



MEDICAID UNDER THE "ONE BIG BEAUTIFUL BILL ACT" (OBBBA)

Change: Reduces maximum home equity limit to \$1 million, regardless of inflation, for Medicaid long-term care programs (including waiver)

- Effective January 1, 2028

26



MEDICAID UNDER THE "ONE BIG BEAUTIFUL BILL ACT" (OBBBA)

Change: Rural Health Transformation Program

- \$50 billion grant program for FY 2026-2030 providing payments to rural health care providers
- Adopted in response to legislators' concerns that rural hospitals would close due to OBBBA's cuts
- Gives back about 37% of the Medicaid funds rural areas otherwise would have lost
- Lack of transparency re how funds are allocated by CMS or states

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MEDICAID UNDER THE “ONE BIG BEAUTIFUL BILL ACT” (OBBBA)

Change: Delayed Rollout of CMS Final Rules

- Implementation, administration, and enforcement of CMS’ recent SNF staffing rule is delayed until October 1, 2034
- Required a minimum of 3.48 total nursing staffing hours per resident day, requiring SNFs to significantly increase staffing
- Rules intended to simplify eligibility and enrollment in Medicaid, CHIP, Basic Health Program, and Medicaid Savings Plans

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MEDICAID UNDER THE “ONE BIG BEAUTIFUL BILL ACT” (OBBBA)

At one point, Congress considered reducing the federal contribution for states that adopted Medicaid expansion from 90% to 50%

If all states that had expanded Medicaid dropped it as a result of this funding cliff, 20 million people were estimated to lose coverage

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What's next?

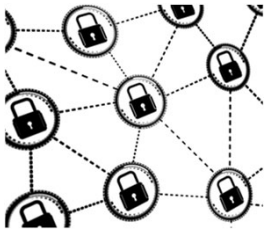
30

CHANGES TO SOCIAL SECURITY OPERATIONS 	SSA's Proposed 2026 Budget • Goals: • Improve customer service • Fight fraud and waste • Empower and optimize SSA's workforce • \$14.793 billion (a decrease from the request for 2025, which was for 15.402 billion)
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CHANGES TO SOCIAL SECURITY OPERATIONS 	Staffing • SSA announced it planned to reduce its workforce to 50,000 (from 57,000) in February • Offered incentives to retire or resign • Required in-office attendance • Told employees that significant workforce reductions were imminent
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CHANGES TO SOCIAL SECURITY OPERATIONS 	Staffing • Administrative and technical support staff reassigned to field offices • Regional offices: 78% staff reduction • Headquarters: 45% • Office of Legislation and Congressional Affairs: 94% • The number of ALJs at SSA has dropped by 14%
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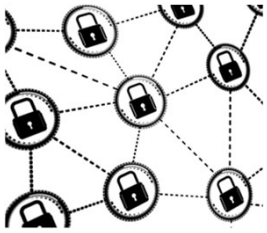
33

CHANGES TO SOCIAL SECURITY OPERATIONS 	Staffing • Previously, largest staffing cut to SSA was 6%, in 1987 • Last time SSA had this few employees was 1967 • At that time, SSA served 480 beneficiaries for every staff member • With the cut, SSA would serve 1,480 beneficiaries per staff member
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CHANGES TO SOCIAL SECURITY OPERATIONS 	Use of AI • SSA appears to have put its faith in AI to make its remaining employees more productive • There is much skepticism over whether the projections are at all possible • Concerns have been fueled by bad experiences and lack of training
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35

CHANGES TO SOCIAL SECURITY OPERATIONS 	SSA Data Operations and Security • Under auspices of DOGE, persons were given access to Social Security's data in ways that were unprecedented and which SSA officials found alarming • In August, SSA's Chief Data Officer, Charles Borges, filed a whistleblower complaint that alleging individuals in DOGE created an unmonitored copy of all SSA's data which could lead to widespread identity theft if compromised • A lawsuit resulted in a temporary restraining order to prevent DOGE from accessing personally identifiable data from SSA
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CONCLUSION





STETSON LAW

Pooled Trusts Intensive

October 22, 2025

How Trust Administrators Can Best Avoid the Unauthorized Practice of Law



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Elder Justice*

Access and Justice For All®

How Trust Administrators Can Avoid the Unauthorized Practice of Law: Practical Tips for Administrators and their Counsel

By Megan Brand and Susie Germany, Esq.

The impetus of this topic stemmed from research conducted for a subcommittee of the Colorado Bar Association on the best practices for fiduciaries to follow in order to avoid the unauthorized practice of law. The committee requested assistance from Professor Bobbi Flowers who helped coordinate the services of Stetson law students to conduct research from across the country on how courts and other regulatory bodies treat fiduciaries who file documents in court in their respective states. Some of the information contained in this presentation was obtained from this study. We would like to thank Prof. Bobbi Flowers and several Stetson Law students for their contributions and research.

I. What Is the Unauthorized Practice of Law and Why Do Pooled Trust Administrators Care?

Pooled Special Needs Trusts (PSNTs) are essential tools that assist individuals with disabilities to maintain access to government benefits while preserving funds for their supplemental needs. These trusts are managed by nonprofit organizations that serve as pooled trust administrators. While administrators provide vital services, they walk a fine line between providing legal information in the performance of their duties as fiduciaries versus providing legal advice—especially in a heavily regulated area like public benefits and trust administration.

To avoid crossing into the **unauthorized practice of law (hereafter, “UPL”)**—which carries serious civil and criminal risks—administrators must understand their role's limitations and know when to engage qualified legal counsel.

A. Legal Definition of UPL

A general definition of UPL is *“offering legal services without being licensed as an attorney”*¹.

So, **UPL** occurs when a person who is not licensed to practice law provides legal services or

¹ National Notary Association. 2025, August 11. *Notary Basics: Avoiding the Unauthorized Practice of Law*.

advice. Individual state statutes vary slightly in their definitions of UPL, but common indicators include:

- Giving specific legal advice tailored to an individual's situation.
- Drafting or interpreting legal documents with binding consequences.
- Representing someone in legal proceedings without a law license.

For trust administrators, the risk of crossing the line emerges regularly, given the legal complexities of trust management, Medicaid, and SSI rules. **Trust administrators are “fiduciaries”.** A fiduciary, derived from the Latin term for “trust”, is a person owing a fiduciary duty to another. When someone has a fiduciary duty to someone else, the person with the duty must act in a way that will benefit someone else financially. Owing a fiduciary duty to a party creates a fiduciary relationship, which then involves greater opportunity for a fiduciary to confuse their role.

B. Risks and Penalties for Engaging in UPL

- Civil and criminal penalties could be incurred.
- Organizational liability increases.
- Potential threats to organization’s reputation
- Regulatory Investigations and/or Mandatory Reporting
- Beneficiary’s loss of Public Benefits

C. Common Triggers for UPL in Trust Administration

- Giving tailored advice on Medicaid/SSI.
- Drafting or interpreting legal documents.
- Negotiating Settlements or Legal Agreements

- Representing individuals (i.e. beneficiaries or family members) before agencies or in court.

D. How Fiduciaries Often Fall into a UPL Trap

UPL traps for fiduciaries happen when various types of fiduciaries, while fulfilling their responsibilities, engage in activities which extend beyond the scope of their fiduciary duties. They then delve into areas traditionally reserved for licensed attorneys.

Here's why and how this can happen:

- **Representing others in court:** While a fiduciary can represent themselves in a legal matter, they generally cannot represent others, even in situations where they are managing assets on someone else's behalf. Appearing in court on behalf of another individual or entity without being a licensed attorney can be seen as the unauthorized practice of law.
- **Providing legal advice:** Offering legal advice falls under the definition of practicing law. If a fiduciary, while managing assets, offers such advice without a license, it can be considered the unauthorized practice of law.
- **Drafting legal documents:** In many jurisdictions, selecting legal documents or guiding the drafting of documents for others, such as wills, trusts, and other legal documents, is considered the practice of law. Fiduciaries who undertake these tasks without proper authorization may face accusations of unauthorized practice of law.
- **Corporate Fiduciaries:** Cases involving corporate fiduciaries like banks or trust companies highlight the challenges of delineating their role. For example, a bank's trust department was sued by the Ohio State Bar Association for offering estate planning services that included drafting legal instruments. Similarly, an Arkansas bank was enjoined

from probating estates and trusts, even though it used licensed attorneys, because the court considered the bank itself to be engaging in the practice of law.

II. Where the Line Is: Education vs. Advice

Administrators are often asked by beneficiaries, family members, or case managers for help understanding how the trust interacts with public benefits. Here's some common activities and what may or may not be acceptable through the lens of UPL:

A. Acceptable Activities:

- Explaining general trust policies and procedures.
- Providing publicly available legal information (e.g., SSA or Medicaid rules).
- Referring clients to state resources or legal aid clinics.
- Sharing how the administrator typically handles disbursement requests under trust guidelines.

B. Potential UPL Activities:

- Advising whether a specific disbursement will affect SSI or Medicaid.
- Suggesting how a client should structure their finances or care arrangements that may have significant legal consequences.
- Drafting spend-down plans to meet Medicaid eligibility.
- Interpreting complex regulations for individual clients.

C. Case Study

Jane Johnson was 82 years old, and the mother of Jack, age 53, and Ginger, age 47. Jack was an IT professional and Ginger, who had a developmental disability, volunteered at a local animal shelter and lived with Jane. Ginger received SSI, Medicaid Home and Community Based Waiver services.

Jane, who was very frugal, owned a home which was paid off and worth \$2 million, and an investment portfolio worth \$1.4 million. Jane had worked with Mac, her financial advisor, for about 10 years. Mac worked for a large investment firm and over the years, he had charged fees which were commensurate with most firms for managing her assets. Jane trusted Mac, so when she was diagnosed with cancer, she shared this information with him along with her concerns about caring for Ginger after she was gone.

Initially, Mac recommended that Jane seek counsel to prepare her estate plan, as she had nothing in place. Jane did not like lawyers, and according to Mac, she refused to seek counsel, despite his insistence. Seeing no other option, shortly before her death, Mac decided to take matters into his own hands, downloaded a form off the internet, and drafted a will with a testamentary special needs trust in it for the benefit of Ginger. The will would leave 50% of the estate outright to Jack and the remaining 50% to the trust for Ginger. After all, how difficult could this be? All the forms were right there on the internet for public use, Mac later testified. The trust Mac created using this form contained mandatory payment provisions, which would make the testamentary trust a countable resource that would impact Ginger's eligibility for public benefits.

Jane signed the will before a notary and two witnesses at her bank. Jane died a few weeks after the will was signed.

Jack, Jane's son, contacted counsel to assist him when he discovered the will as he had concerns about the fact that the financial advisor had prepared it. He was very worried about protecting his sister's benefits. Counsel, upon reviewing the will and trust, as a mandatory reporter, contacted their states Office of Attorney Regulation to report the advisor for the Unauthorized Practice of Law. Further, counsel contacted Mac to attempt to obtain some clarity on how this had occurred. After several weeks of calls, letters, and emails with no response, counsel began receiving late-

night emails from Mac that appeared like they were written while he was under the influence. After Jane's death, Mac had sold his house and moved out of state. Counsel then also filed a petition to reform or decant the trust. Counsel also notified the advisor's employer and made a report to FNRA, which regulates financial planners, where an investigator was assigned.

The Office of Attorney Regulation pursued the matter. Counsel also contacted FNRA and the company the advisor worked for in order to seek compensation for damages.

Eventually, the court approved the reformation of the trust and the deposit of the funds into the a third party trust. However, the trust was not considered third party funds because the trust was defective, so the funds ended up being required to be placed into a first party trust. The damages to Ginger included loss of benefits for a period of time and the beneficial right to the trust without any payback requirement to the state.

In the end, Mac the advisor lost his license to work as a financial advisor and was responsible for payment of all the legal fees incurred to resolve the matter. His former employer also was responsible for payment of damages. He was also investigated for elder fraud and exploitation, but the matter was not pursued by law enforcement.

When are these matters are pursued?

When there are actual damages and victims willing to pursue the matter.

III. Various Examples in Several States: Do any states require a fiduciary to be represented by counsel to file documents in court?

- Generally, no, individuals acting as fiduciaries are not required to be represented by an attorney when filing documents in court, unless they are acting on behalf of a corporation or other legal entity

- However, depending on the specific state and the nature of the fiduciary role, there can be nuances and factors that might make attorney representation highly advisable or necessary in certain circumstances:
- **Fiduciary as an individual vs. entity:** Individuals can represent themselves in court and file documents on their own behalf. However, if the fiduciary is representing a corporation or other legal entity (such as a trust or estate), then the entity usually must be represented by a licensed attorney.
- While not always mandated, the intricacies of fiduciary duties, probate laws, and potential disputes can make legal representation invaluable. While we will not cover all fifty states in this presentation, we will review the guidelines in Florida, Texas, Colorado, and Ohio, as these states are robust in their statutes regarding the unauthorized practice of law, and they also provide some examples of case law in this area.
- Specific state examples:

A. Florida

In Florida, the general rule is that individuals are allowed to represent themselves in court (**pro se**). However, there are significant limitations and specific rules that apply to fiduciaries, such as trustees, personal representatives, and guardians, particularly when they are acting in their official capacity rather than in their own individual interests. A guardian or personal representative who is also a Florida-licensed attorney can represent themselves in that capacity. Regarding trustees, the situation is a bit more nuanced.

- A trustee **can** appear in court without an attorney to represent their *own legal interests* in their individual capacity.

- However, a trustee generally **cannot** represent the legal interests of the **trust or the beneficiaries** in their representative, fiduciary capacity without a licensed attorney.

Doing so can be considered the unauthorized practice of law.²

B. Texas

In probate and guardianship cases, Texas law **requires a licensed attorney** if the fiduciary is seeking letters testamentary, letters of administration, determinations of heirship, or guardianships (for person or estate). A fiduciary who is not an attorney **cannot represent the interests of others** in these proceedings, and doing so would be considered unauthorized practice of law—and thus **not permitted**.³

C. Colorado

Fiduciaries are subject to all of the rights and responsibilities imposed on fiduciaries by the Colorado Probate Code. A fiduciary has an obligation to act in the Protected Person or estate's best interests and as such is held to a very high standard which means placing the Protected Person's or estate's needs above the needs and interests of others, including their own personal interests, when making decisions on their behalf. A fiduciary must always act in the best interest of and with undivided loyalty to the estate or Protected Person and avoid transactions that cause a conflict of interest.

Koscove v. Bolte, 30 P.3d 784 (Colo.App. 2001). While acknowledging the difficulty of giving an all-inclusive definition of the practice of law, the supreme court has defined it as follows: We believe that generally one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in

² See, *Appendix C* #2, for Florida's Rule 5.030.

See, *Appendix C*, #2 to 8, for Florida Case Law.

³ Grimes County Court At Law, Grimes County, Texas. 2025. *Self Represented Litigants/Pro Se*. Retrieved from: www.grimesccl.org/self-represented-litigant-1.

connection with these rights and duties is engaged in the practice of law (Denver Bar Ass'n v. Public Utilities Commission, 391 P.2d 467 (Colo. 1964).). See also C.R.C.P. 201.3(2).)⁴

D. Ohio

A key example of a fiduciary being accused of the unauthorized practice of law is the Ohio Supreme Court case, *Green v. Huntington National Bank* (1965), which centered on estate planning services. The case clarified that while fiduciaries, such as bank trust officers, can perform certain administrative functions, they cross the line into unauthorized law practice when they offer specific, individualized legal advice.

Background of the case:

- The Ohio State Bar Association filed a lawsuit to stop the Huntington National Bank from providing legal services through its trust department.
- The bank advertised that its trust officers were qualified to assist customers with estate planning. When a customer expressed interest, trust officers would collect confidential information about the customer's assets, insurance, and will.
- The officers would then create an "estate analysis," which summarized the customer's current situation and provided suggestions.
- The Ohio Supreme Court held that the bank's "estate analysis" and suggestions constituted the unauthorized practice of law, drawing a distinction between permissible financial advice and impermissible legal counsel:
- **Permissible actions:**
 - Fiduciaries can discuss the financial and business aspects of estate planning with a client.

⁴ See, **Appendix C**, #16 for Colorado's Rules Governing Admission to the Bar.

- They can also perform clerical tasks.
- **Impermissible actions:**
 - The bank's "Comments or Suggestions" section in the estate analysis involved giving specific, tailored legal advice to the client.
 - Providing such specific legal information and preparing documents based on a client's desires goes beyond the administrative duties of a fiduciary and enters the realm of legal practice.

Significance of the ruling:

The *Green v. Huntington National Bank* case and similar rulings established an important principle: *a non-lawyer or corporate fiduciary cannot use a position of trust to offer specific legal advice*. This is intended to protect the public from receiving legal counsel from individuals who are not licensed, trained, or regulated as attorneys. The ruling demonstrates that even when hiring licensed attorneys to assist with legal work, the corporate fiduciary itself can still be found liable for engaging in the unauthorized practice of law.

IV. Best Practices for A Trust Administrator to Avoid UPL

- A. Create Clear Boundaries:** Train staff on what constitutes legal advice and when to escalate to legal counsel.
- B. Maintain Clear Role Definitions**

1. Trust Administrator Responsibilities (Non-Legal)

- Educating beneficiaries and families on trust procedures.
- Processing disbursement requests.
- Managing trust records and compliance.

- Coordinating with financial institutions.
- **2. Legal Counsel Responsibilities**
 - Interpreting and applying public benefits law.
 - Drafting and updating trust documents and Joinder Agreements.
 - Responding to government agency subpoenas or court audits.
 - Advising on inter-state compliance issues. (Example: Transferring a PSNT sub-account to a new state and dealing with an annuity assignment)
 - Representing the trust in litigation or disputes.
- C. Use Disclaimers:** Clarify to beneficiaries that the administrator cannot provide legal advice.
- D. Partner with Law Firms:** Develop relationships with attorneys who specialize in public benefits law and special needs planning.
- E. Document Legal Referrals:** Keep records when you refer beneficiaries to outside counsel, to show due diligence.
- F. Regular Legal Audits:** Periodically review internal practices with legal counsel to ensure ongoing compliance.
- G. Attorney Board and Committee Members:** Utilizing attorneys as board or committee members is beneficial to the PSNT for many reasons. They can help with decisions, policy making, etc through their legal lens. Further, they may be able to more easily identify when seeking counsel is necessary and often have a broad network of other attorneys to refer to. (Ex: You are in need of a referral to a bankruptcy attorney for one of your beneficiaries, etc.)

V. Communication Protocols Between Trust Administrator and Legal Counsel

A. Hold Regular Consultations (e.g., Monthly or Quarterly Legal Reviews).

B. Create Escalation Procedures for Legal Questions.

C. Ensure Trustee Retains Documentation of Legal Advice and Referrals.

D. Protect Confidentiality and Privileged Communication.

E. Develop Best Practices for Working with Counsel as a Trust Administrator

- i. Develop good working relationships with Counsel before you even engage them.
- ii. Retain Counsel with Public Benefits & Trust Law Expertise
- iii. Create Written Engagement Agreements
- iv. Maintain Separate Files for Legal vs. Administrative Matters
- v. Conduct Joint Training Sessions (Staff + Legal Counsel)
- vi. Collaborate on Updating Policies with Law Change
- vii. Understand that attorneys can then be referral sources for a Trustee.
- viii. Consider hiring several different attorneys who have varying areas of expertise. This broadens the skill set and experience available to the Trust Administrator as well as the referral sources for the PSNT. It further solves for potential conflicts of interest.
- ix. Negotiate a fee that may be lower than market rate.

F. Implement Trust Administration Staff Training and Compliance

Infrastructure

- i. Create Internal Policies on Legal vs. Administrative Boundaries.
- ii. Conduct Annual UPL Risk Training for All Staff.

- iii. Enforce the Use of Disclaimers in Written and Verbal Communication.
- iv. Utilize Sample Scripts for Handling Legal Questions from Beneficiaries
- v. Maintain a Trusted Legal Referral List

VI. Issues Attorneys Serving as Fiduciaries May Encounter

A. Role Conflicts - Dual Capacity Issues

- Serving as both attorney and fiduciary can blur roles.
- Risk of confusion between legal advice and fiduciary decision-making.

B. Attorney-Client Privilege Concerns

- Determining when privilege applies if the attorney is also a fiduciary.
- Potential waiver issues when representing the estate/trust vs. themselves as fiduciary.

C. Potential for Self-Dealing

- Using law firm services to assist the fiduciary role.
- Charging both fiduciary fees and attorney fees (risk of excessive compensation claims).

D. Ethical and Professional Responsibility Issues

i. Conflicts of Interest

- Beneficiaries may perceive attorney-fiduciary as favoring their own interests.
- Duty of loyalty to beneficiaries vs. duty to client (if also representing estate/trust).

ii. Disclosure Requirements

- Need to disclose dual roles and obtain informed consent.

- Full transparency on compensation arrangements.
- iii. **Compliance with Rules of Professional Conduct**
 - ABA Model Rules 1.7 (Conflict of Interest), 1.8 (Transactions with Clients), and 1.9 (Duties to Former Clients).
- iv. **Compensation & Fee Disputes**
 - i. **Double Compensation Claims**
 - Charging fiduciary commissions plus legal fees may be challenged.
 - Courts often scrutinize “reasonable compensation” more closely for attorneys.
 - ii. **Billing Transparency**
 - Requirement to distinguish between legal work and fiduciary work.
 - Need for accurate recordkeeping to avoid surcharge.
 - Effective delegation to lower billers
- E. Liability & Litigation Risks**
 - i. **Increased Exposure to Claims**
 - Beneficiaries may sue for breach of fiduciary duty, malpractice, or both.
 - Higher standard of care expected because of legal training.
 - Important for attorney to recognize when they are or are not competent to handle legal matters
 - ii. **Negligence Claims**
 - Courts may hold attorney-fiduciaries to a higher level of skill/diligence.

iii. Contested Matters

- Allegations of undue influence if attorney drafted documents naming themselves fiduciary.
- Will/trust contests citing conflict in attorney's dual role.

F. Practical & Administrative Issues

i. Recordkeeping Burden

- Must maintain clear separation between fiduciary and attorney files.
- Accounting must distinguish fiduciary actions from legal representation.

ii. Time Management

- Balancing fiduciary duties with law practice obligations.

iii. Malpractice Coverage

- Standard attorney malpractice insurance may not cover fiduciary services.
- Need for fiduciary liability coverage.

G. Best Practices to Mitigate Risk

i. Written Disclosures & Consents

- Obtain informed consent from clients/beneficiaries about dual roles.
- Clearly define scope of services and fees in writing.

ii. Separation of Roles

- Use independent professionals when possible (e.g., accountants, co-trustees).
- Avoid self-dealing transactions.

iii. Reasonable Compensation Practices

- Charge either fiduciary or attorney fees, not both, unless justified and disclosed.

- Ensure billing is transparent and defensible.

iv. **Insurance & Risk Management**

- Obtain fiduciary liability insurance.
- Conduct regular training on ethics and fiduciary responsibilities.

VII. When A Trust Administrator Should Involve Legal Counsel: Practical Examples

To protect the organization and ensure proper guidance, pooled trust administrators should retain legal counsel in the following scenarios:

A. Routine matters:

- The trust (or pooled trust) is named as a beneficiary that is part of an estate that is in probate.
- You need to petition the court for guardianship for one of your trust beneficiaries because of health/safety concerns
- You need to ask for a Guardian Ad Litem to be appointed on behalf of your beneficiary related to your trust administration
- Your beneficiary's family member petitions to be conservator for assets owned only in the trust
- You are making a disbursement for a house or car or other exempt asset of great value that you believe should be in a conservatorship
- Your beneficiary brings you into an existing conservatorship or guardianship matter
- You need to bring in an attorney to navigate Medicaid or Social Security issues either on behalf of one or many beneficiaries

- viii. Annuities, spousal or child support needs to be assigned to the trust through a court order
- ix. Drafting:
 - 1. Care agreements
 - 2. Vehicle agreements
 - 3. Rental agreements
 - 4. Resignation and release documents
 - 5. Acceptance documents (more for individual trusts)
 - 6. Revisions to the Master Trust or individual trusts you administer
- x. Decanting from a stand alone trust into your pooled trust

B. Not so routine:

- i. A beneficiary or their representative brings an action against you in court
- ii. Trust beneficiary runs away or is abducted
- iii. You need an attorney to write a stern letter to a vendor, your beneficiary, etc.
- iv. You need to evict a beneficiary from a trust owned property
- v. Annuities assigned to the trust are re-routed by your beneficiary or their representative
- vi. You are in disagreement with your beneficiary, or their court appointed guardian over a significant distribution decision, such as:
 - 1. Assistance with Pregnancy, Abortion, or birth control
 - 2. Residential placement
 - 3. End of Life Medication

4. Gender Affirming Care

VIII. How To Decide Between In-House Counsel or Outside Counsel

The **difference between in-house counsel and outside counsel** primarily lies in their **relationship to the organization, scope of responsibilities, and how they are engaged and compensated**. The following is a clear breakdown for pooled trust administrators—or any organization—on how each legal role functions and when to use them.

The Association of Corporate Counsel (ACC), formerly known as the American Corporate Counsel Association (ACCA), provides guidelines and resources for in-house counsel, emphasizing a balanced approach to managing legal work.

A. What in-house counsel can handle:

1. **Broad scope of activities:** In-house counsel are equipped to handle a wide range of legal activities, including negotiations, counseling, transactional representation, and internal investigations.
2. **Routine matters:** They are ideal for managing consistent and integral legal needs of the company, building lasting relationships and providing stability.
3. **Risk management and compliance:** In-house counsel play a crucial role in enterprise risk management (ERM), according to Diligent⁵, and are often involved in ensuring corporate compliance initiatives.
4. **Understanding the business:** A key aspect of effective in-house counsel is understanding the business they serve, its industry, market challenges, and strategic

⁵ *Diligent*. Dunphy, Kathleen. 2024, December 10. *The Role of in-house legal in enterprise risk management*. Retrieved from: <https://www.diligent.com/resources/blog/the-role-of-in-house-legal-in-enterprise-risk-management>

goals. This enables them to provide tailored legal advice aligned with the overall business strategy.

5. **Communication and collaboration:** They serve as a vital link between the trust company and its business partners and clients, translating complex legal issues into clear, understandable business terms.
6. **Cost-effectiveness:** Keeping work in-house can often be the most cost-effective approach. In-house counsel salaries are predictable compared to the potentially fluctuating costs of outside counsel.

B. When in-house counsel should outsource:

1. **Specialized expertise:** When a matter requires specialized legal expertise not present within the in-house team, outsourcing to a specialized law firm with deeper expertise and resources may be necessary, particularly for litigation or high-stakes matters.
2. **Workload and capacity:** If in-house teams are overwhelmed or stretched thin, outsourcing can help ensure that legal responses are timely and effective.
3. **Budgetary considerations:** For companies with inconsistent or limited legal needs, or those without the budget for a full-time experienced internal General Counsel, outsourcing can provide cost-effective access to legal services.
4. **Strategic goals:** Companies prioritizing flexibility, cost control, and scalability, as opposed to deep, ongoing legal integration, might opt for outsourcing.
5. **High-risk, high-complexity matters:** Best practices suggest assigning a risk and complexity score to all matters and likely outsourcing those that score high in both areas.

6. **Managing outside counsel:** When external counsel is retained, in-house counsel are responsible for coordinating and directing the external team, including potentially requesting budgets or project plans.

In-House Counsel vs. Outside Counsel: Key Differences

Aspect	In-House Counsel	Outside Counsel
Employment Status	Employee of the organization	Independent contractor or law firm
Payment Model	Paid salary (and benefits)	Paid hourly, by project, or on retainer
Primary Loyalty	The employing organization	The client (organization), but works independently
Accessibility	Readily available for day-to-day consultation	Engaged as needed; often scheduled
Institutional Knowledge	Deep, continuous understanding of the organization	May lack context unless long-standing relationship
Scope of Work	Broad, often includes risk management, contracts, HR, compliance	Specific matters: litigation, regulatory filings, etc.
Cost Control	Predictable cost	Can be expensive if not managed properly
Confidentiality	Privileged, like outside counsel	Privileged

Typical Responsibilities Between In-House Counsel Versus Outside Counsel

In-House Counsel

1. Daily legal advice to executives and staff
2. Risk management and policy review
3. Drafting and reviewing contracts and internal documents
4. Overseeing regulatory compliance
5. Coordinating with outside counsel
6. Legal training for staff

7. Institutional memory of legal decisions

Outside Counsel

1. Complex legal research and formal opinions
2. Litigation or administrative hearings
3. Medicaid/SSI appeals or audits
4. Amending trust documents and Joinder Agreements
5. Multi-state regulatory advice
6. Handling disputes, demand letters, or negotiations
7. Specialized areas (e.g., tax, employment law, nonprofit governance)

When to Use Each

Use In-House Counsel When:

- You need legal input embedded in daily operations.
- You're reviewing recurring legal risk or developing policies.
- You're creating routine training for staff on UPL and compliance.
- You want rapid internal responses to administrative questions.

Use Outside Counsel When:

- You are facing complex or high-risk legal issues (e.g., government investigations).
- You need representation in court or before agencies.
- You're dealing with issues outside your in-house counsel's expertise.
- You require the drafting or revising complex trust documents.
- There's a conflict of interest that in-house counsel cannot manage.

Working Together Effectively

Many organizations benefit from a **hybrid model**:

- **In-house counsel** handles the day-to-day and strategic alignment
- **Outside counsel** provides depth, specialization, and litigation support

Example in Pooled Trust Context

Scenario	Counsel Needed
Staff training on UPL	In-house (with outside input)
Medicaid audit appeal	Outside counsel
Disbursement policy updates	In-house with review by outside counsel
Beneficiary litigation threat	Outside counsel
Routine legal questions from admin staff	In-house

IXX. Conclusion

Trust administrators are stewards, not legal advisors. They will protect their organization and the beneficiaries by staying within the scope of their role. Strategically partnering with legal counsel protects trust compliance and integrity. It is important to carefully evaluate how and when to use counsel. From there, determine whether in-house or outside counsel makes the most sense for your organization.



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CFPD Policy: Attorney Involvement in Conservator and Individual Trust Matters Policy

Policy Category: Conservator and Private Services

Drafted by: Megan Brand, Executive Director

Approval date: 12.6.2017

Amended by: Emily Brager, COO

Amended Date: 5.27.2020

When CFPD is serving as Conservator for individuals or as trustee on individual trusts, there are certain circumstances which will require the input of an attorney. If the staff members serving as Conservator designee or Trust Administrator believe an attorney is needed due to anything new or controversial, the designee should first consult with the Executive Director and then they will decide together if the attorney input is needed.

An attorney will always be consulted for the following circumstances, and the Executive Director shall be notified in advance:

Conservator Matters:

1. Real estate held in conservatorship is under foreclosure
2. Settlement agreement or personal injury award through trial
3. Divorce or Post Decree issues or changes involving financial matters
4. Sale of Home or other real estate
5. Any Litigation with regard to the Protected Person (the Conservator is the only legal entity that can act)
6. Bankruptcy
7. A new conservatorship for an adult that does not include a guardianship.
8. Any objection filed with regard to any action on behalf of the Conservator. (Any other general complaint to be brought to the attention of the Executive Director).
9. Any new or existing investment accounts
10. All transactions listed in C.R.S. §15-14-411

Individual Trust Matters:

1. The purchase of real estate to be held in Trust.
2. The sale of real estate which is held in Trust.
3. Any litigation with regard to the Trust.
4. Review of the Trust prior to CFPD's acceptance when serving as sole trustee.
5. Divorce or Post Decree issues in which the Trust is named as a "marital asset".
6. Final estate management/distribution issues for deceased beneficiaries.
7. Any other circumstance in which the Executive Director or Private Services Committee determines counsel is necessary (including HCPF's review of trust, annual accountings or distributions).

The staff member consulting with the attorney will do an initial consultation and then they will determine together if the attorney needs to make an entry of appearance in the case. Whenever possible (in full consideration of any conflicts of interest), CFPD will utilize the attorney services of those who have an



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agreement with CFPD to provide services at a reduced rate. Unless CFPD deems otherwise, the attorney fees and expenses will be paid from the protected person's estate or Trust.

Step-by-Step: Cost-Benefit Analysis

1. Track Current Legal Spending on Outside Counsel

Gather data over the past 12–24 months:

- Hourly rates by firm and by matter type (e.g., \$300/hr–\$600/hr)
- Total legal fees paid annually (e.g., \$120,000/year)
- Common legal matters (e.g., trust revisions, Medicaid audits, dispute resolution)
- Number of hours billed per month
- If you spend **\$10,000/month** on legal fees (~20–30 hours), that's **\$120,000/year**.

2. Estimate the Cost of Hiring In-House Counsel

Include full compensation and overhead:

Cost Component	Estimated Annual Cost
Salary	\$100,000–\$150,000+
Benefits (25–30%)	\$25,000–\$45,000
Office space, IT, tools	\$5,000–\$10,000
Training, insurance, CLEs	\$2,000–\$5,000

Estimated Total: \$140,000–\$210,000/year

3. Compare Break-Even Point

Determine how much outside legal work you would need to break even.

Break-even formula:

Annual cost of in-house counsel ÷ average outside hourly rate = break-even hours

Example: \$160,000 ÷ \$400/hr = **400 hours/year** → That's ~**33 hours/month** of legal work needed to justify an in-house hire.

4. Consider Strategic Value (Qualitative Benefits)

Advantages of In-House Counsel:

- Faster response times and internal alignment.
- Better organizational knowledge and continuity.
- Risk reduction through proactive compliance.
- Lower marginal cost per hour (especially with frequent questions).

Advantages of Outside Counsel:

- Deep subject-matter expertise.
- Scalable (you pay only when needed).
- No fixed overhead or HR obligations.
- Multiple attorneys = broader knowledge base.

5. Hybrid Strategy Option

Many midsize nonprofits or pooled trust administrators use a hybrid model:

- Hire **in-house counsel** at 0.5–1.0 FTE for routine and compliance work.
- Retain **outside counsel** for litigation, trust drafting, Medicaid appeals, or multi-state matters.

Example Hybrid Approach:

- In-house: \$90,000/year for 0.6 FTE
- Outside: \$30,000/year for complex issues → **Total = \$120,000/year**, but with more control and efficiency

6. Build a Decision Matrix

Score or rank each option by category:

Category	In-House	Outside Counsel
----------	----------	-----------------

Category	In-House	Outside Counsel
Cost predictability	✓ ✓ ✓	✓
Response time	✓ ✓ ✓	✓
Specialized expertise	✓	✓ ✓ ✓
Compliance management	✓ ✓ ✓	✓
Flexibility	✓	✓ ✓ ✓
Organizational knowledge	✓ ✓ ✓	✓

When It Makes Sense to Hire In-House:

- You spend more than **\$125,000–\$150,000/year** in outside legal fees.
- Legal questions arise **frequently or daily**.
- Your organization is **growing**, facing increasing complexity, or dealing with **multi-jurisdictional issues**.
- You need **faster turnarounds** and embedded compliance support.

Appendix C

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HOW TRUST ADMINISTRATORS CAN BEST AVOID THE UNAUTHORIZED PRACTICE OF LAW

Megan Brand
Susie Gernsmyr, Esq.
Stetson SNT Conference, 2025



1

INTRODUCTIONS



Megan is the executive director of a non-profit PSNT in Colorado, CFPD. She is not an attorney; she just plays one on TV.

Susie is an attorney practicing in Colorado and Alaska (ask her for AK stories and you'll be entertained all night). Susie served on the board of CFPD for years. Her favorite line during that time... "you need to hire counsel".

Impetus of this Topic, Megan and Susie's work on the UPL committee in Colorado, and the great input from the Stetson Law Students

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BUT FIRST, A STORY OF FRUGAL JANE AND HER RESOURCEFUL FINANCIAL PLANNER MAC



Family Background

- Jane Johnson (82), mother of Jack (53) and Ginger (47)
- Ginger: developmental disability, received SSI & Medicaid Waiver services
- Jane: frugal, owned \$2M home + \$1.4M portfolio

The Mistake

- Financial advisor Mac drafted Jane's will using online forms
- Included a defective testamentary special needs trust
- Mandatory payment provisions jeopardized Ginger's benefits

Legal Fallout

- Counsel reported Mac for Unauthorized Practice of Law
- Trust required reformation → funds placed in a first-party trust
- Ginger lost benefits temporarily and forfeited payback-free status

Consequences

- Mac lost his license, paid legal fees, and was investigated for elder fraud
- His employer was held financially responsible
- Case triggered FNRA investigation and regulatory action

3

WHAT IS UPL AND WHY DO PSNT ADMINISTRATORS CARE?

A general definition of UPL is *“offering legal services without being licensed as an attorney”*.

National Notary Association. August 11, 2025. *Notary Basics: Avoiding the Unauthorized Practice of Law*.

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RISKS AND PENALTIES FOR ENGAGING IN UPL

Civil and criminal penalties could be incurred.

Organizational liability increases.

Potential threats to organization's reputation

Regulatory Investigations and/or Mandatory Reporting

Beneficiary's loss of Public Benefits

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COMMON TRIGGERS FOR UPL IN TRUST ADMINISTRATION

Giving tailored advice on Medicaid/SSI.

Drafting or interpreting legal documents.

Negotiating Settlements or Legal Agreements

Representing individuals (i.e. beneficiaries or family members) before agencies or in court.

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WHERE THE LINE IS—EDUCATION V. ADVICE

Acceptable Activities:

- Explaining general trust policies and procedures
- Providing publicly available legal information (e.g., SSA or Medicaid rules)
- Referring clients to state resources or legal aid clinics
- Sharing how disbursement requests are typically handled under trust guidelines

Potential UPL Activities:

- Suggesting how a client should structure finances or care arrangements
- Drafting spend-down plans to meet Medicaid eligibility
- Interpreting complex regulations for individual clients
- Drafting documents with legal implications such as ownership agreements, etc.

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VARIOUS EXAMPLES IN SEVERAL STATES

Florida, Texas, Colorado and Ohio

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AN OVERVIEW OF STATES

General Rule:

- Individuals acting as fiduciaries are **not typically required** to have attorney representation when filing documents in court.
- **Exception:** When representing a **corporation or legal entity** (e.g., trust or estate), attorney representation is usually required.

Key Considerations:

- **Individual vs. Entity Representation:**
 - Individuals may represent themselves.
 - Entities must be represented by a licensed attorney.
- **State-Specific Nuances:**
 - Laws vary by jurisdiction.
 - Legal representation may be **advisable or necessary** depending on fiduciary role and complexity.



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FLORIDA

General Rule:

- Individuals may represent themselves in court (pro se). However, fiduciaries acting in an official capacity face specific limitations.

Fiduciary Roles & Representation:

- Guardians/Personal Representatives
May represent themselves only if they are Florida-licensed attorneys.
- Trustees
 - Can appear pro se to represent their own legal interests.
 - Cannot represent the trust or beneficiaries without a licensed attorney.
 - Doing so may constitute Unauthorized Practice of Law (UPL).

See Endnotes #1 for Florida's Rule 5.030
See, Endnotes, #2, for Florida Case Law and references regarding UPL.



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TEXAS



In Texas, fiduciaries **must be represented by a licensed attorney** when seeking:

- Letters Testamentary
- Letters of Administration
- Determinations of Heirship
- Guardianships (of Person or Estate)

A fiduciary who is not an attorney **cannot represent the interests of others** in these proceedings, and doing so would be considered unauthorized practice of law—and thus **not permitted**.

Grimes County Court At Law, Grimes County, Texas. 2025. *Self-Represented Litigants/Pro Se*. Retrieved from: www.grimesccl.org/selfrepresented-litigant-1

11

COLORADO



Fiduciary Standards Under Colorado Probate Code

- Fiduciaries must act in the **best interest** of the Protected Person or estate.
- Held to a **high standard of loyalty**, placing the beneficiary's needs above all others—including their own.
- Must **avoid conflicts of interest** and act with **undivided loyalty**.

UPL Definition in Colorado Case Law

- "One who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another... is engaged in the practice of law."
— *Denver Bar Ass'n v. Public Utilities Commission*, 154 Colo. 273 (1964)
- Reinforced in *Koscove v. Bolte*, 30 P.3d 784 (Colo.App. 2001)
- See also: **C.R.C.P. 201.3(2)**

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OHIO



Case Study — Green v. Huntington National Bank (Ohio, 1965)

Background

- Ohio State Bar Association sued Huntington National Bank for offering legal services through its trust department.
- Trust officers collected confidential estate data and produced an "estate analysis" with tailored suggestions.
- Ohio Supreme Court ruled this constituted **Unauthorized Practice of Law (UPL)**.

Permissible Actions

- Discussing financial/business aspects of estate planning
- Performing clerical or administrative tasks

Impermissible Actions

- Giving specific, individualized legal advice
- Preparing legal documents based on client desires

Significance of the Ruling

- Clarified that **non-lawyers and corporate fiduciaries** cannot offer legal counsel—even with licensed attorneys involved.
- Reinforced the boundary between **financial guidance** and **legal advice** to protect the public.

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BEST PRACTICES
FOR A TRUST
ADMINISTRATOR
TO AVOID UPL

Sample Policy (*in materials)

Create Clear Boundaries

Maintain Clear Role Definitions

Use Disclaimers

Partner with a Law Firm(s)

Document Legal Referrals

Regular Legal Audits

Attorney Board and Committee Members and/or Staff

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COMMUNICATION
PROTOCOLS
BETWEEN TRUST
ADMINISTRATOR
AND LEGAL
COUNSEL

Hold	Hold Regular Consultations
Create	Create Escalation Procedures for Legal Questions
Ensure	Ensure Trustee Retains Documentation of Legal Advice and Referrals
Protect	Protect Confidentiality and Privileged Communication
Develop	Develop Best Practices for working with Counsel as a Trust Administrator
Implement	Implement trust Administration Staff Training and Compliance Infrastructure

15

WHEN A TRUST ADMINISTRATOR SHOULD INVOLVE LEGAL COUNSEL: PRACTICAL EXAMPLES



Routine Matters:

1. The trust (or pooled trust) is named as a beneficiary that is part of an estate that is in probate.
2. You need to petition the court for guardianship for one of your trust beneficiaries because of health/safety concerns
3. You need to ask for a Guardian Ad Litem to be appointed on behalf of your beneficiary related to your trust administration
4. Your beneficiary's family member petitions to be conservator for assets owned only in the trust
5. You are making a disbursement for a house or car or other exempt asset of great value that you believe should be in a conservatorship
6. Your beneficiary brings you into an existing trust, conservatorship or guardianship matter
7. You need to bring in an attorney to navigate Medicaid or Social Security issues either on behalf of one or many beneficiaries
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 - i. Care agreements
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 - v. Acceptance documents (more for individual trusts)
 - vi. Revisions to the Master Trust or individual trusts you administer
10. Decanting from a stand alone trust into your pooled trust

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WHEN A TRUST ADMINISTRATOR SHOULD INVOLVE LEGAL COUNSEL: PRACTICAL EXAMPLES



Not so Routine Matters:

1. A beneficiary or their representative brings an action against you in court
2. Trust beneficiary runs away or is abducted
3. You need an attorney to write a stern letter to a vendor, your beneficiary, etc.
4. You need to evict a beneficiary from a trust owned property
5. Annuities assigned to the trust are re-routed by your beneficiary or their representative
6. You are in disagreement with (or need input from the court) your beneficiary, or their court appointed guardian over a significant distribution decision, such as:
 - Assistance with Pregnancy, Abortion, or birth control
 - Residential placement
 - End of Life Medication
 - Gender Affirming Care

**Shameless plug for tomorrow's session: Sex, Drugs and Rock 'n Roll

17

CHOOSING BETWEEN IN-HOUSE AND OUTSIDE COUNSEL

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CHOOSING BETWEEN IN-HOUSE AND OUTSIDE COUNSEL



Key Distinction:

- The difference lies in relationship to the organization, scope of responsibilities, and engagement model.

Guiding Resources:

- The Association of Corporate Counsel (ACC) offers best practices for managing legal work through in-house counsel.
- Asking other PSNTs for **job descriptions**, interviews, etc. to best inform your decision in our work
- Determine-who is your client?
 - counsel for the trust and also for the beneficiaries (Ex: SSA and Master Trust Document for SSI Beneficiaries)
- Various Models/hybrid approaches

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IN-HOUSE COUNSEL

- Broad legal activities: negotiations, counseling, transactions, investigations
- Routine matters and ongoing legal needs
- Risk management and corporate compliance (ERM)
- Deep understanding of business strategy and operations
- Clear communication with internal and community partners
- Cost-effective and predictable cost

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WHEN IN-HOUSE COUNSEL SHOULD OUTSOURCE

- Specialized legal expertise (e.g., litigation, Medicaid audits)
- Overwhelmed internal capacity
- Budget constraints or limited legal needs
- Strategic goals requiring flexibility or scalability
- High-risk, high-complexity matters
- Coordination and oversight of external legal teams
- When Conflicts of Interest Arise

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IN-HOUSE VS. OUTSIDE COUNSEL – KEY DIFFERENCES

Aspect	In-House Counsel	Outside Counsel
Employment Status	Employee of the organization	Independent contractor or law firm
Payment Model	Paid salary (and benefits)	Paid hourly, by project, or on retainer
Primary Loyalty	The employing organization	The client (organization), but works independently
Accessibility	Readily available for day-to-day consultation	Engaged as needed; often scheduled
Institutional Knowledge	Deep, continuous understanding of the organization	May lack context unless long-standing relationship
Scope of Work	Broad, often includes risk management, contracts, HR, compliance	Specific matters: litigation, regulatory filings, etc.
Cost Control	Predictable cost	Can be expensive if not managed properly
Confidentiality	Privileged, like outside counsel	Privileged

**See Appendix B: Cost Benefit Analysis of hiring in-house counsel

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TYPICAL RESPONSIBILITIES

In-House Counsel

- Daily legal advice to organization
- Risk and policy review
- Contract drafting
- Regulatory compliance
- Staff training
- Coordination with outside counsel
- Institutional memory

Outside Counsel

- Complex legal research
- Litigation and hearings
- Medicaid/SSI appeals
- Trust amendments
- Multi-state regulatory advice
- Dispute resolution
- Specialized legal areas

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WHEN TO USE EACH

Use In-House Counsel When:

- Legal input is needed in daily operations
- Reviewing recurring risks or policies
- Training staff on UPL and compliance
- Rapid internal responses are required

Use Outside Counsel When:

- Facing high-risk or complex legal issues
- Need representation before agencies or courts
- Require specialized expertise
- Drafting complex trust documents
- Managing conflicts of interest

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WORKING TOGETHER EFFECTIVELY

Hybrid Model Benefits:

- In-house counsel ensures strategic alignment and continuity
- Outside counsel provides depth, specialization, and litigation support
- Together, they create a responsive, scalable legal framework



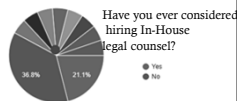
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CONSIDERATIONS FROM OTHER PSNTS...A SURVEY

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SURVEY OF PSNTS IN RE: COUNSEL IN POOLED TRUST ADMINISTRATION

- 20 Organizations responded to the survey
- 100% of responding organizations use outside counsel
- About 40% of those responding have in-house counsel (typically part-time or shared roles)
- Common Legal Needs include:
 - Trust document drafting and amendments
 - Medicaid/SSI eligibility and appeals
 - Joinder Agreement Review
 - Multi-State Compliance
 - UPL Risk Assessment and Training



**Note: Summary of Survey Provided with Assistance from Microsoft Co-Pilot

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SURVEY OF PSNTS IN RE: COUNSEL IN POOLED TRUST ADMINISTRATION, CONT.

Challenges Identified:

- **Cost of legal services** is a major concern, especially for smaller organizations.
- **Timeliness and responsiveness** of outside counsel varies widely.
- **Lack of pooled trust-specific expertise** among general counsel or local attorneys.
- **Difficulty managing multi-state legal issues** without specialized support

Best Practices Shared:

- In-house counsel has **one client-the non-profit**.
- Use **outside counsel with deep pooled trust experience**.
- Maintain **written protocols** for when staff must refer legal questions.
- Provide **UPL training** for all staff interacting with beneficiaries or families.
- Assign **risk scores** to legal matters to guide outsourcing decisions.

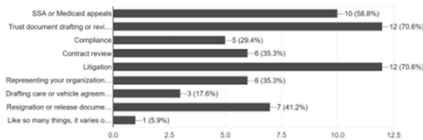
**Note: Summary of Survey Provided with Assistance from Microsoft Co-Pilot

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SURVEY OF PSNTS IN RE: COUNSEL IN POOLED TRUST ADMINISTRATION, CONT.

What types of legal matters do you currently outsource to attorneys?

17 responses

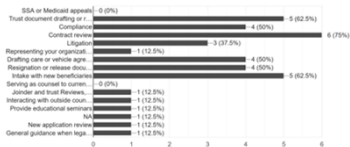


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SURVEY OF PSNTS IN RE: COUNSEL IN POOLED TRUST ADMINISTRATION, CONT.

What types of legal matters does your in-house counsel perform?

8 responses



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RABBIT HOLES...



- 1 Issues Attorneys Serving as Fiduciaries May Encounter
- 2 Cost Benefit Analysis of hiring in-house counsel
- 3 Research on UPL across 50 states (Available upon request)

See full materials for this additional information

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PSNTS AND COUNSEL... FINAL CONSIDERATIONS

- Exploring Different Models
- Considering Referral Sources
- How to best utilize your board and committee members
- Fee Allocation for Advocacy or Legal Representation from the Guidelines for Pooled Trust Organizations*:
 "Legal fees incurred by the organization should not be paid by a beneficiary's account if the expense is not related to that account. A decision that legal fees are related to individual trust accounts should be approved by the organization's Board of Directors. A particular matter might impact just a group within a pooled trust or just one person, or all the pooled trust beneficiaries."

*The Guidelines were developed, and recently revised, by an independent committee and have been adopted by the National PLAN Alliance and are located on their website: <https://nationalplanalliance.org/resources/>

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I. Introduction

Inherent in some trust administration is the oversight of atypical or “unique” assets held within a trust. The term “unique asset” typically refers to non-marketable securities, or those types of assets that cannot be bought or sold on a public exchange. Examples of such unique assets include beneficiary-occupied real estate, Limited Liability Companies (LLCs), timber, oil and gas assets, commercial real estate, water and ditch rights, patents, copyrights, and the like. The Special Needs Trust (SNT) trustee must exercise caution when administering unique assets for a multitude of reasons. For example, some beneficiaries with disabilities may have diminished capacity or may require the trust to hold unique assets due to their public benefits structure, which requires additional oversight from the trustee. Additionally, some beneficiaries with disabilities may be particularly subject to undue influence.

Of utmost importance in the management of unique assets is the ability to clearly and concisely report on their existence, their market value, and their holding nature (titling) to all stakeholders, including potential remainderpersons. The overriding principles guiding unique asset management and planning are perhaps best illustrated in the contemplated purchase of a trust-owned home for a SNT beneficiary. When contemplating such a purchase, it is crucial to ensure that all economic factors have been taken into account. While permissible, using a majority of the beneficiary’s trust corpus for a home purchase is often unwise for a variety of factors. In doing so, the trustee may run afoul of their duty to diversify the assets of the trust. *Restatement (Third) of Trusts Am. Law Inst. (2003) § 90 (Restatement (Third))* recognizes this issue, noting that “efforts to achieve diversification within the affected portion of the trust estate will be complicated” by holding real estate “especially [for] trustees of smaller trusts.”

Trustees must manage unique assets with the same care and prudence that they exercise over the investable assets of an SNT's corpus. This includes making informed decisions about the assets and acting diligently and quickly when issues arise. In non-pooled SNTs, a trustee’s duties may include adherence to a bespoke trust document and its language regarding the management of such assets. Protecting unique assets against loss and properly insuring such assets is also a critical task. That said, the management of unique assets in an SNT, while potentially fraught with risk and additional operational burden, has the potential to be highly rewarding for the beneficiaries and for the longevity and growth potential of the trust.

II. Fiduciary Duties

There are four generally agreed upon key elements to trustee fiduciary responsibility; namely, the duty of loyalty, the duty of impartiality, the duty of care and the duty of full disclosure.

Duties of Loyalty/Impartiality and Conflicts of Interest:

The primary duty of a trustee is loyalty to their beneficiary. This is perhaps the most common tenet in all of trust law. The duty of loyalty is especially important when the trustee is managing a trust containing unique assets. At its core, the duty of loyalty requires any fiduciary to act in the best interest of the beneficiaries - period. A trustee should never act in their own self-interest or in the interests of parties other than their beneficiaries. For example, it is concluded in *Ramsey v. Boatmen's First Nat'l Bank of K.C., N.A.*, 914 S.W.2d 384, 387 (Mo.App. W.D.1996) that trustees are fiduciaries “of the highest order” and are required to exercise “a high standard of conduct and loyalty in administration of [a] trust.” This case goes on to illustrate that this duty of loyalty “precludes self-dealing” which in most cases would be considered a breach of fiduciary duty. For clarification, self-dealing is the conduct of a trustee or other fiduciary that takes advantage of their fiduciary position in a transaction in which they act in their own interests, oftentimes to the detriment of the beneficiary. An example of a potential conflict of interest for

a PSNT trustee managing a trust with unique assets would be the trustee selling a home that the trustee owned personally to a beneficiary's sub-account in which the beneficiary will reside.

Self-dealing is a clear case of conflict of interest. A conflict of interest occurs when any person (e.g. fiduciary) is in a position to gain personal benefit from actions or decisions they make in their appointed capacity. Conflicts of interest could also involve favoring one beneficiary of a trust over another. In such cases, the duty of impartiality should be observed and all beneficiaries must be treated equally. Put simply, the duty of impartiality means that the trustee must treat all of its beneficiaries similarly and fairly, without bias or preference for any one beneficiary. The duty of impartiality of a PSNT may potentially be violated if, for example, the PSNT trustee denies the purchase of a home in one sub-account while approving a similar purchase in another sub-account of substantially similar circumstances. Of course, every beneficiary's life circumstances are different, and the trustee's discretionary authority may have been well-reasoned in this example. Beneficiaries, on the other hand, may see the situation differently. As such, robust documentation around any unique asset purchase or decision is best practice.

Duty of Care/Prudence

The duty of care is oftentimes referred to as the duty of prudence. Essentially, this duty requires all trustees to act reasonably, as any prudent person would when managing a trust. When a trustee is notably skilled in certain areas of trust administration or has held themselves out to be a professional in that area, they will be held to a higher standard of care or prudence. When a trustee is not skilled in certain areas of trust administration (such as unique asset administration), it is recommended that, when appropriate, a trustee delegate those duties to an experienced professional. For example, if a PSNT trustee with little to no commercial real estate experience decided to review leases and screen tenants for a trust-owned office building, and some of those tenants defaulted or were granted lease terms below market standards, the trustee may have violated their fiduciary duty of care. Therefore, in this situation, it is best to delegate this responsibility to a professional with expertise.

Duty of Full Disclosure/Reporting

The duty of full disclosure, or duty to report, requires the trustee to appropriately inform beneficiaries on decisions made on behalf of the trust - generally to all beneficiaries, including remainderpersons. Most states have their own specific requirements in regards to clear and accurate accountings of the trust's administration. Special Needs Trust (SNT) trustees are generally very well-informed as to their states' or regions' public benefits reporting requirements. The frequency of such accountings vary from state to state, as does the expiration of liability after such accountings are provided to the beneficiaries. Financial accountings are especially relevant when dealing with unique assets in a trust as trustees personally may sometimes be titled as legal owners of certain trust assets.

III. Uniform Prudent Investor Act

A prudent trustee will adhere to the tenets espoused in the Uniform Prudent Investor Act (UPIA), which may have an effect on how a trustee manages or purchases unique assets. The UPIA is a landmark statute that has provided valuable guidance for trustees since its approval in 1995. By stating that beneficiaries' portfolios should be viewed in their entirety rather than assessed on single investments (such as a beneficiary-occupied residence), it instructed trustees to diversify investments in order to potentially reduce overall risk and increase returns. An update to the Prudent Man Rule, the UPIA redefined the concept of prudent investment and led to important changes reflected in Modern Portfolio Theory.

The Uniform Prudent Investor Act (UPIA) is widely considered the industry standard for investing fiduciary assets in vehicles such as PSNTs, traditional trusts, and conservatorships/guardianships. Drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association on February 14, 1995, the UPIA replaced the Prudent Man Rule found in *Restatement (Second) of Trusts (Restatement of the Law Second, Trusts, American Law Institute © 1959) (Restatement (Second))*.

Modern Portfolio Theory

The shift from the Prudent Man Rule to the UPIA came about from universal changes in the investment industry that altered the definition of prudence in the fiduciary arena. A robust and widely accepted body of hypothetical and empirical data and practices led to the creation of what is now known as “modern portfolio theory” or MPT. This idea entails that a single investment should not be viewed in a vacuum; rather, it should be evaluated as part of a total portfolio, including its overall risk and return. The various elements of MPT show that an investor can construct a portfolio of multiple types of assets or asset classes that maximize returns while lowering risk or volatility. Some of the key measurement factors in MPT include:

- *Variance*: the difference between the average optimal investment return and volatility
- *Correlation*: the degree to which two investments move in relation to each other
- *Standard Deviation*: the statistical measure that when applied to the annual rate of return of an investment illustrates its historical volatility
- *Efficient Frontier Theory*: a framework for constructing a set of optimal portfolios offering the highest expected rate of return for a defined level of risk (introduced by Nobel Laureate Henry Markowitz)

Prudence

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

- *Uniform Probate Code §7-302 (1969)* - “The trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent [person] dealing with the property of another ...”
- *UPIA §2(a)* - “A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”

UPIA § 2(b) states that investments “must be evaluated not in isolation but in the context of the trust portfolio as a whole.” Here, the UPIA essentially instructs the trustee not to put total emphasis on any one holding; rather, the trustee should review an asset’s contribution to the entirety of the portfolio as a defining factor of its retention. For example, a trustee should certainly review the viability of a PSNT sub-account holding a unique asset on its own merits, but also such unique asset’s contribution (or detriment) to diversification.

UPIA § 2(b) also indicates that the tradeoff between risk and return “reasonably suited to the trust” should be among the trustee’s chief considerations. Additionally, the UPIA lifts all specific investment category or type restrictions that were first promulgated in the Prudent Man Rule, allowing trustees more leeway in

developing a prudent asset allocation that fits the needs of the beneficiary while adhering to the terms of the trust (see UPIA § 2(e)). The removal of these restrictions allows the trustee to take into consideration all investments of the trust, including annuities and beneficiary-occupied homes, for example, to properly balance the risk and return of the overall portfolio through asset allocation.

Diversification

Diversification of investments is a key focus of the UPIA. UPIA § 3 begins with “a trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.” Put simply, diversification is a risk-management strategy that combines a wide variety of different investments and asset classes within a portfolio. Holding securities with similar correlations (e.g., holding Apple and Google stock) may not be as effective as holding a mutual fund or Exchange Traded Fund (ETF) that holds all securities within that sector (e.g., the technology sector) and mitigates the risk of those individual securities’ relative underperformance. Spreading risk over different types of asset classes will on average yield higher long-term portfolio returns while ultimately mitigating the risk of any individual holding within the portfolio. By spreading risk over a wide assortment of assets, diversification smoothes out any unsystematic risk events in the portfolio.

Failure to prudently diversify (for example, a PSNT sub-account having the majority of its assets invested in a beneficiary-occupied home) may have consequences for the PSNT trustee - especially when the sub-account is no longer able to support the beneficiary-occupied home’s tax liabilities, insurance requirements or general upkeep.

Duty of Loyalty and Impartiality

The UPIA also stresses the duty of loyalty and impartiality: “A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries” (UPIA § 5). It is important to note that “beneficiary” may in some cases refer to remainderpersons of the trust as well. And for PSNT beneficiaries, this could mean the PSNT organization itself, Medicaid or the Social Security Administration or the ultimate remainderpersons named in the beneficiary’s joinder agreement or trust document. As such, when the trustee owes duties to all such “beneficiaries,” loyalty requires the trustee to take into account the interests of all parties when prudently investing and administering the trust.

Asset Allocation

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

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

IV. Unique Asset Complications

Managing unique assets in a trust vehicle comes with a particular set of potential complications, which inherently involve varying degrees of risk. Besides the aforementioned hurdles to clear regarding the fiduciary duties of loyalty and impartiality, there are other issues to consider when taking on the management of unique assets.

Liquidity

A key deterrent for trustees when managing unique or illiquid assets within a trust is liquidity risk. Unlike marketable securities that can be easily sold to generate cash, unique assets such as private equity interests, real estate holdings, or collectibles may be difficult to liquidate quickly or at fair value. This limitation can restrict the trustee's ability to respond to beneficiary discretionary distribution requests or to cover trust expenses in a timely manner. The uncertainty surrounding the availability of liquid funds may increase fiduciary risk, as the trustee may be held liable if beneficiaries, courts or oversight agencies perceive that the assets are being mismanaged or that cash needs are not adequately met. PSNT beneficiaries may be particularly sensitive to this risk as their medical or housing needs may change suddenly. Additionally, oftentimes an SNT is the only financial resource available to a beneficiary of an SNT, thus making it imperative that the SNT trustee maintain maximum flexibility.

In addition to liquidity concerns, unique assets often come with ongoing funding requirements that can strain a trust's cash flow. For example, private equity or hedge fund investments may involve unpredictable capital calls that require the trustee to maintain reserves or liquidate other trust assets at inopportune times. Real estate may require continuous maintenance, taxes, or improvement expenditures, while closely held business interests may demand reinvestment of profits or additional capital contributions. These obligations can be an issue for trustees, who must balance fiduciary duties against the risk of being forced to sell other trust assets at a discount to meet such calls. As a result, many trustees prefer to avoid managing these types of assets, favoring investments with more predictable liquidity.

Undue Influence

Undue influence is a significant concern when a beneficiary of an SNT, particularly one with diminished capacity, is involved with day-to-day decisions or arrangements concerning unique trust assets such as real estate. Because the beneficiary may lack the full ability to evaluate financial, legal, or practical consequences, they can become vulnerable to manipulation by family members, caregivers, or others. When the trust owns property that the beneficiary occupies, the risk can be heightened, as the beneficiary's reliance on that property for housing and security may create a strong emotional attachment. This dependency makes it easier for outside parties to exert subtle or overt pressure to shape decisions about the use, improvement, or disposition of the asset, potentially in ways that do not align with the trust's best interests.

From a fiduciary perspective, trustees must remain vigilant in protecting their beneficiaries. For example, a caregiver may pressure the beneficiary to demand improvements to the property that disproportionately benefit the caregiver rather than the beneficiary, or relatives may encourage the beneficiary to oppose a sale of the property even when such a sale is in the beneficiary's long-term best interest (especially if family members reside in the trust-owned property with the beneficiary). In such circumstances, the trustee must exercise independent judgment, ensuring that decisions are based on the beneficiary's needs. Documentation of decisions, consultation with outside professionals, and, where appropriate, court oversight may be necessary.

An SNT trustee should adopt proactive strategies - such as engaging third-party evaluators, seeking input from care managers, using the help of Supported Decision-Makers, or structuring property arrangements transparently - to help minimize the risk of undue influence and better ensure that the asset is managed for the beneficiary's true benefit.

General Liability

Trustees who manage unique assets certainly face heightened liability risks compared to those managing diversified, liquid investments. Unlike publicly traded securities, unique assets often lack transparency, objective valuation, and readily available markets. For example, if a trustee holds a family-owned business in the trust, questions may arise over whether retaining the business is prudent given its concentration risk or uncertain cash flow. Beneficiaries who disagree with the trustee's decisions about retention or liquidation of such assets may bring claims alleging mismanagement or breach of fiduciary duty, exposing the trustee to liability for perceived losses or missed opportunities.

Unique assets also require trustees to take on operational responsibilities that go beyond standard trustee duties. Real estate is a common example: a trustee may be responsible for overseeing property maintenance, paying taxes and insurance, and making decisions about repairs or improvements. If the real estate is occupied by the beneficiary, the trustee must also navigate conflicts of interest, such as balancing the beneficiary's immediate housing needs with the long-term financial sustainability of the trust. Similarly, in the case of a family-owned business, the trustee might be expected to participate in governance or evaluate management decisions - areas in which they are unfamiliar and where mistakes (or simply failure to act) could lead to significant financial harm and subsequent liability.

To mitigate these risks, trustees should act prudently and transparently, often by engaging professionals such as appraisers, property managers, or business consultants to support their administration. For instance, before selling a beneficiary-occupied property, a trustee should obtain independent valuations, consult care providers or guardians about the beneficiary's housing needs, and document why the transaction aligns with the trust's long-term objectives. Likewise, in managing a closely held business, a trustee may reduce liability by retaining financial advisors to assess company health and seeking court approval for major decisions. These steps not only help trustees demonstrate compliance with fiduciary standards but also provide a clear record of good faith, reducing exposure to liability.

Prudence

As mentioned previously, the trustee's duty of prudence requires careful, skillful, and objective administration when managing trust assets, including unique or legacy investments that may hold special meaning for the beneficiary. While a beneficiary may have a strong emotional attachment to certain assets (such as a family home, heirlooms, or shares in a family business), the trustee must evaluate whether retention of those assets aligns with the beneficiary's long-term financial objectives, liquidity needs, and overall risk profile. Prudence obligates the trustee to consider diversification, income generation, and the preservation of value, even if this means selling or restructuring assets to protect the trust corpus. Failure to weigh these considerations could expose the trustee to liability if the asset underperforms or causes losses to the trust.

At the same time, prudence also requires trustees to weigh non-financial factors, including the intent of the settlor and the impact of decisions on the beneficiary's welfare. In some cases, retaining a unique asset may be justifiable if it provides stability, personal comfort, or fulfills the settlor's clear wishes. However, the trustee must still document their reasoning, obtain independent valuations or expert advice, and ensure that any decision to retain or liquidate is made in the best interest of the trust as a whole (potentially including the interests of remainderpersons).

Valuation

In alignment with the fiduciary duty to report, and to keep all beneficiaries (including remainderpersons and Medicaid, for example) a trustee must properly value unique assets within a trust's portfolio and update statements and other financial reportings as applicable. Obtaining proper valuations of unique assets presents significant challenges as such assets often lack active markets or standardized pricing mechanisms. Unlike publicly traded securities, which have transparent and readily available market values, unique assets inherently require specialized appraisals. These appraisals can be costly, time-consuming, and subjective, as they rely on assumptions about future income, market conditions, or comparable sales that may not be directly relatable. Disagreements between beneficiaries, trustees, and appraisers may arise, particularly if different valuation methods produce widely varying results.

The difficulty of securing accurate valuations also creates fiduciary risks for trustees. For example, an undervaluation of the asset may lead to premature liquidation at a loss, while an overvaluation may justify retention of an asset that ultimately erodes trust value. To mitigate these risks, trustees should engage multiple independent experts, document their reliance on professional advice, and revisit valuations periodically. In certain complex cases, obtaining more than one appraisal can provide a broader perspective and help defend against claims of bias or negligence. Trustees should also establish a schedule for periodic revaluations, especially when the trust may be required to report asset values for tax, accounting, or public benefits purposes.

Equally important is maintaining thorough documentation of the valuation process and the trustee's reliance on professional advice. By consistently applying these practices, trustees can reduce exposure to liability and ensure that decisions regarding unique trust assets are defensible, transparent, and in alignment with fiduciary duties.

Outside Management

The use of outside managers may be critical for trustees managing beneficiary-occupied residences or commercial real estate. These assets present complexities that go beyond traditional trust investment management, and involve day-to-day operational, legal, and compliance responsibilities. A trustee may lack the specialized expertise required to oversee property maintenance, navigate landlord-tenant law, or manage leasing and development issues. By engaging qualified property managers, real estate advisors, or other professionals, trustees can ensure that the asset is properly maintained, that regulatory obligations are met, and that the property continues to serve the beneficiary's needs without exposing the trustee to claims of mismanagement.

The importance of outside managers becomes especially pronounced with beneficiary-occupied residences. These properties often carry heightened emotional and practical significance for beneficiaries, making decisions about maintenance, repairs, or improvements particularly sensitive. A trustee who directly manages such assets may face conflicts with the beneficiary over perceived inadequacies or intrusions. Outside managers provide a buffer, offering professional oversight while depersonalizing potentially contentious decisions. Similarly, commercial real estate introduces financial and operational complexities, such as lease negotiations, tenant relations, and market positioning, which require specialized knowledge. Delegating these responsibilities to experienced professionals reduces the trustee's exposure to liability and ensures that the trust benefits from informed, market-driven decision-making.

From a fiduciary perspective, the prudent use of outside managers demonstrates that the trustee is exercising appropriate care and skill in the administration of the trust. Courts and beneficiaries are more likely to view reliance on experts as evidence of prudence, particularly when the trustee documents the

selection process, monitors performance, and ensures ongoing accountability of the managers. In this way, trustees fulfill their duty to act in the best interest of the trust, while reducing exposure to fiduciary liability.

Trust Longevity

Beneficiaries' plans and lives change, whether due to unforeseen circumstances or changes in their desires and needs. Such changes can have a significant impact on unique assets within a trust. As such, any financial plan should be variable and adaptable - but both the short- and long-term effects of distribution changes should always be analyzed vis-a-vis the trust's longevity.

In order to project a trust's longevity, an investment advisor will typically utilize a Monte Carlo or Trust Longevity simulation, which models the probability of different investment outcomes. These are not easy to predict due to the intervention of random variables, such as trade disputes, economic conditions, and company failures (also known as "systematic risk"). These simulations ignore outside, uncontrollable factors which include macroeconomic trends, company stability, media hype, and sector performance data (cyclical or otherwise) and assume an efficient market. Generally, these simulations aim to project how the investment markets may perform during the lifetime of the portfolio by randomizing market returns using Standard Deviation figures. Standard Deviation is a statistical measurement that when applied to the annual rate of return for an investment, sheds light on the volatility of the investment (in other words, how much could the investment value move up or down based on statistics). Then, the simulation takes random return figures annually within the Standard Deviation range to illustrate positive as well as negative investment returns for each year (and takes into account distributions (plus inflation) and fees). For the most thorough analysis, these simulations generally take into account potential negative market returns as well as positive return figures.

By removing such unknowable data and inserting beneficiary-specific financial plans or budgets coupled with projected inflationary data, these types of simulations assist both the trustee and the beneficiary in planning for the beneficiary's long-term financial stability. These simulations are helpful in generating peace of mind for the beneficiary and assisting the trustee in making appropriate plans around the liquidation or retention of unique assets.

V. Types of Unique Assets

While there are a vast variety of types of unique assets that trustees are asked to consider administering, many unique assets are transferred to the trust from previous investment advisors or resigning trustees, or, in the case of third party SNTs, are inherited from the funding trust or estate's corpus. In all cases, as discussed, unique assets present unique administration challenges and varying forms of liability. As such, it is highly recommended that the trustee include the valuation or existence of any trust-owned unique asset on statements, court accountings or other fiduciary reports.

Beneficiary-Occupied Real Estate

Beneficiary occupied-real estate may be the most common of unique assets that a trustee may encounter. A trustee may find it important to consider purchasing a home within the trust for the benefit of a disabled beneficiary, as housing stability can be one of the most critical components of the beneficiary's overall well-being. Beyond simply providing shelter, home ownership within the trust can offer long-term security, independence, and continuity of care while preserving the beneficiary's eligibility for government benefits such as Supplemental Security Income (SSI) or Medicaid. The decision, however, requires careful analysis of the trust's liquidity, ongoing expenses (such as taxes, insurance, and maintenance), and the suitability of the property to the beneficiary's needs, both now and in the future. By

thoughtfully evaluating these factors, a trustee can ensure that the acquisition of a residence not only enhances the beneficiary's quality of life but also aligns with the trustee's fiduciary duty to act in the beneficiary's best interests.

At the same time, purchasing a home in trust for a beneficiary with disabilities may present risks and fiduciary considerations that a trustee should weigh carefully. Real estate is an illiquid and undiversified asset, which can create concentration risk if a large portion of the trust's assets are tied up in a single property. The industry standard for allocation of a trust-owned, beneficiary-occupied residence is 15-25% of the trust corpus, assuming that the remaining trust corpus can provide for the beneficiary's needs for their projected lifetime or needs, including ongoing funding requirements, such as property taxes, insurance, repairs, and accessibility modifications, which may strain trust resources over time.

Wispect, Inc. (Wispect), a PSNT, manages and administers the largest pool of special needs trusts in the state of Wisconsin and are assisted in the management of such by a corporate trustee. Wispect recognizes that "there are certain situations where acceptance of non-liquid assets may be necessary in order to protect a beneficiary's public benefits in furtherance of [their] mission of improving the quality of life for each Wispect beneficiary." As such, they have drafted Unique Asset Policies and Procedures (UAPs) to outline policies, procedures and expectations for drafting attorneys and beneficiaries. A copy of Wispect's UAPs may be found in **Appendix A**. Wispect's UAPs regarding real estate note the following:

- The real estate must be unencumbered (e.g., not pending sale, not mortgaged, not subject to land contract, etc.)
- The real estate must be 100% owned by the trust
- The real estate must not be unimproved or vacant
- If the real estate is a mobile home or trailer, they must be permanently affixed to real estate
- The real estate must not cost more than 25% of the liquid or readily available corpus of the trust
- Any retention of real estate is subject to analysis to demonstrate long-term sustainability
- A beneficiary or their legal representative must execute a Hold Harmless letter exonerating the trustee and Wispect from the real estate's ongoing retention and purchase
- The appraised real estate valuation or Comparable Market Analysis (which is routinely reassessed) is included in the trustee's administration fee (but not in the investment manager's fee)
- All costs (including routine property inspections) associated with the real estate are borne by the trust

Vehicle Liens

When a trustee purchases a vehicle for the use of a beneficiary, it is often prudent to place a lien on the title of the vehicle to protect the trust's ownership interest (and to potentially prove sole benefit to SSI). This step helps ensure that the asset remains part of the trust corpus and prevents unauthorized transfer, sale, or encumbrance of the vehicle by the beneficiary or third parties. A lien also establishes clear legal control in the event of disputes, accidents, or liability claims, allowing the trustee to safeguard the asset and verify that it continues to be used in accordance with the terms of the trust and/or public benefits regulations.

Vehicles carry ongoing risks and expenses, such as insurance, maintenance, and potential misuse by the beneficiary or caregivers. By retaining a lien, the trustee ensures that they have the authority to intervene if the vehicle is not being maintained or used properly, or if circumstances change such that the vehicle is no longer appropriate.

A trustee should ensure that adequate insurance coverage is in place, including liability and, where appropriate, comprehensive and collision coverage, with the trust named as an additional insured or loss payee. Finally, all documentation (including purchase agreements, loan or lien filings, insurance policies, and trustee meeting notes) should be carefully maintained.

Mineral Interests

Managing mineral interests, including oil and gas rights, within a trust presents unique difficulties due to the highly specialized and fluctuating nature of these assets. Mineral interests require ongoing oversight of leases, royalty payments, tax reporting, and compliance with complex state and federal regulations. The value of these interests can vary dramatically with commodity prices, production activity, and the solvency of operating companies, making it difficult for trustees to forecast income or determine fair market value. Trustees without industry expertise may struggle to monitor whether royalty payments are accurate, whether lease terms are favorable, or whether environmental obligations are being met, all of which exposes the trust to potential financial losses or diminished asset value.

Additionally, oil and gas rights are considered a depleting asset or resource. A producing oil well will provide distribution payments for years to a trust. However, while this is happening the underlying oil reserves are actually being depleted and the well will eventually run dry. In non-SNT cases, if all distribution checks were being allocated to accounting or trust income and subsequently distributed to the mandatory net income beneficiary, the remainderpersons whose interests in the trust are that of principal allocations are denied any gain from this asset. The Uniform Fiduciary Income and Principal Act (UFIPA) § 411 provides guidance for such situations and illustrates how a trustee should allocate oil and gas distribution checks between both principal and income.

Wispect's UAPs section on Closely Held Business Interest, Nonmarketable Securities, and Land Contract Interests (which would include mineral interests) notes that:

- “The illiquid nature of these unique assets complicates the pooled accounting (“unitization”) of the Trusts, and can result in a lack of funds available to meet a beneficiary’s needs which is contrary to the purpose of the Trusts, and presents administrative challenges that are beyond the scope of the Trusts.”
- “These assets may not have a readily ascertainable current market value which hinders accurate valuation assessments potentially necessary for proper accountings and other administrative requirements.”

A trustee who fails to properly administer mineral interests by neglecting to collect royalties (past or present), overlooking lease renewals, or failing to address environmental liabilities can face claims of breach of fiduciary duty. For example, if a trustee ignores opportunities to renegotiate lease terms or fails to verify accountings from operators, beneficiaries or remainderpersons may argue that the trust suffered financial harm. To mitigate these risks, trustees may wish to engage specialized managers, attorneys, or accountants with experience in mineral rights, and carefully document their reliance on expert advice.

Farm/Ranch Land and Commercial Real Estate

Unlike traditional marketable investments, farm or ranch land holdings often require ongoing management of farming operations, leases, maintenance, and compliance with environmental and land-use regulations. Market volatility in crop or livestock prices, drought, and other natural disasters can affect income and property value, making the trustee responsible for navigating unpredictable returns while ensuring the land is properly maintained. The illiquid nature of farm and ranch property also poses

challenges if the trust needs cash for expenses or discretionary distributions, as selling such land quickly or at fair market value may be difficult.

Many trustees lack agricultural expertise, enhancing liability risk. Failure to secure appropriate insurance, maintain the land, or oversee tenant farmers and ranchers could result in financial loss, legal disputes, or even environmental penalties. Conflicts can also arise when beneficiaries may prefer to retain the land due to sentimental or family ties. To reduce liability exposure, trustees often must engage costly agricultural managers, appraisers, and legal advisors, and maintain detailed documentation.

Holding commercial real estate (CRE) within a trust presents many of the same complications for trustees as holding farmland. Commercial property requires active management, including leasing, tenant relations, compliance with zoning and building codes, and regular maintenance - all of which increase a trustee's operational burden. Vacancy risk, market fluctuations, and unexpected capital expenditures can significantly impact the trust's cash flow. Additionally, trustees must also navigate complex contractual relationships with tenants and service providers, where disputes or defaults can lead to costly litigation or long-term financial loss for the trust.

Beyond financial risks, trustees managing CRE face heightened regulatory liability by potentially neglecting building safety, environmental hazards, or insurance coverage. As such, it is best practice for trustees to delegate the management and oversight of such assets to a well-vetted and seasoned outside professional.

Promissory Notes

Holding a promissory note in a trust creates many complexities for prudent trust administration - mainly because the asset's value and performance depend heavily on the borrower's creditworthiness, repayment discipline, and the enforceability of the note's terms. Promissory notes are illiquid and lack a ready secondary market, making it difficult for a trustee to convert them to cash if the trust needs liquidity. Trustees must also carefully monitor payments, interest accrual, and compliance with the note, while being prepared to initiate collection actions or litigation in the event of default. Any of these remedies may be costly and contentious. Further, if the borrower has a personal or familial connection to the beneficiary, the trustee may face heightened conflicts of interest or disputes among beneficiaries and their family over whether to enforce the note aggressively. These challenges create both administrative burdens and potential liability for the trustee, underscoring the need for careful oversight and, often, legal or accounting support.

Wispect's UAPs for Promissory Notes state:

- “Any special record keeping requirements, unique tax reporting, collateral interests, any requirement or likelihood for a legal enforcement action to compel payment, debtor's ability for repayment, debtor credit rating, interest rate assigned, amortization schedule, payment facility, and whether the promissory note provides for recovery of actual attorney fees and costs. New issuances of promissory notes shall be set with the appropriate interest rate as determined by the Trustee.”
- “Trustee is not responsible to monitor payor, value of any collateral that secures the Promissory Note, or required to commence any legal proceedings against the payor in case of default.”
- “Trustee is not responsible for amending or restructuring any promissory note already in existence, applicable to both current promissory notes administered by Wispect and in any such cases wherein Trustee and Wispect are considering acceptance of a successor trusteeship appointment or joinder.”

Closely Held Interest

As with many of the unique assets discussed herein, closely held companies often lack liquidity, reliable valuations, and transparent governance structures, making it difficult for trustees to assess performance or generate cash for discretionary distributions. Trustees may also be drawn into operational or strategic decisions, such as whether to reinvest profits, sell the business, or replace management. These areas require specialized expertise and carry a high potential for disputes, especially if the interests underperform.

In addition, closely held interests can intensify conflicts between a trust beneficiary and their family, particularly if some family members are actively involved in the business while others are passive recipients of business distributions. These dynamics increase fiduciary liability, especially if the trustee lacks this specialized oversight expertise or fails to seek outside professional guidance. To mitigate risks, trustees should engage valuation experts, corporate counsel, or independent managers.

Wispect's UAPs in regards to Closely Held Business Interests notes that:

- They “may accept an irrevocable direct ownership interest in closely held business interests, nonmarketable securities, and land contract interests...”, but, “at the discretion of the Trustee, [they] may instead accept an irrevocable assignment of proceeds rather than a direct ownership interest in closely held business interests.”
- “Closely held business interests and nonmarketable securities are not able to be readily liquidated in full or in part on an organized securities exchange and have limited marketability.”
- “If closely held business interests are accepted, beneficiary must specifically waive Trustee’s obligation to comply with the prudent investor rule and allow Trustee to hold non-income producing interests.”
- “Trustee does not have a duty to monitor financial conditions of the company and any loss of value associated with closely held business interests.”
- “Trustee will not accept a general partnership interest or stock issued by a subchapter S corporation.”
- “Trustee will not exercise any applicable voting rights and may retain outside professionals to do as such. The cost of said retention shall be borne by the beneficiary’s sub account.”

Exit strategies are an important consideration for trustees holding closely held interests, as they provide a pathway to reduce concentration risk and preserve trust value over time. Tools such as buy-sell agreements can offer a structured mechanism for liquidating or transferring the interest under predetermined terms, helping to avoid disputes and ensuring fair value is realized. In some cases, a staged divestiture (selling portions of the interest gradually) may allow the trust to balance liquidity needs with market timing and valuation fluctuation. For minority holdings, trustees should also evaluate the availability of minority protections, such as voting rights, tag-along rights, or protective covenants to safeguard the trust in corporate decisions. By proactively considering and, where appropriate, negotiating exit strategies, trustees demonstrate prudence in managing the long-term risks of closely held business interests while positioning the trust to meet both current and future beneficiary needs.

Life Insurance

In a first-party SNT, a trustee may consider holding a life insurance policy on the life of a beneficiary within an SNT as a way to provide for funeral and burial expenses (as allowable per state Medicaid requirements), or to ensure there are funds available for other final needs without burdening the trust’s liquid assets. Additionally, oftentimes these life insurance policies may have already been obtained by the beneficiary before establishing their first-party SNT and liquidation of the policy to qualify for SSI may

not be prudent. In either case, the trustee must carefully monitor the policy's cash value as SSI regulations stipulate that life insurance with a cash surrender value may count as a resource. According to the SSI Program Operations Manual System (POMS), life insurance policies with a combined face value of \$1,500 or less are excluded as resources (see **POMS SI 01130.300**). If the face value exceeds \$1,500, then the cash surrender value counts toward the resource limit, which can potentially disrupt the beneficiary's eligibility for SSI.

For this reason, trustees must exercise caution and structure ownership of life insurance policies in compliance with SSI resource rules. A common approach is ensuring that policies either remain below the \$1,500 exclusion threshold or that the trust itself (not the beneficiary individually) owns the policy so that the asset is properly insulated. Trustees must also evaluate whether premium payments from the trust are an appropriate use of trust funds, given their fiduciary duty to preserve trust assets for the beneficiary's ongoing care and supplemental needs.

Additionally, a trustee may hold life insurance on the grantor of a third-party SNT as a strategic way to provide additional funding for the beneficiary's long-term care and supplemental needs after the grantor's death. Unlike life insurance on the beneficiary, a policy insuring the grantor does not affect the beneficiary's SSI or Medicaid eligibility because the policy is owned by and payable to the trust, not the beneficiary. This approach ensures that upon the grantor's passing, the trust receives a fresh infusion of liquid assets, which can then be used to support the beneficiary throughout their lifetime. By holding this life insurance, the trustee helps preserve the stability and continuity of care for the beneficiary, while also reducing reliance on family members or future contributions that may be uncertain.

There are risks and considerations that a trustee must carefully manage in this third-party situation. Life insurance premium payments on the grantor can be expensive and may reduce the trust's liquidity, potentially raising questions about whether such expenditures are consistent with the trustee's fiduciary duty. In addition, trustees must ensure that the policy complies with insurable interest requirements under state law, and that the trust is properly designated as both the owner and beneficiary of the policy to avoid unintended tax or eligibility consequences. There is also the risk that the grantor may live far longer than anticipated, causing the trust to carry premium obligations for many years without immediate benefit.

Wispect's UAPs addresses their requirements for holding life insurance as follows:

- The policy or contract must be owned by, or is contemporaneously being transferred to, the Trust.
- The policy or contract must name the Trust as its sole beneficiary.
- They receive a Hold Harmless letter from the beneficiary, or the grantor or his/her legal representative.
- The beneficiary must consult his or her own tax advisor before transferring ownership of the policy to the trust.
- Variable life insurance policies shall only be accepted in third-party trusts.
- The trustee is not under any ongoing duty to monitor the investment allocation or performance of any variable life insurance policy.
- The trustee must determine that the beneficiary's trust account has sufficient funds to pay all premiums due on the policy for the life expectancy of the insured.
- The trustee is not responsible or liable for a lapse or termination of the life insurance policy due to non-payment of premiums.

Annuities

Fixed and variable annuities can provide a reliable stream of income to an SNT, which may help fund the beneficiary's supplemental needs over time. Even when payable to the trust, careful administration and annuity oversight is required to ensure prudent trust administration.

Variable annuities complicate matters because their value fluctuates with market performance, making them more difficult to evaluate, monitor, and report for fiduciary and compliance purposes. Trustees may also encounter restrictions on liquidity or penalties for early withdrawals, which limit flexibility in addressing unexpected beneficiary needs. In addition, annuity contracts can carry complex fee structures, mortality charges, and surrender charges, which may reduce overall returns. If the trustee lacks experience with insurance products or fails to fully understand the annuity's terms, they may inadvertently expose the trust to financial inefficiencies or liability.

Finally, tax treatment adds another layer of complexity for annuities. Annuity distributions may carry income tax consequences, and trustees must account for how taxable amounts flow through to the trust or the beneficiary. Improper handling of these tax issues can result in unexpected liabilities or penalties. To mitigate these risks, trustees often must engage professionals such as financial advisors, accountants, or Elder Law attorneys to evaluate the annuity contracts, monitor distributions, and ensure proper reporting.

Wispect's UAPs on Annuities require that:

- "The policy or contract names the Trust as its sole beneficiary."
- They receive "a Hold Harmless letter from the beneficiary, the grantor or his/her legal representative...."
- "Factors in determining whether the Trustee may accept an annuity include whether the annuity can be liquidated (partially or in-full) at a reasonable cost in order to properly support the Beneficiary's spending needs and whether the fixed annuity fits within beneficiary's investment goals as determined by Trustee."
- "Beneficiary must consult his or her tax advisor before transferring ownership of the annuity to the Trustee."
- "Trustee is not responsible to determine when or best option to annuitize a contract."
- "Trustee not responsible to monitor investment allocation or performance under contract."
- "Beneficiary consents to an early withdrawal from the contract as determined by Trustee even if such withdrawal is penalized under the terms of the contract."
- "Only nonqualified annuity contracts are accepted under this annuity section."

Individual Retirement Accounts (IRAs)

As the U.S. population continues to age, there is even more need for competent SNT administration - especially when PSNTs are managing Individual Retirement Accounts (IRAs) for trusts for people with disabilities. Most importantly, retirement savings in the U.S. continue to grow and approximately 76 million baby boomers are living in the U.S. today. The choices baby boomers will make in terms of retirement and how they pass on their retirement savings will have a significant impact on trustees of all types of trusts, but potentially most significantly on trustees of SNTs.

An IRA is a tax-advantaged savings account that individuals can use to save for retirement. Any person who has earned income can fund an IRA. The Setting Every Community Up for Retirement

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

The most notable change brought about by the SECURE Act is the elimination of “stretching” RMDs for beneficiaries of an IRA in most cases. Earnings in a traditional IRA are generally not taxable to the IRA beneficiary until they are distributed. Once funds are distributed for Required Minimum Distributions (RMDs) or otherwise, they are taxed as regular income at the beneficiary’s applicable ordinary income rate. Before the passage of the SECURE Act, a beneficiary (other than a spouse) of an inherited IRA could choose to take distributions over their lifetime and pass any remaining funds onto future generations. This is colloquially known as the “stretch” option. The RMDs under the stretch option were calculated based on the beneficiary’s life expectancy. As such, the younger the beneficiary, the smaller the annual distributions and the longer the inherited IRA funds could grow tax deferred. Should the IRA beneficiary need to take out funds exceeding the RMD, they may certainly do so.

The SECURE Act now provides that the IRA holder may designate an SNT as the beneficiary of the IRA (IRC § 401(a)(9)(H)(iv)), and the SNT trustee may use the IRA to fund the SNT for the beneficiary’s supplemental needs. When the SNT pays nothing to anyone other than the Eligible Designated Beneficiary (EDB), the life expectancy payout rules apply - a fantastic planning tool for people with disabilities. This provision allows the SNT beneficiary to continue to qualify for means-tested public benefits by creating a see-through trust. There are generally two types of see-through trusts: a conduit trust and an accumulation trust. In a conduit trust, the IRA would make distributions to the trust, and the trust would subsequently pass out these funds to or for the benefit of the beneficiary. This is advantageous from a tax perspective as the IRA funds would flow out to the beneficiary and be taxed at their personal tax rate, which is most likely lower than the compressed trust tax rates. However, this income distribution to the beneficiary is generally mandatory in the trust language and would most likely disqualify the beneficiary from means-tested public benefits eligibility (as the beneficiary would be over income). Conversely, in an accumulation trust, the IRA would make distributions to the trust, and the trustee may retain those funds or use them for the benefit of the trust’s beneficiary at the sole discretion of the trustee. This may result in trapped income vis-a-vis Distributable Net Income (DNI) and discretionary distributions to or for the benefit of the beneficiary. While such trapped income may potentially be taxed at the higher compressed trust tax rates, proceeding as such will protect the beneficiary’s vital means-tested public benefits. In either scenario, the Inherited IRA for the benefit of an SNT takes advantage of the tax-deferred nature of IRAs, thus potentially prolonging the longevity of the SNT beneficiary’s trust.

Many PSNTs are now administering IRAs for the benefit of their beneficiaries’ PSNT sub-accounts. Wispact’s UAPs for IRAs require that:

- “The IRA is an “inherited IRA” as defined by the Internal Revenue Code.”
- “The beneficial interest in the IRA is irrevocably assigned to the Wispact, Inc. Trust sub-account by the IRA beneficiary....”
- “Beneficiary must consult his or her own tax advisor regarding the tax consequences of a transfer of an IRA to the trust. Trustee makes no representation that an assignment of a beneficiary’s intent to transfer to the trust will not create adverse tax consequences to the beneficiary.”
- “Trustee and Wispact have full discretion to determine annual withdrawals from the IRA account.”

- “Beneficiary agrees to sign a hold harmless letter to the Trustee.”

VI. Delegation

Prudent delegation of duties is a critical tool for trustees when administering unique or complex assets that require expertise beyond the trustee’s own knowledge. *Restatement (Second)* §171 historically took a restrictive view, providing that a trustee generally could not delegate acts that a prudent person would be expected to perform personally. This standard created significant challenges for trustees overseeing unique assets such as closely held businesses, real estate, mineral rights, or complex financial instruments, where specialized knowledge is often essential. However, courts recognized that strict non-delegation could expose trusts to unnecessary risk, and common law has evolved to reflect a more practical approach.

The *Restatement (Third)* adopts a more modern standard, expressly allowing trustees to delegate investment and management functions if it is prudent to do so (§80). Under this standard, the trustee is not expected to possess all expertise personally but must exercise prudence in selecting qualified agents, clearly defining the scope of their duties, and monitoring their performance. In *Wood v. U.S. Bank, N.A.*, 160 P.3d 1249 (Wash. 2007), the court emphasized that delegation can be consistent with a trustee’s fiduciary duty if the trustee exercises due care in choosing and supervising the agent. This reflects the realities of modern trust administration, where trustees may lack the specialized knowledge to directly manage unique assets such as oil and gas interests or commercial real estate.

The Uniform Trust Code (UTC) §807 codifies this approach, expressly permitting delegation of duties as long as the trustee uses reasonable care, skill, and caution in (1) selecting the agent, (2) establishing the scope and terms of the delegation, and (3) periodically reviewing the agent’s actions. The UTC makes clear that while delegation is permissible, the trustee remains ultimately responsible for the process of supervision and cannot abdicate their fiduciary obligations. Importantly, if these requirements are met, a trustee will not be liable for the decisions or actions of the agent, which offers significant protection when dealing with unique and high-risk assets.

For ongoing monitoring of a delegated advisors’ performance and suitability, it may be helpful to rely on the Office of the Comptroller of the Currency’s (OCC) guidance for assessing third-party vendors. Of note, the OCC is the governmental agency that oversees and audits nationally chartered trust companies.

On October 30, 2013, the OCC released Risk Management Guidance in regards to Third-Party Relationships (see OCC Bulletin 2013-29: www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html). The bulletin provides guidance for assessing and managing risk associated with entering into any third-party business arrangement between banks and any other entity. Compliance with this guidance is expected by bank trustees and the OCC stresses that the bank “should ensure comprehensive risk management and oversight of third-party relationships ... throughout the life cycle of the relationship....” In this bulletin, the OCC confirms that a trustee’s “use of third parties does not diminish the responsibility of [the bank trustee] to ensure that the activity is performed in a safe and sound manner and in compliance with applicable laws.” The bulletin also outlines that the trustee should carefully evaluate and consider the following aspects of the third-party relationship at the onset as well as continuously throughout the relationship’s “risk management life cycle”:

- Planning
- Due diligence before third-party selection
- Contract negotiation
- Ongoing monitoring

- Termination of third-party and contingency plan
- Oversight and accountability
- Documentation and reporting
- Independent reviews

By relying on outside advisors, trustees can better navigate the complexities of specialized assets while reducing exposure to liability. At the same time, documentation of the advisor's selection, qualifications, and ongoing oversight provides evidence of the trustee's compliance with fiduciary duties. This approach, grounded in the principles of the *Restatements* and the UTC, underscores that prudent delegation is not only permissible but often essential in fulfilling a trustee's fiduciary duties.

VII. Taxation

Unique assets in a trust create significant tax complexities for trustees as such assets may produce irregular income streams or more complex tax reporting requirements. For example, real estate may generate rental income subject to depreciation rules, while mineral rights can result in royalty payments requiring specialized reporting under depletion deductions. Closely held business interests introduce further complications, as income may be passed through on a Schedule K-1, potentially exposing the trust to unrelated business taxable income (UBTI). Trustees must not only report this income correctly but also allocate it in accordance with the trust's terms and applicable tax law, which may be highly technical.

Valuation issues add another layer of complexity, particularly for estate and gift tax reporting. Unique assets often lack readily ascertainable fair market values, requiring professional appraisals that are subject to IRS scrutiny. Overvaluing an asset can create unnecessary final trust tax return tax liability exposure, while undervaluing can invite audits, penalties, and disputes. Special tax elections may also apply depending on the type of asset—for instance, conservation easements on farm or ranch land can yield tax deductions but limit future use of the property. Trustees must be attentive to these nuanced rules, as missteps can compromise both tax efficiency and fiduciary compliance. Finally, unique assets often follow different tax reporting timelines. Schedule K-1s issued from closely held businesses, for example, may not be available to the trustee until right before the tax filing deadline - and are even sometimes extended and issued well after the April 15th trust tax return due date. This can complicate trust tax filings - especially in a pooled trust construct.

To navigate these challenges, trustees should engage tax professionals and document their reliance on expert advice to reduce the risk of costly tax errors.

VIII. Conclusion

While the administration and operational burden of managing unique assets in any trust vehicle is complicated and onerous, it may prove beneficial both to the SNT beneficiary as well as the SNT trustee. By accepting the challenge of unique asset administration, the SNT trustee may provide their beneficiaries with peace of mind, stability (beneficiary-occupied residences, for example), and potentially enhanced trust longevity. Administration of unique assets will also set PSNT organizations apart from organizations who do not administer such assets. Finally, proceeding with caution and prudence in this area is highly recommended - as is delegation of oversight and management duties of unique assets to a well-vetted and well-tenured advisor.

Please note that the views and opinions expressed herein are not necessarily those of True Link Financial, or any of their subsidiaries

Appendix A

Wispect Special Needs Trusts Unique Asset Policies and Procedures

Wispect, Inc. manages and administers the largest pool of special needs trusts in the state of Wisconsin. We are assisted in the management and investment of special needs trust sub-accounts by our Trustee, Capital First Trust Company (Capital First) and our Investment Manager, True Link Financial, Inc. (True Link) – collectively, the “Trustee”.

Wispect prides itself on serving the lifelong needs of our beneficiaries through the professional management of their special needs trusts. Our mission is to improve the lives of people of all ages with disabilities across Wisconsin through the management of special needs trusts to provide more choice, more opportunities, and a better quality of life.

Assets held in Wispect Trusts serve to assist beneficiaries with complying with their necessary benefit program eligibility regulations while providing them with supplementary resources to enhance the quality of their lives. This is primarily accomplished through the management and investment of pooled assets invested to maximize investment opportunities and minimize risk through a professionally managed and diversified strategy while allowing for readily-available resources to meet an individual’s immediate needs. While the preference of Wispect and our Trustee is that beneficiaries fund their special needs trusts with cash that is able to be invested in this pooled investment strategy, we recognize there are certain situations where acceptance of non- liquid assets may be necessary in order to protect a beneficiary’s public benefits in furtherance of our mission of improving the quality of life for each Wispect beneficiary.

In recognition that acceptance of non-liquid or “unique” assets falls outside of the primary investment and management strategy of Wispect trusts, Wispect and our Trustee have crafted the following Unique Asset Policies. This document also outlines procedures and expectations for both drafting attorneys and their clients for potential and current Wispect special needs trust beneficiaries and their supporters.

Please review the following policies and procedures carefully as they relate to your specific situation and unique asset. If you wish to fund a Wispect Special Needs Trust with a unique asset please follow the application procedures as set forth below. Wispect and the Trustee will work collaboratively with the drafting attorney to determine whether or not the unique asset will be able to be held in a Wispect special needs trust. Each situation is analyzed on an individual basis, taking into account that individual’s unique situation and the costs and risks associated with the acceptance and management responsibility of that asset. Please keep in mind that no two situations are the same and, as such, acceptance of a unique asset in one situation does not set a precedent that a similar type of asset will be accepted for a different beneficiary.

We would be happy to discuss the foregoing information along with the following policies and procedures at any time. Please contact Wispect to discuss.

Unique Asset Category	Forms needed
I. Marketable Securities	<i>Request form:</i> Addendum 1 Hold Harmless Letter & Disclosure: Addendum 2
II. A. Closely Held Business Interests, Non-marketable Securities, and Land Contracts B. Promissory Notes	Agreement to Accept Closely Held Business Interests, Nonmarketable Securities, Partnership Interests & Land Contracts & Hold Harmless Letter Agreement to Accept Promissory Notes & Hold Harmless Letter
III. Real Property & TOD Deeds	Request form: Addendum 3 Residential Indemnification & Hold Harmless Letter: Addendum 4 Vacant Indemnification & Hold Harmless Letter: Addendum 5
IV. Life Insurance Policies & Fixed Annuities	Request form: Addendum 6 Hold Harmless Letter: Addendum 7
V. Variable Annuities	N/A
VI. Personal Property	Request form: Addendum 8 Indemnification & Hold Harmless Letter: Addendum 9
VII. Beneficial Interest in Inherited IRAs	Request form: Addendum 10 Assignment & Hold Harmless Letter: Addendum 11

All forms requesting acceptance of Unique Asset(s) into a Wispact, Inc. Trust should be submitted to:

True Link Financial, Investment Manager

With a copy to

Wispact, Inc.'s Executive Director, Kevin Hayde

And

Capital First Trust Company

I. Marketable Securities:

Wispect, Inc. and Capital First may, on a case by case basis, accept as a Trust asset, title to and custody of certain securities (for example individual stocks or bonds), whether in electronic or valid certificate form, which are denominated and settle in US dollars and which are readily tradeable on an organized domestic securities exchange.

At the time of application for acceptance of this asset into trust, Wispect and the Trustee will work with the drafting attorney to determine if the securities should be sold and the proceeds invested in the investment pool or held separately in a trust sub-account.

Generally, Wispect and the Trustee will require that all of the following requirements are met if the beneficiary wishes to separately hold their marketable securities in a trust sub-account outside of the investment pool:

1. The market value of the securities requested to be retained is greater than \$167,000; and
2. Additional cash or other marketable securities that will be immediately sold and deposited into the Trust is greater than \$10,000; and
3. The sale of the securities requested to be retained would cause hardship due to potential excessive capital gains taxation (this is a subjective and case-by-case determination which requires submission to True Link of the information requested on the Request For Acceptance of Asset form); and
4. If the asset is deemed acceptable, the Beneficiary/their legal representative shall execute a hold harmless letter, in the form of Addendum 2, which letter requires that the Beneficiary confirm the accuracy of asset cost basis and tax acquisition date(s) information prior to transfer.
5. If marketable securities exceed 20% of beneficiary's pooled account, beneficiary must specifically waive Trustee's obligation to comply with the prudent investor rule and allow Trustee to hold non-income producing security.
6. In such cases wherein indefinite retention of the position is contemplated, Trustee does not have a duty to monitor financial conditions of company and any loss of value associated with marketable securities.
7. This section does not apply to securities held within variable annuity contracts or any other entity that holds marketable securities.

If the marketable security asset(s) is/are accepted, and the letter is executed, a Trust Administration Fee is charged, pursuant to the Wispact Fee Disclosure, on the market value of the assets. Only in such cases wherein indefinite retention of the position is contemplated, no Investment Management Fee is charged.

If you wish to request consideration of marketable securities as a Wispact Trust asset, please complete Addendum 1.

II. A. Closely Held Business Interests, Nonmarketable Securities, Land Contract Interests:

Wispact and Capital First may accept an irrevocable direct ownership interest in closely held business interests, nonmarketable securities, and land contract interests. At the discretion of the Trustee, Wispact and Capital First may instead accept an irrevocable assignment of proceeds rather than a direct ownership interest in closely held business interests, nonmarketable securities, and land contract interests as:

1. The illiquid nature of these unique assets complicates the pooled accounting (“unitization”) of the Trusts, and can result in a lack of funds available to meet a beneficiary’s needs which is contrary to the purpose of the Trusts, and present administrative challenges that are beyond the scope of the Trusts;
2. These assets may not have a readily ascertainable current market value which hinders accurate valuation assessments potentially necessary for proper accountings and other administrative requirements;
3. Closely held business interests and nonmarketable securities are not able to be readily liquidated in full or in part on an organized securities exchange and have limited marketability.
4. If closely held business interests are accepted, beneficiary must specifically waive Trustee’s obligation to comply with the prudent investor rule and allow Trustee to hold non-income producing interests.
5. Trustee does not have a duty to monitor financial conditions of the company and any loss of value associated with closely held business interests.
6. Trustee will not accept a general partnership interest or stock issued by a subchapter S corporation.
7. Trustee will not exercise any applicable voting rights and may retain outside professionals to do as such. The cost of said retention shall be borne by the beneficiary’s sub account.
8. Beneficiary must provide written approval from entity of beneficiary’s right to assign such held business interest to the Trustee.

B. PROMISSORY NOTES

Wispact and Capital First may accept either ownership or an irrevocable assignment of a

promissory note. Considerations in the decision whether to accept include:

Any special record keeping requirements, unique tax reporting, collateral interests, any requirement or likelihood for a legal enforcement action to compel payment, debtor's ability for repayment, debtor credit rating, interest rate assigned, amortization schedule, payment facility, and whether the promissory note provides for recovery of actual attorney fees and costs. New issuances of promissory notes shall be set with the appropriate interest rate as determined by the Trustee.

Trustee is not responsible to monitor payor, value of any collateral that secures the Promissory Note, or required to commence any legal proceedings against the payor in case of default.

Trustee is not responsible for amending or restructuring any promissory note already in existence, applicable to both current promissory notes administered by Wispact and in any such cases wherein Trustee and Wispact are considering acceptance of a successor trusteeship appointment or joinder.

III. Real Estate:

Wispact Trusts may hold unencumbered ownership to real estate in specific situations. If accepted, said real estate shall be deemed directed trust property under Wisconsin Statute 701.0902, in such case, Wispact, Inc, shall be the Directing Party. Generally, a Wispact Trust will not accept any of the following interests in real estate as a Trust asset:

1. Real estate that is not situated in the State of Wisconsin;
2. Real estate that will not be 100% owned by the Trust;
3. Real estate that is not beneficiary-occupied;
4. Real estate that is for sale;
5. Real estate that is subject to a land contract and/or mortgage;
6. Improved, non-residential, real estate;
7. Unimproved, vacant, real estate;
8. Mobile homes or trailers which are not permanently affixed to real estate;
9. Oil, gas or mineral interests (At the discretion of the Trustee, Wispact and Capital First may instead accept an irrevocable assignment of proceeds of the interests rather than a direct ownership interest.)

As a condition to acceptance of real estate, the Trustee will require that the Beneficiary's Wispact Trust sub-account initially have liquid or readily available funds of at least 25% of the appraised or assessed value of the real property at the time of acceptance. As a further condition to acceptance of real estate, the Trustee will require completion of a questionnaire and analysis, showing anticipated future likely expenses and affordability of long-term ownership of the home. The Beneficiary will also have to provide plans for future property management, if necessary.

If you wish to request consideration of ownership of real property into a Wispact Trust, please complete Addendum 3. If the real estate is deemed acceptable, the Beneficiary/their legal representative shall execute a Hold Harmless letter in the form of Addendum 4 (residential).

If a real estate asset is accepted and the Hold Harmless letter is executed, the market value of the real estate asset shall be reflected at the most current appraised or Comparable Market Analysis valuation and shall be

included in the Trust Administration Fee. The Investment Management Fee will not apply. Additionally, all costs associated with the management and administration of the real estate including but not limited to the cost of routine appraisals, inspections and management services shall be paid from the Beneficiary's trust sub-account.

Transfer on death deeds of property to a Wispact Trust will be analyzed per the same criteria above. If unacceptable to hold, due to the Real Estate Acceptance Policy criteria in Section III, the Trustee and Wispact will work with the beneficiary and their representatives to determine the most appropriate action regarding the real property, to potentially include such remedies as a disclaimer, deeding/distributing the real property to the beneficiary directly, or a sale of the real property.

Please note: that completion of a transfer on death deed is not an asset in the Trust; rather, a method of directing a future transfer to the Trust. The Trustee could decline to accept the real estate at the time that the transfer on death deed becomes effective.

Further, caution should be used when preparing estate plans that direct homes to a beneficiary's sub-account, without doing a projection on whether the home is likely to be accepted, as well as financially sustainable.

As a condition to accepting property under this section, Beneficiary consents to a property inspection report to be completed by a property management company selected by the Trustee. Beneficiary's trust sub-account must pay for the cost of such report and agrees to ongoing periodic inspections as determined by the Trustee. All costs associated with property inspection and management shall be paid from beneficiary's subaccount. Beneficiary must also sign a hold harmless letter to Trustee.

IV. Life Insurance Policies:

Wispact, Inc. and Capital First may on a case by case basis accept a life insurance policy on the life of the beneficiary of a self-funded Trust, or a life insurance policy on the life of the grantor of a third-party funded Trust, if the following conditions are met:

1. The policy or contract is owned by, or is contemporaneously being transferred to, the Trust;
2. The policy or contract names the Trust as its sole beneficiary;
3. The liquidation of the life insurance policy being requested to be retained would cause hardship due to income realization or excessive capital gains taxation (this is a subjective and case-by-case determination which requires submission to the Trustee of the information requested on the Request For Acceptance of Asset form); and
4. Capital First receives a Hold Harmless letter from the beneficiary, the grantor or his/her legal representative, in the form of Addendum 7.
5. Beneficiary must consult his or her own tax advisor before transferring ownership of the policy to the trust.
6. Variable life insurance policies shall only be accepted in Third Party trusts.
7. Trustee is not under any ongoing duty to monitor the investment allocation or performance of any variable life insurance policy.

8. The Trustee must determine that the beneficiary's trust account has sufficient funds to pay all premiums due on the policy for the life expectancy of the insured.
9. The Trustee is not responsible or liable for a lapse or termination of the life insurance policy due to non-payment of premiums.
10. Trustee may impose additional fees to hold the life insurance policy.
11. The insurance policy contract (or a valid copy of the policy contract) must be delivered to the Trustee.

If you wish to request consideration of ownership of life insurance policies into a Wispact Trust please complete Addendum 6.

If the life insurance policy is accepted, and the Hold Harmless letter is executed, the market value of the life insurance policy shall be reflected as \$1.00, and shall be excluded from the Investment Management Fee calculation. Trustee fees shall still apply pursuant to the attached Unique Asset Fee disclosure. Additionally, all costs associated with the management and administration of life insurance policies including but not limited to the cost of routine appraisals and reviews shall be paid from the Beneficiary's trust sub-account.

Fixed Annuities:

Wispact and Capital First may on a case by case basis accept as a Trust asset a fixed annuity contract if all of the following conditions are met:

1. The policy or contract is owned by, or is contemporaneously being transferred to, the Trust;
2. The policy or contract names the Trust as its sole beneficiary;
3. Capital First receives a Hold Harmless letter from the beneficiary, the grantor or his/her legal representative, in the form of Addendum 7.
4. Factors in determining whether the Trustee may accept an annuity include whether the annuity can be liquidated (partially or in-full) at a reasonable cost in order to properly support the Beneficiary's spending needs and whether the fixed annuity fits within beneficiary's investment goals as determined by Trustee.
5. Beneficiary must consult his or her tax advisor before transferring ownership of the annuity to the Trustee.
6. Trustee is not responsible to determine when or best option to annuitize a contract.

V. Variable Annuities:

Variable annuities present unique problems with respect to prudent management, and generally require the owner to direct the underlying investments, which does not comply with Wispact, Inc.'s pooled investment strategy. Wispact, Inc. and Capital First will not accept variable annuities as an asset of a Wispact Trust I or Trust II.

1. Beneficiary must consult his or her tax advisor, advise on tax consequences of transferring ownership of annuity to trust, guarantee option under contract.
2. Trustee not responsible to monitor investment allocation or performance under contract.
3. Beneficiary consents to an early withdrawal from the contract as determined by Trustee even if such withdrawal is penalized under the terms of the contract.
4. Only nonqualified annuity contracts are accepted under this annuity section.

VI. Personal Property:

It is the general policy of Wispact, Inc. and Capital First to not hold and manage, as a Trust asset, any personal property; however each determination will be made on a case by case basis.

“Personal Property” shall include, but shall not be limited to, precious metals, collectibles, jewelry, artwork, furniture or furnishings, equipment, tractors, automobiles, motorcycles or other motorized vehicles. Under no circumstances will any hazardous materials or firearms be accepted. Any such personal property retained by the trust shall be subject to public benefits eligibility as required by state, federal or applicable regulation, including POMS, as applicable

If you wish to request consideration acceptance of personal property into a Wispact Trust please complete Addendum 8. If accepted, the beneficiary, the grantor or his/her legal representative, shall sign a Personal Property Indemnification and Hold Harmless Letter in the form of Addendum 9.

If personal property assets are accepted, and the Hold Harmless letter is executed, the market value of the personal property asset may be reflected at the most current appraised value. The Investment Management Fee shall not apply. Additionally, all costs associated with the management and administration of the personal property including but not limited to the cost of routine appraisals and management services shall be paid from the Beneficiary's trust sub- account. The Trustee may charge a reasonable fee to store the personal property. Trustee may limit size of personal property accepted and such property cannot have any specific storage requirements. Under no circumstances will any hazardous materials be accepted.

VII. Beneficial Interest in Inherited Individual Retirement Accounts:

If all of the following conditions are met Wispact, Inc. and Capital First may agree to accept as a Trust asset a beneficial interest in an individual retirement account (IRA), in which the IRA will be retained until economically unfeasible:

1. The IRA is an “inherited IRA” as defined by the Internal Revenue Code; and
2. The IRA is transferred contemporaneously to a Capital First Beneficiary IRA in the form of cash assets; and
3. The beneficial interest in the IRA is irrevocably assigned to the Wispact, Inc. Trust sub-account by the IRA beneficiary, in the form of the attached Addendum 11; and
4. The parties execute the necessary IRA transfer forms, to be supplied and completed if the asset is agreed to be accepted in the Wispact Trust.
5. Beneficiary must consult his or her own tax advisor regarding the tax consequences of a transfer of an IRA to the trust. Trustee makes no representation that an assignment of a beneficiary’s intent to transfer to the trust will not create adverse tax consequences to the beneficiary.
6. Trustee and Wispact have full discretion to determine annual withdrawals from the IRA account.
7. Beneficiary agrees to sign a hold harmless letter to the Trustee.

If you wish to request consideration acceptance of a beneficial interest in an inherited IRA into a Wispact Trust please complete Addendum 10.

If the Beneficiary IRA is accepted, and the Assignment is executed, a Trust Administration/Trust Investment Fee is assessed as in existence at that time.

Nothing contained in this Unique Asset Policies and Procedures is intended to be nor should be construed as tax, legal or investment advice.

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

Unique Asset Management

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Unique Asset Management

- May enhance PSNT's attractiveness to new clients
- Enhanced due diligence / potential liability
- Inherited / legacy assets

Types:

- Beneficiary-occupied real estate
- Vehicle Liens
- Mineral Interests
 - Working vs. non-producing
 - Oil & Gas
 - Surface rights vs. underlying rights
- Farm/Ranch Land
- Commercial Real Estate
- Promissory Notes
- Closely Held Interests
- Life Insurance
- Annuities
- IRAs

2

Fiduciary Duties

Duty of Loyalty

- "[T]he essence of the fiduciary relationship" (J.C. Shepherd, *The Law of Fiduciaries* 481 (1981))

Duty of Care/Prudence

- Note: when a fiduciary has held themselves out as a professional in certain areas, a higher standard of care applies (esp. in litigation).
- Harvard College v. Amory* 26 Mass. (19 Pick.) 446 (1830) - "Observe how [people] of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."

Duty of Impartiality

- Treat all parties of the trust similarly and fairly, with no bias between class of beneficiaries (unless otherwise noted in the trust agreement)
 - Applies to remainder persons
- UTC § 803: "If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests"
- Restatement (Second) § 183: "when there are two or more beneficiaries of a trust, the trustee is under the duty to deal impartially with them"

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

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

Latin: fiduciarius, from fiducia - "trust"

Ramsey v. Boatmen's First Nat'l Bank of K.C., N.A., 914 S.W.2d 384, 387 (Mo.App.W.D.1996) —

Trustees are fiduciaries "of the highest order" and are required to exercise "a high standard of conduct and loyalty in administration of [a] trust." The duty of loyalty "precludes self-dealing" which in most cases would be considered a "breach of fiduciary duty."

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Fiduciary Duties

Pitts v. Blackwell, No. M200-01733-COA-R3-CV 2011 (Tenn. App. Dec. 28, 2001)

"Nothing in the law of fiduciary trusts is better settled than that the trustee shall not be allowed to advantage [himself] in dealings with the trust estate."

- Blackwell, an undertaker, was appointed co-conservator of an elderly woman
- Protected person already held a prepaid burial plan with another funeral home prior to Blackwell's appointment
- Blackwell and co-conservator transferred prepaid burial policy to Blackwell's business
- Burial expenses after protected person's passing totaled more than \$18,000
- Was Blackwell's most expensive funeral to date
- Court ordered only Blackwell's expenses could be paid (i.e., no profits) from the estate

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Uniform Prudent Investor Act (UPIA)

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

UPIA § 9

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

UPIA § 9(a)(3)

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

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UPIA - Prudence

- UPIA §1 (a) – a "trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this [Act]" **unless otherwise directed by the trust instrument. [emphasis added]**
- *Uniform Probate Code §7-302 (1969)* – "The trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent [person] dealing with the property of another ..."
- UPIA §2 (b) – investments "must be evaluated not in isolation but in the context of the trust portfolio as a whole."
 - Unique assets' contribution or detriment to overall portfolio diversification
- UPIA §2 (b) – the tradeoff between risk and return "reasonably suited to the trust" should be among the trustee's chief considerations
- UPIA §2 (e) – removes category-specific restrictions previously found in the Prudent Man Rule
 - Allows consideration of unique assets

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UPIA - Diversification

Diversification

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

Diversifying holdings:

- On average yields higher long term-term returns while mitigating risk
- Smoothes out unsystematic risk (risk specific to the security or the industry)
- Reduces risk as stock prices are not uniform (imperfect correlation)

How to diversify:

- Across capitalization (large cap, mid cap, small cap)
- Growth stocks (tech, biotech, discretionary) vs. value stocks (dividend paying, financials)
- ETF/mutual funds
- By geography (domestic vs. international)
- Fund manager
- Proprietary investment products

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Unique Asset Considerations:

General Liability:

- Lack of:
 - Transparency
 - Objective valuation
 - Readily available markets
 - Certainty in cash flow
- Operational responsibility
- Heightened administrative liability / bandwidth
- Specialized knowledge
- Prudence:
 - Non-financial factors: settlor intent, beneficiary welfare
 - Trust longevity
 - Portfolio risk profile
 - Remainderperson interests

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Unique Asset Considerations:

Liquidity Risk:

- Unique assets are generally illiquid / non-marketable
- Liability to courts or public benefits agencies / remainderpersons
- Ongoing funding requirements
 - Maintenance
 - Legal expenses
 - Capital calls

Valuation:

- Duty to report
- Lack of active markets
- Varying standardized pricing mechanisms
 - Fast sale = loss?
- Valuation frequency?
 - Tax issues

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Unique Asset Considerations:

Undue Influence:

- Beneficiary with diminished capacity
- Fraud / elder abuse
- Third-party involvement
 - Family / friends residing in trust-owned home
 - Live-in caregiver improvements
- Supported Decision-Making

Emotional Attachment:

- Beneficiary-occupied residence
 - Long-term security
 - Family home
- Collectibles
- Family company
- Legacy stock positions



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Unique Asset Considerations:

Trust Longevity:

- SNTs = wasting trusts
- Monte Carlo / Trust Longevity Simulations
 - Models probability of different investment outcomes
 - Systematic risk
 - Randomized market returns factoring in portfolio standard deviation
- Assists with trustee planning **and** beneficiary expectation setting



Source: True Link Investment Advisors, LLC - for illustrative purposes only

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Beneficiary-Occupied Real Estate

- Beneficiary stability
 - Long-term beneficiary security, safety (e.g., location / proximity to services, etc.), independence and continuity of care
- Asset allocation: industry standard of 15-25% of corpus
 - Diversification issues
- Sustainability concerns:
 - Taxes, insurance, upkeep and maintenance, accessibility requirements, utilities
- Sole benefit
 - Undue influence
- SSI value cap
- Valuation
- Outside property management / oversight
- Eviction



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Beneficiary-Occupied Real Estate

Wispect, Inc: Unique Asset Policies and Procedures (see Appendix for full Unique Asset Policies and Procedures)

- The real estate must be unencumbered (e.g., not pending sale, not mortgaged, not subject to land contract, etc.)
- The real estate must be 100% owned by the trust
- The real estate must not be unimproved or vacant
- If the real estate is a mobile home or trailer, they must be permanently affixed to real estate
- The real estate must not cost more than 25% of the liquid or readily available corpus of the trust
- Any retention of real estate is subject to analysis to demonstrate long-term sustainability
- A beneficiary or their legal representative must execute a Hold Harmless letter exonerating the trustee and Wispect from the real estate's ongoing retention and purchase
- The appraised real estate valuation or Comparable Market Analysis (which is routinely reassessed) is included in the trustee's administration fee (but not in the investment manager's fee)
- All costs (including routine property inspections) associated with the real estate are borne by the trust

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Vehicle Liens

- Protects trust's ownership interest
- Sole benefit
- Establishes clear legal control in event of disputes, accidents, or liability claims
- Insurance paid by trust
 - Named as additional insured / loss payee
- Undue influence
- Maintenance
 - How often to document?
- Appropriateness

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Farm / Ranch Land / Commercial Real Estate (CRE)

Farm / Ranch Land:

- Unmarketable / valuation issues
- Ongoing management of farming operations, leases, land-use regulations
- Crop / livestock market volatility
 - Drought / natural disasters
- Maintenance
- Insurance, oversight of tenant farmers
- Costly delegation to agricultural managers, attorneys, appraisers

Commercial Real Estate (CRE):

- Active management: leasing, tenant relations, zoning / building codes compliance, maintenance
- Risks: vacancies (see: COVID), market fluctuations, capital expenditures, building safety, environmental hazards
- Costly delegation to CRE managers, attorneys, appraisers
 - Tenant disputes / lease negotiations

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Mineral Interests

- Lease oversight
- Royalty payment processing
 - Past and present
- Operator accountability
- Division orders
- Valuation fluctuation (commodity pricing)
- Environmental concerns
- Depleting asset
 - Remainderperson considerations
 - URIPA depletion transfers

Wispect, Inc: Unique Asset Policies and Procedures (see Appendix for full Unique Asset Policies and Procedures)

- "The illiquid nature of these unique assets complicates the pooled accounting ("unitization") of the Trusts, and can result in a lack of funds available to meet a beneficiary's needs which is contrary to the purpose of the Trusts, and presents administrative challenges that are beyond the scope of the Trusts."
- "These assets may not have a readily ascertainable current market value which hinders accurate valuation assessments potentially necessary for proper accountings and other administrative requirements."

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Closely Held Interests

- Liquidity risk
- Governance transparency
- Valuation issues
- Concentration risk
- Voting rights
 - Operational or strategic decisions
 - Profit reinvestment vs. payout
 - Company performance
 - Staff oversight
- Family owned businesses
- Exit strategies
 - Proactive planning to meet beneficiary needs
 - Buy-sell agreements
 - Staged divestiture
- Minority rights
 - Tag-along rights
 - Protection covenants

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Closely Held Interests

Wispact, Inc: Unique Asset Policies and Procedures

(see Appendix for full Unique Asset Policies and Procedures)

- They "may accept an irrevocable direct ownership interest in closely held business interests, nonmarketable securities, and land contract interests...", but, "at the discretion of the Trustee, [they] may instead accept an irrevocable assignment of proceeds rather than a direct ownership interest in closely held business interests."
- "Closely held business interests and nonmarketable securities are not able to be readily liquidated in full or in part on an organized securities exchange and have limited marketability."
- "If closely held business interests are accepted, beneficiary must specifically waive Trustee's obligation to comply with the prudent investor rule and allow Trustee to hold non-income producing interests."
- "Trustee does not have a duty to monitor financial conditions of the company and any loss of value associated with closely held business interests."
- "Trustee will not accept a general partnership interest or stock issued by a subchapter S corporation."
- "Trustee will not exercise any applicable voting rights and may retain outside professionals to do as such. The cost of said retention shall be borne by the beneficiary's sub account."

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Life Insurance

First Party SNTs

- Funeral / burial expenses
- Existing policy at joinder
- POMS SI 01130.300
 - Requires waiver of Cash Surrender Value (CSV)
 - \$1,500 maximum face value
 - Beneficiary naming issues
- Premium payments / liquidity risk

Third Party SNTs

- Grantor as insured = funding mechanism
- Provides stability for beneficiary
- Premium payments / liquidity risk
- Diversification

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Life Insurance

Wispact, Inc: Unique Asset Policies and Procedures

(see Appendix for full Unique Asset Policies and Procedures)

- The policy or contract must be owned by, or is contemporaneously being transferred to, the Trust.
- The policy or contract must name the Trust as its sole beneficiary.
- They receive a Hold Harmless letter from the beneficiary, or the grantor or his/her legal representative.
- The beneficiary must consult his or her own tax advisor before transferring ownership of the policy to the trust.
- Variable life insurance policies shall only be accepted in third-party trusts.
- The trustee is not under any ongoing duty to monitor the investment allocation or performance of any variable life insurance policy.
- The trustee must determine that the beneficiary's trust account has sufficient funds to pay all premiums due on the policy for the life expectancy of the insured.
- The trustee is not responsible or liable for a lapse or termination of the life insurance policy due to non-payment of premiums.

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Annuities

Fixed Annuities

- Reliable income stream
- Structured settlement annuities; generally tax free
- Penalties for early surrender / withdrawal
- Verify titling / ownership
- Potentially complex and onerous fee structures
- Complex agreements
- Tax issues
- Duty to monitor?
- Remainderperson issues

Variable Annuities

- Potentially unreliable income stream
- Market value fluctuation
- Penalties for early withdrawals
- Liquidity restrictions
- Potentially complex and onerous fee structures
- Complex agreements
- Tax issues
- Limited investment options
- Duty to monitor

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Annuities

Wispact, Inc: Unique Asset Policies and Procedures

(see Appendix for full Unique Asset Policies and Procedures)

- "The policy or contract names the Trust as its sole beneficiary."
- They receive "a Hold Harmless letter from the beneficiary, the grantor or his/her legal representative...."
- "Factors in determining whether the Trustee may accept an annuity include whether the annuity can be liquidated (partially or in-full) at a reasonable cost in order to properly support the Beneficiary's spending needs and whether the fixed annuity fits within beneficiary's investment goals as determined by Trustee."
- "Beneficiary must consult his or her tax advisor before transferring ownership of the annuity to the Trustee."
- "Trustee is not responsible to determine when or best option to annuitize a contract."
- "Trustee not responsible to monitor investment allocation or performance under contract."
- "Beneficiary consents to an early withdrawal from the contract as determined by Trustee even if such withdrawal is penalized under the terms of the contract."
- "Only nonqualified annuity contracts are accepted under this annuity section."

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Inherited IRAs

Setting Every Community Up for Retirement Enhancement - SECURE Act

- Passed at the end of 2019
- Followed by the SECURE Act 2.0 (passed 12/29/2022)
 - Securing a Strong Retirement Act of 2022
 - Retirement Improvement and Savings Enhancement To Supplement Healthy Investments for the Nest Egg Act (RISE & SHINE Act)
 - Enhancing American Retirement Now Act (EARN Act)
- Eliminated RMD "stretch" for many beneficiaries
 - Generally, the inherited IRA was distributed over lifetime of IRA beneficiary
 - Now, most beneficiaries must withdraw all IRA funds (and pay applicable income taxes) within ten years of IRA owner's death (with certain exceptions)
- New RMD dates:
 - SECURE Act
 - RMDs begin at age 72 (previously 70 1/2) if account owner turned 70 1/2 after Jan 1, 2020
 - SECURE Act 2.0
 - RMDs begin at age 73 (2022), and 75 (2033)
- Applies to IRAs inherited January 1, 2020 +

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Inherited IRAs

Eligible Designated Beneficiary (EDB):

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

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Inherited IRAs

Eligible Designated Beneficiary (EDB):

Eligible Designated Beneficiaries (EDBs) (cont'd)

- SNTs (IRC § 401(a)(9)(H)(i))

"See-Through Trust" / "Qualified Trust"

IRC § 401(a)(9)(H)(v)(II):

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

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Inherited IRAs

Eligible Designated Beneficiary (EDB):

Eligible Designated Beneficiaries (EDBs)

Withdrawal rules: life expectancy of beneficiary

Special Needs Trust Improvement Act

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

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

Advantages for EDBs:

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

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Inherited IRAs

Required Minimum Distributions (RMDs)

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

TABLES

IRS Publication 590-B, Distributions from Individual Retirement Accounts

Joint and Last Survivor Table I:

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

Uniform Life Table:

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

Single Life Expectancy Table I:

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

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Inherited IRAs

Wispact, Inc. Unique Asset Policies and Procedures

(see Appendix for full Unique Asset Policies and Procedures)

- “The IRA is an “inherited IRA” as defined by the Internal Revenue Code.”
- “The beneficial interest in the IRA is irrevocably assigned to the Wispact, Inc. Trust sub-account by the IRA beneficiary...”
- “Beneficiary must consult his or her own tax advisor regarding the tax consequences of a transfer of an IRA to the trust. Trustee makes no representation that an assignment of a beneficiary's intent to transfer to the trust will not create adverse tax consequences to the beneficiary.”
- “Trustee and Wispact have full discretion to determine annual withdrawals from the IRA account.”
- “Beneficiary agrees to sign a hold harmless letter to the Trustee.”

Consider IRA account size minimums?

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Promissory Notes

- Liquidity risk
- Value and performance dependent upon:
 - Borrower's creditworthiness
 - Repayment discipline
 - Note enforceability
- Operational burdens:
 - Payment monitoring and recording
 - Interest accrual
 - Note compliance
 - Collection actions / litigation
 - Potentially against a family member

Wispact, Inc: Unique Asset Policies and Procedures

(see Appendix for full Unique Asset Policies and Procedures)

- "Any special record keeping requirements, unique tax reporting, collateral interests, any requirement or likelihood for a legal enforcement action to compel payment, debtor's ability for repayment, debtor credit rating, interest rate assigned, amortization schedule, payment facility, and whether the promissory note provides for recovery of actual attorney fees and costs. New issuances of promissory notes shall be set with the appropriate interest rate as determined by the Trustee."
- "Trustee is not responsible to monitor payor, value of any collateral that secures the Promissory Note, or required to commence any legal proceedings against the payor in case of default."
- "Trustee is not responsible for amending or restructuring any promissory note already in existence, applicable to both current promissory notes administered by Wispact and in any such cases wherein Trustee and Wispact are considering acceptance of a successor trusteeship appointment or joinder."

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Delegation

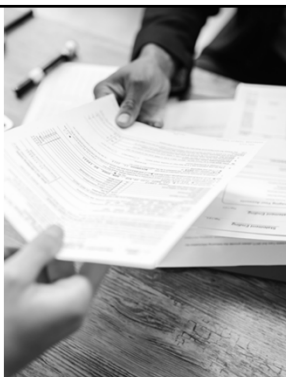
- **Restatement (Third) § 80**
 - Delegation is permitted, but only to the extent that "a prudent person of comparable skill" would
 - Ongoing duty to "supervise and monitor" delegated agent
- UTC § 807
 - Trustee must exercise reasonable care, skill and caution in:
 - Agent selection
 - Establishing scope of terms of the delegation
 - Periodically reviewing agent's actions
- OCC Risk Management Guidance in regards to Third-Party Relationships
 - OCC Bulletin 2013-29
 - Fiduciary "should ensure comprehensive risk management and oversight of third-party relationships...through the life cycle of the relationship..."
 - Some aspects to review (at onset and periodically):
 - Planning
 - Due diligence before third-party selection
 - Contract negotiation
 - Ongoing monitoring
 - Termination of third-party and contingency plan
 - Oversight and accountability
 - Documentation and reporting
 - Independent reviews

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Taxation

- Real estate: income / depreciation
- Mineral interests: return of capital vs. income
 - Depletion deductions
- Closely held interests
 - Income on K-1s
 - Unrelated Business Taxable Income (UBTI)
- Valuations for final accountings / estate tax reporting
- "Late" K-1s
 - PSNT 1041 complications



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2025 National Conference on Special Needs Planning and Special Needs Trusts

Unique Asset
Management

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Thank You!

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Pooled Trusts Intensive

October 22, 2025

Outreach and Services to Diverse Communities with Special Needs



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*Center for
Elder Justice*

Access and Justice For All®

Outreach and Services to Diverse Communities with Special Needs

Presented by

Michelle Wolf, MPA, CLPF,

Executive Director JLA Trust

and

Anthony Verdeja, MJur, RID CI, CT, NIC, NAD IV

Executive Director, Family Center on Deafness

Pooled Trust Intensive,

October 22nd, 2025

Outreach and Services to Diverse Communities with Special Needs

Universal Design Concepts

What does Universal Design mean?

According to the Centre for Excellence in Universal Design, this concept encompasses the design and composition of an environment so that it can be accessed, understood and used to the greatest extent possible by all people regardless of their age, size, ability or disability. With the three key principles of simplicity, flexibility, and efficiency, Universal Design seeks the easiest solution to all types of access, whether being able to enter a building with a wheelchair using a ramp, or including closed captioning in all videos.

History of Universal Design

Universal Design is a term coined by an architect, [Ronald Mace](#) who wanted to focus on accessible housing with a universal design. Mace championed accessible building codes and standards in the United States. Mace's term [universal design](#) exemplifies an all-inclusive philosophy of barrier free design.

Mace was born in New Jersey and contracted polio as a child. As a student at North Carolina State University School of Design, Mace encountered barriers in his wheelchair. Mace became an accessible built environment activist due to the inaccessible design of many facilities that he

encountered. He was involved with the passage of North Carolina's Chapter 11X, the first accessibility-focused building code in the United States. North Carolina's Chapter 11X became the model for other States to follow. This also influenced Federal legislation prohibiting disability discrimination. The requirements came to be included in the Fair Housing Amendments Act of 1988, and the Americans with Disabilities Act of 1990.

The concept of Universal Design is credited to Mace but it is [Selwyn Goldsmith](#) of the United Kingdom who contributed the idea of curb cuts. Goldsmith, after consulting with 284 other wheelchair users, conceived "dropped kerbs" in the early 1960s, better known as curb cuts today. The City of Norwich in the United Kingdom was the first city to install curb cuts at different intersections. Today, curb cuts are a common feature throughout the world.

Accessibility legislation such as the Architectural Barriers Act (1968); Section 504 of The Rehabilitation Act of 1973; the Fair Housing Act Amendments (1988); and the Americans with Disabilities Act (1990) established minimum requirements to protect people with disabilities from discrimination. Universal Design focused on making the environment more accessible above and beyond the minimum requirements that law may require. Designers must focus attention on improving function for a larger range of people. While ensuring accessibility, these laws fail to address equity and diversity of use.

In 1985, Ron Mace cautioned that Universal Design should be: "The design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design." (Maisel & Ranahan, 2017). Mainly from the need to reevaluate existing legal mandates to ensure usability by people with disabilities, the [Principles of Universal Design](#) were developed at the Center on Universal Design, North Carolina State University in 1997.

Seven Principles of Universal Design

1. Equitable Use
2. Flexibility in Use
3. Simple and Intuitive
4. Perceptible Information
5. Tolerance for Error
6. Low Physical Effort
7. Size and Space for Approach and Use

Universal Design emerged from a barrier-free design concept within the built environment, to one of accessible design in all things for all people. This Universal Design approach is currently embraced by the broader accessibility movement. The focus expanded to include adaptive and assistive technology.

ACCESSIBLE	UNIVERSAL
A custom designed home based on an existing plan but requires additional costs for the redesign and custom construction details	A universally designed home plan costs the same as any other plan to build that anyone can purchase
Home modifications services by a contractor who charges more for her specialized knowledge of design for disability and aging	Home improvement services that incorporate universal design as a basic service
Assistive technology used to adapt an automobile display for people with special needs	Automobile instruments and controls customizable to accommodate differences in perceptual abilities, stature, motor abilities, and preferences
A building entry with a ramp at the side that is out of the way for all visitors but is accessible by code	A no step building entry that everyone can use easily and together
A hotel that has only the code-required percentage of accessible rooms	A hotel that has 100% universally designed rooms in a variety of types

(Steinfeld and Maisel, 2012, p. 69)

While both "accessible" and "universal" relate to design for diverse users, "accessible" focuses on ensuring a product or environment can be used by people with disabilities, often through specific accommodations. "Universal design" aims to create products and environments usable by all people, regardless of their abilities, to the greatest extent possible, without needing separate or specialized designs. Essentially, accessibility is a subset of universal design, ensuring that the needs of those with disabilities are met, while universal design takes a broader approach to usability for all users.

Outreach and Services to Diverse Communities with Special Needs

Working with Deaf and Hard of Hearing Clients

Excerpts from “Handbook for Florida Attorneys” Written by Sharon Caserta, Esq., SC:L

Deaf/Hard of Hearing Legal Advocacy Program Jacksonville Area Legal Aid Inc.

Equal Justice Works Fellow, CI/CT/CSC October 2008 with minor edits by Anthony Verdeja
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I. Community Terminology

As with any Cross culture terminology has great importance and will be viewed by the members of the community in different ways. People with some form of hearing loss will generally self-identify and use terms to define themselves. The most common terms used are “Deaf”, “Hard of hearing”, “Deaf/Blind” or Late- deafened”. If you are unclear as to your client’s identifier, simply ask them. One factor in a good attorney client relationship is to understand how the client wants you and others to perceive them as a person not just a client.(Citation1)

Deaf people who use American Sign Language (ASL) to communicate are proud of their language and cultural norms. Attorneys should be vigilant to respect this pride and avoid using pejorative terms such as “deaf and dumb”, “deaf-mute”, or “hearing impaired” in conversation or in court filings.

“Hard of hearing” individuals do not consider themselves culturally Deaf. The majority of this group does not know or use ASL. The qualifying identifier of this client base is the desire to

utilize their residual hearing by wearing hearing aids, augmenting their hearing aids with assistive listening devices and speech reading.

II. Communication Methods Use by Deaf, Hard of Hearing and Deaf/Blind clients

Not all Deaf and Hard of Hearing people communicate the same way, even those who use sign language may use different forms of a signing system or signed language. Some deaf people can communicate in many modalities where others may choose to communicate in only one. When meeting with a Deaf or Hard of Hearing client a determination must be made as to the type of access services, auxiliary aid or assistive device needed for effective communication. The easiest way to ascertain the need is to simply ask the client what is most effective. Although Title III of the ADA does not require a private attorney to provide the exact auxiliary aid requested by the client (Citation 2) if a contrary aid is used it must be effective and should be done upon consult with the client. Since most attorneys have no training as to effectiveness of communication, linguistic needs, reading ability and other relevant criteria it's wise for counsel to defer to the Deaf client—who really is the expert on efficacy.

1. American Sign Language (ASL)

Sign Language is a visual and manual form of communication.(Citation 3) American Sign Language (ASL) is the primary language used by the Deaf Community.(Citation 4) ASL is not a universal language; it is a living, visual language that is not only a means of communication but also a repository of cultural knowledge and a symbol of social identity.(Citation 5) ASL is not English, nor is it based on the characteristics of an audist community. Most attorneys incorrectly think ASL is simply the English language signed on one's hands. ASL possesses its own grammatical rules, syntax, and includes regional dialects and can convey abstract

concepts.(Citation 6) ASL is not a written language; thus ASL users must navigate through legal documents in their second language, English, and second-language fluency varies with each client.(Citation 7).

For ASL users generally effective communication is achieved by the provision of a qualified, nationally certified and legally trained ASL interpreter. (Citation 8)

2. Signed English

ASL is a language whereas the American signing methods which are dependent upon knowledge of English are known as sign systems.(Citation 9). There is a section of the deaf and hard of hearing population who use a signing system known as Signed Exact English (SEE) or Pidgin Signed English (PSE). Signed English is a system that attempts, with varied degrees of success, to replicate the English language manually. (Citation 10) PSE is in essence a blend of ASL and Signed English. For clients using these systems English may be their primary language, and they may have less difficulty with written communication than ASL users.

For the Signed English, or Pidgin Signed English user, generally effective communication is achieved by the provision of a qualified, nationally certified, and legally trained ASL interpreter or transliterator (Citation 11)

3. Deaf/Blind Clients

A smaller section of the Deaf community are those individuals who are Deaf/Blind. These individuals have both a form of hearing loss and vision loss. Persons who are Deaf/Blind typically do not have total deafness or total blindness but rather have their functionality significantly affected due to an impairment of both hearing and vision.(Citation 12). Some Deaf/Blind clients use sign language and others do not.

For Deaf/Blind clients effective communication needs vary widely please consult with the client directly about the appropriate accommodation.

4. Oralism and Associated Communication Techniques

There is a segment of the deaf and hard of hearing population that does not use ASL or any form of a signed system and communicate orally. This client base often refers to itself as “hard of hearing”. These individuals will speak and attempt to speechread (lip-read) when communicating, and English is typically their primary language, therefore require different accommodations than members of the Deaf Community.

Not all deaf and hard of hearing people can speechread, and those who can have widely varying levels of proficiency. The task of speech reading is very difficult to master, with only 35% of spoken English visible on the lips; the ability or inability to lip-read is in no way related to a deaf or hard of hearing person’s intelligence. Some deaf and hard of hearing people use speech reading, typically augmented with hearing aids or other devices, as one part of their communication method but not as a standalone technique. Each client should be asked which mode of communication they prefer and be provided with the appropriate accommodation.

Hard of hearing individuals face a very difficult quandary because their hearing loss comes in many forms and degrees. There are times when they can hear well and other times when they cannot. The ability to communicate effectively depends on the environment, the speaker’s voice, the level of anxiety the situation imparts and other factors which the hard of hearing person cannot control. As a result, hard of hearing clients often report that people think they are faking their hearing loss or failing to try hard enough to hear. Many hard of hearing individuals will *nod their head* and appear to understand what is said when in fact they do not. This behavior is

common because they do not want to appear “difficult” or “uncooperative” or are ashamed of their deficient hearing. Attorneys should note that many of these clients constantly struggle to hear and are often left out of conversations. As result they may miss large sections of dialogue without always reporting that they could not “hear” what was relayed. Constantly trying to hear and participate in conversations can often lead to fatigue or frustration which can lead to misunderstandings. Phone conversations or group dialogue may be especially difficult for these clients, and they must constantly remind others to speak louder, clearer or at a slower pace. To learn more about the communication difficulties encountered by those who are Hard of Hearing refer to resources available by Hearing Loss of America (Citation 13) and The Association of Late-Deafened Adults (ALDA) (Citation 14).

Endnotes

1. <https://www.nad.org/resources/advocacy-letters/>
2. 28 CFR § 36.303 (2019)
3. John Fallahay, The Right to a Full Hearing, Improving Access to the Courts for People who are Deaf or Hard of Hearing, 2000,pg 33
4. The term “Deaf Community” is generally known to mean that segment of the deaf population who uses ASL as their primary language. There is a distinction made by the members of the Deaf and hard of hearing community as to “(d)eaf” people--who do not communicate in ASL, and those “(D)eaf” people who do.
5. Harlan Lane, The Mask of Benevolence, Disabling the Deaf Community, 1993, pg 45
6. Jack R. Gannon, Deaf Heritage, A History of Deaf America, 1981, pg 365 (edited)

7. Similar to Spanish or Italian, ASL is taught and accepted as a foreign language by universities and colleges in the United States.
8. <https://rid.org/>
9. John Fallahay, The Right to a Full Hearing, Improving Access to the Courts for People who are Deaf or Hard of Hearing, 2000, page 34
10. Sharon Caserta, Jacksonville Area Legal Aid: Handbook on the Use of ASL Interpreters, 2005
11. A transliterator is one who does not sign in ASL but conveys a message from spoken English into a manual code for English such as PSE or Signed English. This task contrasts with interpreting because interpreting requires working between two languages e.g. spoken English and ASL
12. Accessibility Needs of Deaf, Hard of Hearing, and Late Deafened Persons in Florida: A Report on Requirements, Current Status and Recommendations. Glossary of Terms, Florida Coordinating Council of the Deaf and Hard of Hearing, Revised 2015
13. www.hearingloss.org
14. <https://alda.org/>

Outreach and Services to Diverse Communities with Special Needs

Culturally Competent Outreach and Services for Latino Special Needs Trust Beneficiaries

Introduction

According to US Census figures from 2023-2024, the Hispanic population in the United States is approximately 19.1% to 19.5% of the total U.S. population. This figure represents the nation's largest ethnic minority, with the Census Bureau estimating the population to have reached over 65 million people in 2023.

Therefore, Latino and Hispanic families make up a growing portion of individuals and families served by special needs trusts (SNTs). Trustees have a unique opportunity to reach out and support this population, but effective outreach requires cultural awareness, trust-building, and responsiveness to the specific needs of Latino beneficiaries and their families.

1. Building Trust and Relationships

Latino families often view disability services through the lens of their home countries, family, community, and faith. Trustees who demonstrate respect, empathy and caring will strengthen their ability to serve.

Strategies:

- **Be personal and relational:** Take time to learn about the beneficiary's home country, family structure, values, and goals
- **Understanding nuance-**Spanish speaking clients are not monolithic, and there are many distinctions between country of origin, economic and educational backgrounds and dialects.

- **Acknowledge roles of various family members:** Many decisions are made collectively, not individually. Be prepared to engage parents, adult children, siblings, or extended relatives.
- **Respect cultural values:** Values such as *familismo* (family loyalty), *respeto* (respect), and *personalismo* (warm, personal interaction) may strongly influence decision-making.
- **Households with mixed immigration status-**According to the National Research Center on Hispanic Children, the vast majority (93%) are U.S-born. Nonetheless, the immigrant experience remains central to many Latino children's households; slightly more than half (53%) of Latino children live with at least one foreign-born parent, and research estimates that approximately [one-quarter of Latino children](#) have at least one parent who is an unauthorized immigrant. Confidentiality is more important than ever.

2. Language Access and Communication

As expected, language can be a major barrier to trust. Even bilingual families often prefer important financial and legal information in Spanish to avoid misunderstanding as their knowledge of English may not be comprehensive enough for key legal and government benefit rules.

Strategies:

- **Offer documents in Spanish:** Trust materials, instructions, and key notices should be available in both English and Spanish.
- **Provide interpretation services:** Use trained interpreters—not family members—whenever possible to discuss financial or legal details.

- **Use plain language:** Avoid jargon; explain financial and legal concepts with relatable examples.
- **Leverage multiple modes of communication:** Latino families may be more responsive to phone calls, WhatsApp messages, or in-person meetings than email and snail mail.

3. Outreach Approaches

Effective outreach is proactive. Many Latino families are unfamiliar with special needs trusts and may not know how trustees can help.

Strategies:

- **Community partnerships:** Collaborate with local disability nonprofits, churches, parent groups, and cultural organizations.
- **Educational workshops:** Offer bilingual sessions on what an SNT is, how it works, and what services it can provide.
- **Cultural events:** Participate in Latino community fairs, disability resource expos, or health fairs.
- **Trusted messengers:** Work with *promotores de salud* (community health workers) or parent advocates who are trusted in Latino communities.

4. Addressing Barriers

Latino families may face unique barriers in accessing SNT services. Trustees should anticipate and address these challenges.

Common Barriers and Solutions:

Barrier	Solution
Limited knowledge of trusts	Provide bilingual, plain-language guides; hold Q&A sessions.
Immigration concerns	Emphasize that trust benefits are not immigration-dependent and do not affect status.
Distrust of financial/legal systems	Highlight nonprofit or community partnerships; share success stories.
Limited transportation	Offer phone or video meetings; consider home visits in some cases.
Stigma around disability	Frame trust services as supportive of dignity, independence, and family well-being.

5. Best Practices for Service Delivery

To ensure Latino beneficiaries feel supported, trustees can implement service practices that go beyond the minimum.

Recommendations:

- **Hire bilingual staff** or ensure access to interpreters.
- **Be flexible** with meeting times in the evenings or weekends to accommodate work schedules
- **Offer culturally relevant supports**, such as facilitating access to bilingual aides, referrals to local Spanish-speaking agencies or appropriate community activities.

- **Highlight independence and dignity**, which resonates across cultures.
- **Develop long-term relationships** rather than transactional interactions.

Trustees who approach Latino beneficiaries with respect, cultural awareness, and proactive outreach can bridge gaps and provide life-changing support. By prioritizing communication, trust-building, and community engagement, trustees can ensure that Latino families fully benefit from special needs trusts.

Resources

- **National Alliance for Hispanic Health** – www.hispanichealth.org
- **Disability Rights California** – www.disabilityrightsca.org (bilingual resources)

Latino Family Support Organizations (local chapters vary; e.g., Fiesta Educativa in California)



Michelle K. Wolf
Executive Director
JLA Trust

OCTOBER 22, 2025

Outreach and Services to Diverse Communities with Special Needs

Stetson Pooled Trust Intensive 2025

1

Today's Presentation



- Overview of Universal Design Principles
- Outreach to Diverse Communities
- Case study: JLA Trust Initiative to Reach Latino families

2

What is Universal Design?



"The design and composition of an environment so that it can be accessed, understood and used to the greatest extent possible by all people regardless of their age, size, ability or disability."

3

7 Key Concepts of Universal Design



1. Equitable Use – Same means for all users; avoid segregation
2. Flexibility in Use- Accommodates wide range of individual preferences and abilities
3. Simple and Intuitive -Accommodate a wide range of literacy & language skills.
4. Perceptible Information- Communicate necessary information effectively to users, regardless of conditions or the user's sensory abilities
5. Tolerance for Error - Minimizes hazards/adverse consequences of accidental or unintended actions
6. Low Physical Effort –Used efficiently and comfortably and with a minimum of fatigue
7. Size and Space for Approach/Use – works for any user body size, posture or mobility.

4

Accessible vs Universal Design



ACCESSIBLE	UNIVERSAL
A custom designed home based on an existing plan but requires additional costs for the redesign and custom construction details	A universally designed home plan costs the same as any other plan to build that anyone can purchase
Home modifications services by a contractor who charges more for her specialized knowledge of design for disability and aging	Home improvement services that incorporate universal design as a basic service
Assistive technology used to adapt an automobile display for people with special needs	Automobile instruments and controls customizable to accommodate differences in perceptual abilities, stature, motor abilities, and preferences
A building entry with a ramp at the side that is out of the way for all visitors but is accessible by code	A no step building entry that everyone can use easily and together
A hotel that has only the code-required percentage of accessible rooms	A hotel that has 100% universally designed rooms in a variety of types

5

Outreach to Diverse Communities



1. Language capacity- translations, clear and easy spoken/written materials
2. Cultural competence and humility – respect
3. Structural and systemic considerations - partner with existing community orgs

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JLA Trust Case Study: Spanish Outreach



Background:

- The Hispanic/Latino population is **4.8 million** out of **9.8 million** in Los Angeles County according to 2023 Census estimates. People of Hispanic/Latino origin are the county's largest ethnic/racial group in Los Angeles County, making up 48% of the population.
- Los Angeles County has the largest Hispanic/Latino population of any county in the United States, followed by Harris County, Texas, at **2.1 million** and Miami-Dade County, Florida, at **1.9 million**.
- **74%** of Hispanic/Latino population in Los Angeles County of Mexican heritage, according to 2023 Census estimates. Another 9% were of Salvadoran heritage, 6% Guatemalan, 3% South American, and Honduran 1%.

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Latino/Spanish Outreach Elements



- When first launched in 2016, sought out Spanish-speaking volunteers through United Way's volunteer matching program
- Later hired one of those volunteers to be a part-time Client Services Rep
- Translated basic brochure to Spanish
- Started to translate some of our enrollment materials
- When we revised website, created an entire parallel website in Spanish
- Presented our slides in Spanish with community-based orgs

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Spanish Version of JLATrust.org



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Latino/Hispanic Ongoing Service Elements



- Assign Spanish speaking staff member to be the primary liaison
- Connect clients with other Spanish-speaking staff at local agencies
- Text in Spanish for urgent communication
- As new materials are created (such as Enrollment Guide), or revised, need to translate into Spanish
- Be sensitive to current issues around immigration/ICE

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Key Facts: Latino Families



- Hispanic population in the United States is 19.1% to 19.5% of the total U.S. population (2023 census) and growing
- Latino families often view disability services through the lens of their home countries, family, community, and faith
- Spanish-speaking clients are not monolithic, many distinctions: country of origin, economic and educational backgrounds.
- Importance of family, many decisions are made collectively, not individually.
- Many households have persons with mixed immigration status

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JLA Trust's Other Diverse Outreach



- LGBTQ parents and beneficiaries
- Chinese-American parent groups/Elders
- Korean community, parent group
- Japanese older adults
- Farsi-speaking Iranian Jewish community
- Russian and Israeli beneficiaries

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Take Aways



- With a small staff, need to approach second-language outreach strategically:
 1. Staff/Volunteer Language Capacity first
 2. Translate materials
 3. Reach out to community-based groups
- Second-language families may not be familiar with many of the financial/legal issues around future planning and need extra time and support in those areas
- Working with community-based orgs is a two-way street. We send clients to them, and they can help us find a targeted audience

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JLA Trust Stats



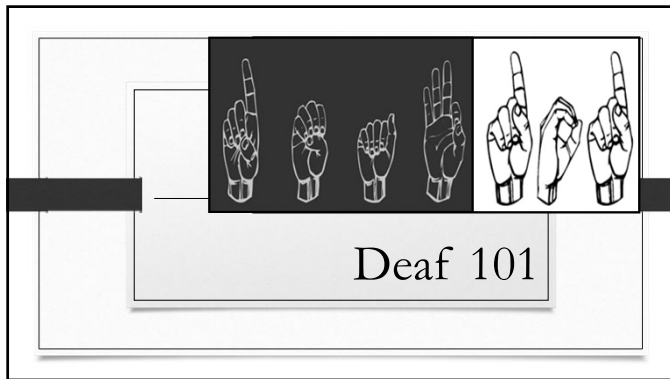
- We opened our doors in 2016, seed funding from the Jewish Community Foundation of LA, but open to all faiths and ethnicities
- Currently have 222 pooled special needs trust accounts and 6 Stand-Alone accounts
- Total pooled assets under management \$13.8 million plus another \$1.6 million in Stand alone accounts
- Seven employees, 4 full-time and 3 part-time
- All active account beneficiaries are assigned to a Client Service Representative

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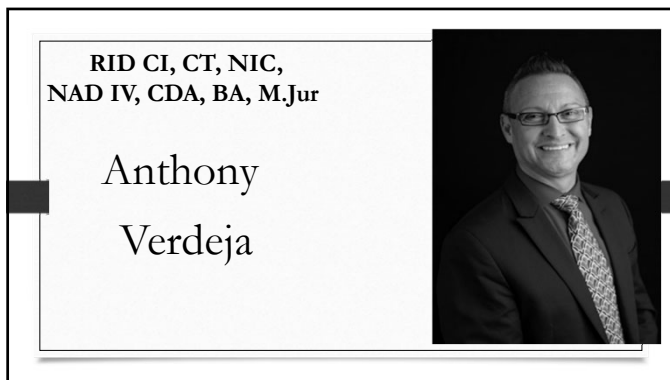
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Facebook: www.Facebook.com/JLATrust
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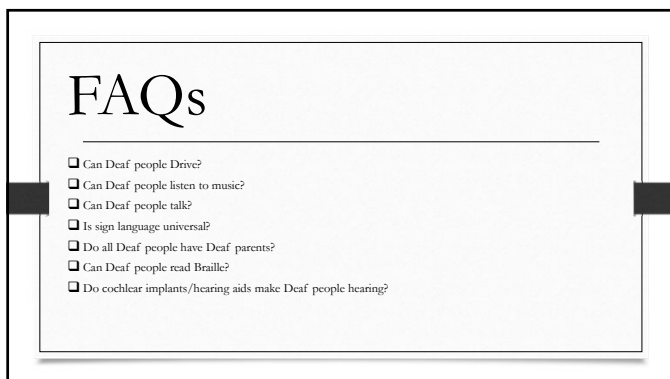
15



1



2



3

What does it mean to be Deaf?



4

"Deaf people as a linguistic minority have a common experience of life, and this manifests itself in Deaf culture."

This includes beliefs, attitudes, history, norms, values, literary traditions, and art shared by Deaf people."

-World Federation of the Deaf

- Collectivist Community
- Direct
- Animated
- Long goodbyes



5

Words
Matter

Deaf	deaf
Hard of hearing	Late deafened
Hearing	CODA

6

Don't Say

- Hearing Impaired
- Deaf and Dumb
- Deaf Mute

7

Communicating

Dos

- ✓ Let them lead
- ✓ Be flexible
- ✓ Use tools
- ✓ Body language/gestures
- ✓ Establish the topic
- ✓ Rephrase and repeat

Don'ts

- Don't say "Nevermind", "It doesn't matter", "I'll tell you later."
- Don't assume
- Don't criticize their English
- Don't yell
- Don't talk over each other
- Don't give up

**Attention getting: tap, wave, flash the lights

8

Can you read my lips:

CAN YOU READ MY LIPS? on Vimeo

9

Lipreading

Dos

- ✓ Speak clearly
- ✓ Establish the topic
- ✓ Rephrase and repeat
- ✓ Maintain eye contact

Don'ts

- Don't cover your mouth
- Don't eat or chew gum
- Don't turn your back
- Don't yell

**Studies show roughly only 30% of the English language can be understood by lipreading

10

National Association of the Deaf (NAD)

Advocacy Papers

NAD.org

- Lawyers and Legal Services:
 - Courts: [Communication Access in Federal Courts](#)
 - [Communication Access in State and Local Courts](#)
- Police and Law Enforcement
- Jails and Prisons

11

Registry of Interpreters for the Deaf (RID)

Resources

- Interpreting In Legal Settings: [Legal Interpreting SPPpdf - Google Drive](#)
- National Certifications: [Available Certifications - Registry of Interpreters for the Deaf, Inc.](#)

National Certifications

- National Interpreter Certification (NIC)
- Specialized Certificate: Legal (SCL) Moratorium
- Certified Deaf Interpreter (CDI)
- Others: NIC Master, NIC Advanced, RID CI, CT, NAD IV, V

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Interpreters

- ☐ Look and speak directly to the Deaf/HoH individual
- ☐ Speak in a normal tone at a normal pace
- ☐ Be aware the interpreter must interpret everything
- ☐ Avoid personal conversations with the interpreter
- ☐ The interpreter is not a companion, tutor, or helper
- ☐ Relax and be yourself!



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Video Relay Services

14

Questions?

15

Thank you!

- 651-271-7580 voice/text
- a_verdeja@msn.com



STETSON LAW

Pooled Trusts Intensive

October 22, 2025

Determining Sole Benefit: Practical Guidance for Compliant Disbursements



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The Sole Benefit Rule and Administration of Pooled Special Needs Trusts

Brenna Galvin

Bravura Group Law & Fiduciary, P.C.

Program Overview

This session examines the Sole Benefit Rule under federal Medicaid law and its application to the administration of pooled special needs trusts. Attendees will explore how trustees can navigate complex distribution decisions while maintaining compliance with 42 U.S.C. §1396p(d)(4)(C) and POMS SI 01120.203. The presentation provides both the legal foundation and practical guidance for trustees, attorneys, and fiduciaries.

Learning Objectives

- Understand the legislative intent and policy rationale behind the Sole Benefit Rule.
- Apply the POMS standards for permissible and impermissible expenditures.
- Evaluate common 'red flag' transactions that risk disqualification.
- Implement administrative best practices and documentation strategies.

Federal Framework

Under federal law, trusts established for individuals with disabilities may be exempt from Medicaid resource consideration if they meet statutory criteria. A trust that is established for a disabled individual is not considered an asset or resource for Medicaid purposes if the trust includes provisions that require the trust assets to be spent only to supplement, rather

than supplant or replace, government benefits, and has provisions that require it to repay the state Medicaid agency after the trust terminates. Such trusts are meant to provide goods and services above and beyond what Medicaid will provide—and which will enhance the disabled beneficiary’s life.

Federal law specifically exempts “pooled” trusts administered by non-profit organizations. A pooled trust can be funded with a disabled individual’s assets and/or the assets of the person’s parent, grandparent, a legal guardian, or a court. A pooled trust does not need to be established before the individual reaches age 65, a requirement that applies to other exempt trusts permitted under federal law. Indeed, a pooled trust is the only method under current law for a disabled individual over the age of 65 to place their own assets without disqualifying them from receiving Medicaid benefits.

Specifically, a pooled trust under 42 U.S.C. §1396p(d)(4)(C) must be administered by a nonprofit association, maintain separate accounts for each beneficiary, and include payback or retention provisions. A key compliance requirement is that each sub-account be established for the *sole benefit* of the disabled individual.

Legislative Intent and Policy

Congress enacted the Omnibus Budget Reconciliation Act of 1993 (OBRA ’93) to protect assets belonging to individuals with disabilities while ensuring Medicaid resources are used appropriately. The Sole Benefit Rule was created to ensure that trust assets enhance a beneficiary’s quality of life without providing windfalls to others. The rule preserves eligibility for public benefits while allowing beneficiaries access to supplemental goods and services.

Overview of the Sole Benefit Rule

To be considered an exempt under pooled trust rules, the individual trust account (or the “sub-account”) must be established for the sole benefit of the disabled individual. According to POMS, which state Medicaid agencies use as a guide on federal pooled trust requirements, a trust is considered to be established for the sole benefit of an individual “if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual’s life” A trust that allows the trust assets or income to be paid to or for the benefit of any individual or entity other than the beneficiary is not established for the sole benefit of the disabled individual.

The Sole Benefit Rule requires that all disbursements from a pooled trust be made for the sole benefit of the disabled beneficiary. According to POMS SI 01120.203, a trust is not considered for the sole benefit of an individual if it allows assets to be used for anyone other than the beneficiary during their lifetime. However, incidental or collateral benefits do not necessarily constitute violations.

Application of *Lewis v. Alexander* to the Sole Benefit Rule

The *Lewis v. Alexander* decision (3d Cir. 2012) clarified that states may not impose additional substantive requirements on pooled special needs trusts beyond those enumerated in 42 U.S.C. § 1396p(d)(4). This holding directly impacts how states interpret and enforce the Sole Benefit Rule.

Federal law requires that expenditures from a pooled trust be for the sole benefit of the disabled beneficiary. However, some states had attempted to restrict that principle by

adding limitations such as “reasonable relationship to the beneficiary’s needs” or prohibiting certain expenditures that incidentally benefit others.

The Third Circuit rejected these added state restrictions, finding them preempted by federal law. The court held that:

- The federal statute’s list of criteria for pooled trusts is exclusive, leaving no room for state modification.
- The “sole benefit” standard must be interpreted under federal law and SSA POMS guidance (SI 01120.201 and SI 01120.203), not by varying state definitions.
- States may monitor trusts and enforce compliance, but they cannot redefine “sole benefit” or add “reasonableness” or “special needs” requirements.

The practical implications of *Lewis v. Alexander* include:

- Trustees and fiduciaries should evaluate disbursements using the federal definition of “sole benefit,” which allows incidental benefits to others if the primary purpose is for the beneficiary.
- Attorneys can rely on *Lewis* to challenge state attempts to deny eligibility or impose penalties based on non-federal interpretations.
- This decision reinforces that uniform federal standards govern the creation and administration of pooled special needs trusts nationwide.

Exceptions to the Sole Benefit Rule

It is important to understand the exceptions to the sole benefit rule. Some of the major exceptions to the sole benefit rule, as outlined in POMS, are as follows:

- 1) Payments to third parties that provide goods or services to the beneficiary (e.g., purchasing a home or television).
 - a. A trustee can make a payment to a third-party if the *primary* benefit goes to the trust beneficiary. According to POMS, “you should not read this so strictly as to prevent any collateral benefit to anyone else. For example, if the trust buys a house for the beneficiary to live in, that does not mean that no one else can live there, or if the trust purchases a television, that no one else can watch it. On the other hand, it would violate the sole benefit rule if the trust purchased a car for the beneficiary’s grandchild to take the beneficiary to their doctor’s appointments twice a month, but the grandchild was also driving it to work every day.”
 - b. It is acceptable for trust assets to pay a family member who is providing services to the trust beneficiary, as long as the payments are reasonable and customary for similar services being provided in the geographic area. The fact that the person is a family member does not change the analysis.
 - c. Trust payment for companion expenses can be a valid expense paid to a family member. According to POMS, “[f]amily members may normally

do some of these things without compensation, but that does not prohibit the trust from paying for these services.”

- d. Incidental expenses are acceptable. An example of an acceptable incidental expense is if a companion takes the trust beneficiary to a museum. The trust can pay for the admission for the companion to the museum, as this is part of the cost of providing the service.

2) Payments to of travel expenses (transportation, lodging, and food) for a third-party to accompany the trust beneficiary.

- a. A trust may pay for the travel expenses of a third-party if the service or assistance of the third-party is “necessary to permit the trust beneficiary to travel.” For example, a minor child cannot travel unaccompanied and requires an adult to travel with them. Payment for the adult to travel with the minor child who is the trust beneficiary is not prohibited.
- b. A “reasonableness test” is used for evaluating the number of people the trust is paying to accompany the beneficiary. It would violate the sole benefit rule if the trust paid for other individuals who are not providing services or assistance *necessary for the beneficiary to travel*.
- c. Trust payments for other children in the family to travel along with a disabled minor child who is the trust beneficiary is prohibited by the sole benefit rule.

3) Payments of third-party travel expenses to visit a trust beneficiary.

- a. Travel for a service provider (including a family member) to oversee the trust beneficiary’s living arrangements when the beneficiary lives in a

long-term care facility or other supported living arrangement is acceptable under the sole benefit rule.

- b. Travel for a trustee or trust advisor (including a family member) to exercise their fiduciary duties or to ensure the well-being of the beneficiary is acceptable under the sole benefit rule.

- 4) Trustee and professional fees for management, investment, and legal services rendered on behalf of the trust.

- a. The trust may pay for reasonable compensation for managing the trustee(s) and reasonable costs associated with investment, legal, or other services rendered on behalf of the individual regarding the trust.

Case Studies and Hypotheticals

For each scenario, consider: Does this violate the Sole Benefit Rule? Why or why not?

- Purchase of a home titled to the trust, where family members also reside.
- Payment of above-market caregiver compensation to a sibling.
- Trust-funded family vacation that provides mixed benefit.
- Airfare for family visits versus fiduciary monitoring visits.

Trustee Guidance and Best Practices

- Maintain documentation for each disbursement decision, including invoices and notes on benefit to the beneficiary.
- Execute written service agreements for family caregivers or service providers.

- Perform annual reviews of the trust’s purpose, distributions, and continued compliance with Medicaid eligibility.
- Consult with legal counsel or benefits specialists before making discretionary expenditures.
- Train fiduciary and administrative staff on current SSA and DHS interpretations of the rule.

Common Compliance Pitfalls

- Paying for goods or services already covered by governmental programs.
- Depositing assets received from government entities into the pooled trust.
- Commingling assets between beneficiaries or with the nonprofit’s operational funds.
- Failing to document the direct benefit to the trust beneficiary.

Key Legal Authorities and References

- 42 U.S.C. §1396p(d)(4)(A)–(C)
- Omnibus Budget Reconciliation Act of 1993 (OBRA ’93), Pub. L. No. 103-66, §13611
- SSA POMS SI 01120.203 – Trusts Established under §1917(d)(4)(C)
- SSA POMS SI 01120.201 – Trusts and Sole Benefit Requirements
- CMS State Medicaid Manual §§ 3257-3259
- *Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012)
- *Pfoser v. Harpstead*, 953 N.W.2d 507 (Minn. 2021)

This material is intended for educational purposes and should not be construed as legal advice.

Presented by: Brenna Galvin

Determining Sole Benefit

Practical Guidance for Compliant Disbursements

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Date: October 22, 2025



1



Brenna Galvin



2



Learning Objectives

- Understand the legislative intent and policy rationale behind the Sole Benefit Rule.
- Apply the POMS standards for permissible and impermissible expenditures.
- Evaluate common "red flag" transactions that risk disqualification.
- Implement administrative best practices and documentation strategies.



3

Federal Framework Special Needs Trusts



	Special Needs Trust	Pooled Special Needs Trust
Use	Pay for needs and wants not otherwise provided by government programs	Pay for needs and wants not otherwise provided by government programs
For	Individuals with disabilities under age 65	Individuals with disabilities
Established By	Created by an individual, a parent, a grandparent, or a legal guardian	Created by an individual, a parent, a grandparent, or a legal guardian
Funded By	Assets of the individual with a disability	Assets of the individual with a disability
Distribution at Death	Repayment to state prior to beneficiaries	Amount Retained by Trustee Repayment to State
Trustee	Anyone other than Beneficiary	Nonprofit Organization
Statute	42 U.S.C. § 1396p(d)(4)(A)	42 U.S.C. § 1396p(d)(4)(C)

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Overview of the Sole Benefit Rule



Requires that all disbursements from a pooled trust be made for the sole benefit of the disabled beneficiary

Exclusivity of Benefit

to

Primary Benefit



"If the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life..."

5



Lewis v. Alexander Preemption

- States may not impose additional restrictions beyond § 1396p(d)(4)(C)
- Federal law preempts state-imposed 'reasonableness' or 'special needs' requirements
- Uniform Federal Interpretation of the Sole Benefit Rule is required
- Trustees should apply the federal definition, allowing incidental benefits if primarily for the beneficiary

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Exceptions to the Sole Benefit Rule



Third Party Payments
Payments to third parties providing goods/services for the beneficiary.



Caregiver Compensation
Reasonable caregiver compensation to family members at market rates.



Travel Expenses
Travel expenses for necessary companions.



Incidental Expenses
Admission for companion accompanying beneficiary.



7



Additional Exception to Sole Benefit Rule

Reasonable Trustee and Professional fees for trust administration.



8



Hypothetical Family Vacation

- Beneficiary and her family are Hmong. Her parents originally immigrated from Laos.
- Beneficiary has cognitive and physical disabilities. She currently resides at home with the support of her family and a Medicaid Waiver.
- Beneficiary's parents and primary caregivers plan a trip to southeast Asia to visit family.
- Beneficiary wants to go with her parents and requires 24/7 supervision and care.
- Can Trustee pay for parent(s) airfare?
- Can Trustee pay for hotel stays?
- Can Trustee pay for meals?



9





Hypothetical Caregiver Comp

- Beneficiary received a settlement through Worker's Compensation after an injury at work.
- Beneficiary experienced a traumatic brain injury and is unable to live independently.
- His spouse has never worked outside the home.
- Beneficiary receives benefits through a Medicaid Waiver. His spouse is now his primary caregiver and receives payment through the Waiver.
- Can Trustee pay spouse additional compensation?
 - Consider greater hourly wage
 - Consider additional hours

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Hypothetical Visit or Monitoring

- Beneficiary has early onset dementia.
- Beneficiary has appointed his daughter as his Attorney-in-Fact and Health Care Agent.
- Daughter typically comes around the holidays to visit her father.
- During her visits, daughter checks on her father's mail and status of his important paperwork, Medicaid renewal preparation, and Social Security annual accounting.
- Can Trustee pay for daughter's airfare?
- Can Trustee pay for her hotel stay?
- Can Trustee pay for meals while she is visiting?



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Hypothetical Home Purchase

- Beneficiary has cerebral palsy and wants to buy a home.
- Beneficiary plans to live in the home with her sister, sister's spouse, and their children.
- Beneficiary has been living with the sibling since her parents' died.
- Sibling's home is not accessible, and they wish to purchase something that is more wheelchair friendly for Beneficiary.
- Can Trustee pay for the home?
- Can Trustee pay for a portion of the home?
- If so, how should the home be titled?
- Can the Trustee pay for furnishings?
- What if others will also be using that furniture?

12



Common Compliance Pitfalls

- Paying for goods and services covered by government programs.
- Paying above-market value for goods and services to an interested party.
- Not maintaining documentation regarding distribution.
- Not having a practice for systematic review of beneficiary's needs and wants.



13



Trustee Guidance Best Practices

- Maintain documentation for each disbursement and its benefit to the beneficiary.
- Use written service agreements for caregivers and service providers.
- Review comparable services and market values.
- Conduct annual reviews for compliance and purpose alignment.
- Consult legal counsel before discretionary expenditures.
- Train fiduciary staff on reviewing SSA and DHS updates.

14

Legal Authority and Citations

Trusts

42 U.S.C. § 1396p(d)(4) (A)–(C)

Cases

Lewis v. Alexander
Pfoser v. Harpstead

Resources

Special Needs Alliance
Alliance of Pooled Trusts

POMS

SSA POMS SI 01120.203
SSA POMS SI 01120.201

Manuals

CMS State Medicaid Manual §§ 3257–3259
State Medicaid Manuals



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Questions and Gratitude

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STETSON LAW

Pooled Trusts Intensive

October 22, 2025

Trust Transfers Demystified: Legal and Practical Essentials



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**Trust Transfers Demystified:
Legal and Practical Essentials**

**Haley D. Greer, JD
The Arc of Texas**

Trust Transfers Demystified: Legal and Practical Essentials

Trustees change. Beneficiaries' needs evolve. And pooled trusts play an increasingly important role in managing assets for people with disabilities while preserving benefits eligibility. Trust transfers are often necessary but rarely straightforward. Whatever the reason, transferring a trust requires navigating state law, federal benefit rules, and the practical realities of pooled trust administration. This paper provides guidance on transfers from Section 1917(d)(4)(A) trusts ("D(4)(a)") to Section 1917(d)(4)(C) pooled trusts ("D(4)(c)"), and between D(4)(c) trusts. While not the main focus here, the same principles usually apply to third-party trust transfers.

Read the Trust

No matter the situation, the first step is always the same: **read the original trust document**. It contains the key terms and restrictions that will guide every decision in the transfer process.

Statutory Authority for Transfers

Most states do not have statutes that directly address transfers to pooled trusts. As a result, the method used will depend largely on how the original trust was established and the language contained in that document. If the trust was created by court order, a petition to the court will almost always be required to authorize a transfer.

Texas is an exception. The Texas Legislature has enacted statutes that specifically govern the transfer to pooled trusts. Under these laws, the court may order the transfer of funds from the existing D(4)(a) special needs trust to a D(4)(c) pooled trust. The resulting pooled trust sub-

account is established by court order, and the transfer is treated as a continuation of the original trust — not the creation of a new one — even though the trust no longer exists in the same form.

The legislature recognized the need to allow self-settled management trusts created under Section 1301 of the Texas Estates Code to a pooled trust. In 2014, the legislature created Texas Estates Code Section 1302 which governs the establishment of a pooled trust sub-account and Section 1301.202, which explicitly authorizes the transfer of a self-settled management trust to a pooled trust sub-account.

Sec. 1301.202. TRANSFER TO POOLED TRUST SUBACCOUNT. (a) If the court determines that it is in the best interests of the person for whom a management trust is created, the court may order the transfer of all property in the management trust to a pooled trust subaccount established in accordance with Chapter [1302](#).

(a-1) For purposes of a proceeding to determine whether to transfer property from a management trust to a pooled trust subaccount, the court may, but is not required to, appoint an attorney ad litem or guardian ad litem to represent the interests of a person who has only a physical disability for whom the management trust was created.

(b) The transfer of property from the management trust to the pooled trust subaccount shall be treated as a continuation of the management trust and may not be treated as the establishment of a new trust for purposes of 42 U.S.C. Section 1396p(d)(4)(A) or (C) or otherwise for purposes of the management trust beneficiary's eligibility for medical assistance under Chapter [32](#), Human Resources Code.

(c) The court may not allow termination of the management trust from which property is transferred under this section until all of the property in the management trust has been

transferred to the pooled trust subaccount.

Then in 2019, the Texas Legislature extended the same transfer authority for court created management trusts established under Texas Property Code Section 142 (Management Of Property Recovered In Suit By A Next Friend Or Guardian Ad Litem). An important piece to note in both statutes is “*The court may not allow termination of the management trust from which property is transferred under this section until all of the property in the management trust has been transferred to the pooled trust subaccount.* (emphasis added)” A sample order is included in Appendix A of this paper.

Before these statutory changes, transfers of a D(4)(a) trust to a D(4)(c) pooled trust were possible but often complex. The enactment of these statutes has created a clear, streamlined path to effectuate these transfers.

Federal Guidance: POMS and Decanting

In addition to state statutes, federal rules — especially The Social Security Administration’s (SSA) Program Operating Manual Systems (POMS) — influence how transfers are treated for benefits eligibility. SSA’s POMS has two provisions regarding decanting and transfers between trusts. The POMS include a definition and examples for decanting and language for early termination provisions.

POMS SI 01120.199D.7: Decanting (*Definition*)

Trust decanting generally refers to the distribution or transfer of trust property from one trust to one or more other trusts, usually with more favorable terms. Decanting may involve the early termination of the first trust, or the effect of decanting may be materially the same as the effect of an early termination. In such a situation, we generally

evaluate the decanting provision under the instructions on early termination in this section. However, decanting can be complex and can vary depending on applicable State law. It may be appropriate for the RO to seek input from OPLaw.

POMS SI 01120.199E.2: Exception for transfers to a secondary trust upon early termination.

An early termination provision in a section 1917(d)(4)(A) special needs trust or section 1917(d)(4)(C) pooled trust does not need to meet the above criteria if the provision allows solely for a transfer of the beneficiary's assets to a secondary section 1917(d)(4)(A) or section 1917(d)(4)(C) trust of which the same individual is the beneficiary.

The early termination provision must contain specific limiting language that precludes the early termination from resulting in disbursements other than to the secondary section 1917(d)(4)(A) or section 1917(d)(4)(C) trust or to pay for the administrative expenses listed in [SI 01120.199E.3](#) in this section and in [SI 01120.201F.4](#).

The Dallas SSA region has accepted transfers — whether completed before or initiated after the POMS revisions — without imposing penalties or raising eligibility concerns.

Understanding Pooled Trusts

To understand if a pooled trust transfer is right for a client's situation, the attorney first must understand how pooled trust sub-accounts are established and how they operate. Pooled Trust administrators will often find their role includes educating attorneys and families on what pooled trusts are and how they work. Pooled Trusts are not always the best solution and sometimes not a solution at all.

Most pooled trusts — including The Arc of Texas Master Pooled Trust (The Arc MPT) — use a single master trust(s) document for all beneficiaries. It is imperative that you discuss with the pooled trust you have chosen to determine their established procedures before moving forward. I will discuss how The Arc MPT works as an example, with a general understanding that many pooled trusts work similarly.

1. Pooled Trusts' Trustees are not Successor Trustees

Pooled Trusts' Trustees are not successor Trustees and cannot accept your trust as written. The transfer must be to a sub-account held under the Master Trust documents provided by the pooled trust. Generally, these documents are only changed or amended for the entire pool of beneficiaries that fall under that Trust. The Trust documents have language for amendments, but the Court does not have the authority to make amendments to the document as it is a master document.

2. The Court Does Not Appoint or Change the Trustee.

The Trust provisions govern the trustee, not the Court. These documents remain as written unless amendments are made to the master document, which in turn impacts all individuals in sub-accounts under that master trust document.

3. Joinder Agreements

Individuals join the pooled trust through an application document often called a Joinder Agreement. These joinder agreements are also static documents and cannot be individually amended or changed by the Grantor or court, only the Manager and/or Trustee. Review the trust agreement carefully to determine if this is the appropriate route for your client.

4. Assets to be Transferred and Pooled Investments

Pooled trusts often combine all the assets into a single pool for investment purposes. Some pooled trusts have different pools within their control, but they are not individually held. You must consider what assets are being held in trust and if the pooled trust can take such assets. Some pooled trusts will accept real property or other assets, however, The Arc MPT is only able to accept cash assets. The Arc MPT and many other pooled trusts cannot accept assets in kind, such as stocks or other investment vehicles, due to the pooled nature of the assets.

Understanding both the benefits and limitations of using a pooled trust is essential when determining if it is the right choice for the beneficiary's unique needs. If there are specific individual needs that the beneficiary has that do not fit the pooled trust model, then another option should be reviewed. Trying to fit a square peg in a round hole is never the right option.

Checklist: Questions to Ask Before Transfer

Before initiating a transfer or terminating an existing trust, carefully assess whether a pooled trust is the best solution. Use the following questions as a framework to determine whether a pooled trust sub-account meets the beneficiary's needs and circumstances.

1. Does the beneficiary meet SSA's definition of disability?

Medicaid eligibility alone does not establish disability for SSA purposes. You must confirm that the beneficiary meets the Social Security Administration's definition. Review the individual's Title II and Title XVI benefit status carefully — particularly for minors, who may receive Medicaid but not meet SSA's criteria for disability. If the beneficiary does not qualify under SSA's definition, a D(4)(C) pooled trust transfer is not an option (though other types of pooled trusts may still be).

2. Where does the beneficiary reside?

Choose a pooled trust that serves the state where the beneficiary lives or one that operates nationally. The Alliance of Pooled Trusts (<https://aptrusts.org/about/members/>) and Special Needs Answers (<https://specialneedsanswers.com/pooled-trust>) both offer useful directories to help you identify potential options.

3. What type of assets does the originating trust hold?

The nature of the trust's assets can determine whether a pooled trust is appropriate. Many pooled trusts accept only cash or easily liquidated assets. If the original trust holds real property, stocks, or other non-cash assets, verify that the chosen pooled trust will accept them before proceeding.

4. Will the pooled trust accept this particular sub-account?

Pooled trusts are not required to accept every applicant. Confirm — before filing anything with the court — that the pooled trust is willing and able to accept the beneficiary.

Completing a joinder agreement or preliminary application in advance is strongly recommended.

5. Was the original trust court-established?

If the trust was created by court order, a new court order will almost always be required to authorize the transfer. This order should include specific language establishing the pooled trust sub-account. The sample order included specifically references the information required under Texas Estates Code §1301.202 or Texas Property Code §142.010, but can be modified for other jurisdictions.

6. Who will complete the joinder agreement or application?

Most pooled trusts, including The Arc of Texas Master Pooled Trust, require a designated individual or entity — such as the original trustee, an ad litem, the beneficiary, their

guardian, or another party appointed by the court — to complete and sign the joinder documents. These documents must be accurate and should be reviewed and approved by the pooled trust before filing. The individual, a parent, grandparent, guardian or COURT must establish a self-settled account for SSA to accept the trust as exempt.

Practical Considerations:

1. **Verify SSI exception compliance.** Decanting is generally permissible if the new trust also qualifies for the same SSI exception — for example, when transferring from one compliant special needs trust (SNT) to another.
2. **Submit both trusts for review.** SSA requires copies of both the original and the new trust documents. All requirements under POMS SI 01120.203 must be met before and after the transfer. If the original trust was noncompliant, the decanting may be treated as the creation of a new trust.
3. **Do not terminate the original trust prematurely.** The original trust should remain in place until SSA confirms that the new trust is accepted.
4. **Be aware of transfer penalty risks.** If the new trust fails to meet SSA's requirements, the decanting may be treated as a transfer of assets for less than fair market value, potentially triggering a penalty.
5. **Transfer all irrevocably assigned assets.** Ensure that any assets previously assigned to the original trust are properly transferred to the new trust. If there was an irrevocable assignment (e.g., Court order, divorce decree, etc.) ensure that it is addressed appropriately.

Court Orders: Key Requirement

Depending on the situation, a court order may be required to authorize a trust transfer. If the trust was originally established by court order, the court typically retains jurisdiction over any subsequent transfer. Additionally, if the transfer involves a trust located in another state, court involvement may be required in both the originating and receiving jurisdictions.

In Texas, a court order is required to transfer funds from a management trust to a pooled trust sub-account. The following items should be included in the transfer application and order. (A sample order is included in Appendix A.)

1. **Establishment of the new trust sub-account.**

The court must explicitly order the creation of the pooled trust sub-account.

2. **Direction to complete all necessary paperwork.**

The order should identify the individual or organization responsible for preparing and submitting all documents required to establish the sub-account with the pooled trust.

3. **Terminate the original trust AFTER TRANSFER AND ACCEPTANCE**

The original trust must remain in place until all funds have been transferred to the new sub-account and acceptance by SSA/Medicaid has been completed. Premature termination could render the funds available to the beneficiary and jeopardize their benefits eligibility.

4. **Disclosure of continued funding sources.**

The application and order should include details about any ongoing or recurring funding sources associated with the trust. The order should direct payors to transfer the payments to the new trust/trustee.

5. **Direction to update beneficiary or payee designations.**

The order should require the originating trustee to update the beneficiary or payee

information on all ongoing funding sources. These entities typically will not make changes without proper documentation and a copy of the court order.

6. Timeline for updating payment designations.

The order should specify that any changes to payee or beneficiary designations for continued funding sources must be completed within 60 days of the court order.

7. Annual accounting requirements (if applicable).

If the court requires annual accountings, this must be stated explicitly. *Texas-specific note:* Sub-accounts established under Texas law do not require inventories or annual accountings unless ordered by the court.

Preparing for a Smooth Transfer

When assets or a trust is transferred to a new trust or trustee, clear communication and thorough documentation are essential. The following steps will help ensure the process goes smoothly and minimize disruptions for the beneficiary:

1. Confirm the new sub-account is established.

Before transferring funds or halting existing payments, verify that the pooled trust sub-account has been officially established and is ready to receive assets.

2. Communicate with the beneficiary and their representatives.

Notify the beneficiary (and anyone assisting them) when funds are sent. Remind them that it can take several weeks for funds to become available after transfer. Whenever possible, use electronic deposit to avoid delays.

3. Provide a copy of the court order.

Send the finalized court order to the pooled trust administrator to confirm authority for the transfer and guide account setup.

4. Share financial records.

Include recent trust statements or a balance sheet from the previous year to help the new trustee understand the account's history and activity.

5. Document recurring expenses.

Provide details on any ongoing or recurring disbursements — such as caregiver payments, regular bills, or structured payouts — along with addresses or other identifying information needed to continue those payments without interruption. If applicable, disclose ABLE account information and include relevant details so the pooled trust administrator can coordinate distributions appropriately.

6. List major past purchases.

Supply information on significant expenditures made in recent years (e.g., vehicles, home modifications, durable medical equipment, computers, or assistive technology) to provide context for ongoing needs and spending patterns.

7. Provide comprehensive beneficiary information.

Ensure the pooled trust has accurate contact information, benefit details, and living arrangement data for the beneficiary. If applicable, share information about housing stability, mental health considerations, or other recurring issues that may impact disbursement decisions.

8. Identify key individuals.

Notify the pooled trust of any individuals involved in the beneficiary's life (e.g., guardians, caregivers, case managers) who may need to be contacted or consulted.

9. Include funding source contracts.

When initiating changes to annuities, structured settlements, or other funding sources, request copies of those contracts and provide them to the pooled trust.

10. Address tax and TIN considerations.

Determine how the original trust was titled and whether it had its own Tax Identification Number (TIN). For example, The Arc of Texas Master Pooled Trust requires the original trustee to file tax returns for their period of service. Often, the pooled trust will obtain a new TIN and handle future tax filings but work with the new pooled trust to determine the appropriate steps.

Anytime there is a change in the way a beneficiary or their family requests or receives funds from their trust can be difficult. By providing thorough documentation and proactive communication, you can significantly reduce delays, prevent interruptions of benefits, and ensure the transition occurs as smoothly as possible.

Properly transferring a trust — especially from a D(4)(a) to a D(4)(c) pooled trust — requires careful attention to both legal requirements and practical realities. By understanding the statutory framework, SSA expectations, and pooled trust operations, practitioners can avoid pitfalls and ensure a seamless transition that preserves the beneficiary's eligibility and quality of life.



Trust Transfers Demystified: Legal and Practical Essentials

Haley Greer, JD
Director, Master Pooled Trust
The Arc of Texas

1

Transfer Map

Why Transfers
Matter

Legal Authority
& Guidance

Is a pooled
trust the right
destination?

Pre-Transfer
Checklist

Court Order
Essentials

Practical
Considerations

Preparing for a
Smooth
Transfer

Mind the Gap

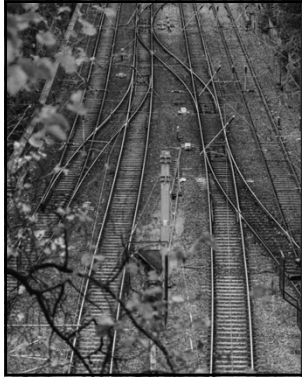
2

READ THE TRUST

Always start with reading the
originating trust. Is transfer an
option?



3



Why Transfers Matter

- Trustees change, beneficiaries' needs evolve, and circumstances shift.
- Transfers often become necessary for:
 - Trustee resignation or removal
 - Beneficiaries Move
 - Other trust management options
 - Structural or financial reasons
- Getting the process wrong risks benefits eligibility and legal compliance

4

Legal Authority & Guidance

- Most states lack specific statutes on transfers to pooled trusts.
- Decanting may be used.
- Court can order a transfer; treated as a continuation, not a new trust.
- **Key rule: Original trust cannot terminate until all assets are transferred.**



5



Legal Authority & Guidance

- SSA's POMS governs how trust transfers impact benefits.
 - POMS SI 01120.199D.7: Decanting (Definition)
 - POMS SI 01120.199E.2: Exception for transfers to a secondary trust upon early termination.
- Must still meet all criteria before and after the transfer.
- SSA will review both trusts and may impose penalties if requirements are not met.

6

Is a Pooled Trust the right Destination?

- ✓ Pooled Trusts' Trustees are not Successor Trustees
- ✓ The Court Does Not Appoint or Change the Trustee.
- ✓ Joinder Agreements
- ✓ Assets to be Transferred and Pooled Investments

7



Am I ready? Pre Transfer Checklist

- Does the beneficiary meet SSA's definition of disability?
- Where does the beneficiary reside?
- What type of assets does the originating trust hold?
- Will the pooled trust accept this sub-account?
- Was the original trust court-established?
- Who will complete the joinder agreement or application?

8

Ticket to Ride

What should be included in Court Orders

- Establishment of the new trust sub-account.
- Direction to complete all necessary paperwork.
- Terminate the original trust AFTER TRANSFER AND ACCEPTANCE
- Disclosure of continued funding sources.
- Direction to update beneficiary or payee designations.
- Timeline for updating payment designations.
- Annual accounting requirements (if applicable).



9



10



Preparing for a Smooth Transfer

11



Smooth Transfers

Confirm	Confirm the new sub-account is established.
Communicate	Communicate with the beneficiary and their representatives.
Court	Provide a copy of the court order.
Records	Share financial records.
Expenses	Document recurring expenses.

12

Smooth Transfers

List	List major past purchases.
Provide	Provide comprehensive beneficiary information.
Identify	Identify key individuals.
Funding	Include funding source contracts.
Tax	Address tax and TIN considerations.



13



- Transfers are routine — but **details matter**.
- Always read the original trust first.
- Communicate thoroughly to avoid disruption.
- Done right, a transfer preserves eligibility and ensures continuity of care.

14

Questions



15



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Pooled Trusts Intensive

October 22, 2025

Parental Duty of Support for Minors



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Pooled Trusts Intensive

October 22, 2025

Supported Decision Making



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***2025 National Conference on Special Needs Planning
and Special Needs Trusts***



October 22-24, 2025

Supported Decision-Making

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I. Introduction

Supported Decision-Making has become a focus of many advocates for people with disabilities and seniors, typically with the goal of reducing the need for guardianships or conservatorships in favor of the person with a disability or senior making their own decision with assistance. The Supported Decision-Making process allows the senior or person with a disability (commonly referred to as the “Decider”) to select friends, family, or professionals (commonly referred to as “Supporters”) to assist with gathering information in order to assist the Decider in making informed decisions about their own lives. While Supported Decision-Making Agreements may be new to many practitioners, the concept has been in practice for decades in Australia, Canada, Ireland, Israel, Sweden, Bulgaria, Croatia and Peru¹. In particular, Canada is internationally recognized for its leadership in legislated Supported Decision-Making. British Columbia’s *Representation Agreement Act*² is considered pioneer legislation, as it was one of the very first self-contained Supported Decision-Making (SDM) statutes in the world. Additionally, although British Columbia’s *Representation Agreement Act* was primarily developed to support people with developmental disabilities, the act is completely disability-neutral and assists all people with cognitive limitations or diminished capacity.

SDM certainly has its challenges for the Elder Law or Special Needs Trust practitioner. This presentation will focus not only on attorneys, but also fiduciaries, financial planners and other professionals involved in a Decider’s life. The history and scope of SDM will be provided, addressing the challenges that professionals may encounter with SDM. Incorporating the concept of Supported Decision-Making in drafting and administration of Special Needs Trusts (SNTs) will be reviewed, stressing beneficiary empowerment and settlor intent. Even in states that lack a SDM statute, it is prudent for all professionals to be familiar with its principles.

II. Supported-Decision Making: Goals

Putting the Decider at the helm of the decision-making process is a crucial and commendable goal. Understandably, one of the primary objectives of SDM advocates is the empowerment of Deciders, who, in addition to potentially having diminished capacity, may also be vulnerable to undue influence, fraud, or poor decision-making. SDM assists a person with a disability or senior with a cognitive challenge to assess all information about decisions that affect their lives, and have the information gathered by a Supporter whom they trust. In addition to information gathering, Supporters are tasked with communicating the relevant information effectively to the Decider in a manner they can understand. This translation and communication role is pivotal in empowering a Decider to make a fully informed decision, making SDM an effective tool for Deciders to have more control over their lives. For example, some persons with cerebral palsy may have severe challenges in mobility or communication, but be fully capable cognitively.

¹ <https://supporteddecisions.org/about-supported-decision-making/sdm-as-an-international-movement/>

² *Representation Agreement Act*, RSBC 1996, c 405

Therefore, having Supporters involved with medical or legal matters may assist the person to better gather information and express their true wishes.

An additional objective of SDM advocates is to encourage less reliance on conservatorships and guardianships (or even agencies under a power of attorney), due to their highly constrictive nature. To support this goal and assist in Decider empowerment, practitioners may consider reducing or limiting the full scope of conservatorship or guardianship arrangements by utilizing Supported Decision-Making agreements. In appropriate situations, an SDM agreement is an effective and less restrictive alternative, and is less costly than a court order or professional review. Dealing with capacity issues is nothing new to most Elder Law or Special Needs Trust practitioners. In fact, most such practitioners commonly provide counsel on estate planning, guardianships, conservatorships, powers of attorney, and health care directives while determining a client's legal or testamentary capacity. Additionally, planners need to be hyper-vigilant in such cases for issues concerning undue influence. Despite the challenges that the Supported Decision-Making process presents, SDM presents practitioners with a myriad of options to better serve their clients and communities.

III. Scope

The American Civil Liberties Union (ACLU) defines Supported Decision-Making as:

“Supported decision making (SDM) is a tool that allows people with disabilities to retain their decision-making capacity by choosing supporters to help them make choices. A person using SDM selects trusted advisors, such as friends, family members, or professionals, to serve as supporters. The supporters agree to help the person with a disability understand, consider, and communicate decisions, giving the person with a disability the tools to make her own, informed, decisions.”³

Historically, many people with disabilities and seniors with cognitive challenges would be forced to rely on guardians or conservators to make decisions about their lives. With SDM, this population may now be able to make their own determinations about what is best for them with the proper support in place. While many states do not have SDM statutes, the concept and process of SDM Agreements may assist in providing guidelines to further empower Deciders.

Internationally, the United Nations Convention on the Rights of Persons with Disabilities has endorsed the concept of Supported Decision-Making designed “to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and promote respect for their inherent dignity.” In the United States, there are a growing group of advocacy organizations that have endorsed the concept of Supported Decision-Making. For example, the National Guardianship Association (NGA) enacted the following

³ https://www.aclu.org/wp-content/uploads/legal-documents/faq_about_supported_decision_making.pdf

position statement on Guardianship, Surrogate Decision-Making and Supported Decision-Making: ⁴

OUR POSITION:

- The National Guardianship Association supports ongoing research to determine the effectiveness of supported decision-making models as alternatives to guardianship.
- Guardianship should be utilized only when lesser restrictive supports are not available. Alternatives to guardianship, including supported decision making, should always be identified and considered whenever possible prior to the commencement of guardianship proceedings.
- Whenever guardianship is necessary to assist a person, the guardianship must be limited, allow the maximum retention of individual rights, and be customized to the individual needs of the person under guardianship. NGA supports policies that help maximize the participation of the person and provide the person under guardianship with every opportunity to exercise those individual rights that the person might be capable of exercising.
- Under all circumstances, efforts should be made to encourage every person under guardianship to exercise his/her individual rights retained and participate, to the maximum extent of the person's abilities, in all decisions that affect him or her, to act on his or her own behalf in all matters in which the person is able to do so, and to develop or regain his or her own capacity to the maximum extent possible.
- Supported decision making should be considered for the person before guardianship, and the supported decision-making process should be incorporated as a part of the guardianship if guardianship is necessary.
- Supported decision making has been described as occurring when an individual with cognitive challenges is the ultimate decision maker but is provided support from one or more persons who explain issues to the individual and, where necessary, interpret the individual's words and behavior to determine his or her goals and preferences.
- Every guardianship should be focused on the person and grounded in demonstrating respect for the dignity of all involved.
- A guardian must understand and protect the rights of the person and utilize all the tools available to maximize the participation of the person and enable self-determination.

There are currently more than 20 states that have passed SDM statutes, and the list is expected to grow. Texas was the first state to enact a statute in 2015. To locate legislation in other states, visit [Access to Information Under Supported Decision-Making Statutes](#) ⁵, maintained by the American Bar Association (ABA). This ABA chart highlights four key elements of each piece of legislation, including Access to Information, Authorization or Obligation of Third Parties to Share Information, Third Party Reliance and Limitation of Liability. For brevity's sake, this presentation will only review SDM statutes in California, Texas and New York.

⁴ <https://www.guardianship.org/wp-content/uploads/2017/07/SDM-Position-Statement-9-20-17.pdf>

⁵ https://www.americanbar.org/content/dam/aba/administrative/law_aging/2022-accss-infmtn-sdm.pdf

In states that have enacted such statutes, practitioners, fiduciaries and trusted advisors should familiarize themselves with these statutes and resources. Even if practicing in a jurisdiction where SDM statutes have not been enacted, it is prudent that professionals become familiar with other states' statutes and strive to incorporate SDM elements into their planning, if appropriate. In addition, should a client or beneficiary move to a state with formalized SDM, it is prudent for the practitioner to understand the SDM regulations to assist clients in making thoughtful and prudent decisions.

IV. Supporters

SDM is a practical tool to use when incorporating person-centered planning. It allows the Decider to select Supporters that they trust, whether that be a friend, family member, or professional. Supporters agree to assist the Decider in understanding and considering the decision, as well as assisting them communicate the decision. To effectively relay such information, Supporters will often use different methods to assist the Decider such as:

- plain language
- visual or audio communication tools
- extra time to discuss decisions
- creating a list of pros and cons
- role-playing activities
- attending important meetings and taking notes for future reference

While the list of who can serve as a Supporter is extensive, there are some prohibitions on who may not. Full detail on Who Can Be a Supporter in Texas, California and New York may be found in **Appendix A**.

Statutes in California and New York list persons who are ineligible to serve as a Supporter and forbid a Supporter to serve if the Decider has been the subject of a protective order or restraining order against the Supporter. California further forbids someone to serve as a Supporter if they have been removed as the conservator of the Decider based upon a finding that they did not act in the conservatee's best interest. Additionally in California, a Supporter may not serve if they have been found criminally, civilly, or administratively liable for abuse, neglect, mistreatment, coercion, or fraud.

New York forbids someone to serve as a supporter if the local department of social services has found that the Supporter has committed abuse, neglect, financial exploitation, or physical coercion against the decision-maker.

Texas does not have a list of who can serve, but does require the SDM agreement to be terminated if "the Department of Family and Protective Services finds that the adult with a disability has been abused, neglected, or exploited by the supporter; the supporter is found

criminally liable for abuse, neglect or exploitation of the decider, or a temporary or permanent guardian of the person or estate appointed for the decider.”⁶

Both California and New York have specific limitations for the Supporter’s authority. The key principle in these restrictions is the role of the Supporter as an information gatherer rather than a surrogate decision-maker for the Decider. In fact, California forbids coercion, as well as obtaining any information not related to the matter for which the Decider has requested assistance. California statute also forbids disclosure of information for any purpose other than supporting the Decider. California law also disallows the Supporter from making any decisions or signing any documents on behalf of the Decider unless the Supporter has specific legal authorization to do so (and the action is within the scope of their authority). Of course, this principle does not apply if a Supporter also serves as an agent under a power of attorney for the Decider. More information on Limits on a Supporters Authority may be found in **Appendix D**.

V. Inventory System

A Supported Decision-Making Inventory System (SDMIS) is a robust assessment tool used to best assist the needs of the Decider. The SDMIS essentially establishes a holistic view of the Decider’s support needs, providing the Supporter a reference tool that assists with framing decision-making concepts in a manner that is easy to understand.

Developed in 2014, the Shogren and Wehmeyer SDMIS model (**Shogren, Wehmeyer, Palmer, Forber-Platt, et al. (2014b). *Self-Determination Inventory: Student-report [Pilot Version]***. Lawrence: Kansas University Center on Developmental Disabilities) is completed in an interview process with the Decider and may be used by the Supporter throughout the Decider’s lifetime. As with any tool for people with disabilities, it is designed to be flexible and change as the Decider’s needs and circumstances change. The Shogren and Wehmeyer model consists of three main inventories that focus on the Decider’s support needs:

- SDM Personal Factors Inventory: assesses a Decider’s personal aspects that influence decision-making including a Decider’s competency, communication preferences, and goals.
- SDM Environmental Demands Inventory: evaluates the complexity and relative nature of decisions in five key life areas (Health, Legal, Financial, Social, and Independent/Community Living) and assesses whether there are opportunities or supports available for such.
- SDM Autonomy Inventory: measures a Decider’s current level of autonomy in making their own decisions.

Put simply, a SDMIS is a tool designed to identify and customize a plan for support for a Decider. It helps identify which decisions or specific areas wherein a Decider may need assistance, and then assists in creating short- or long-term plans detailing what kind of assistance Supporters will provide. A SDMIS may also outline and provide a guide for multiple Supporters as different types of decisions may require different Supporters. A SDMIS may also track

⁶ TX Est Code, § 1357.053

decisions and their ultimate outcomes as decision-making is a skill that takes practice. Recording and assessing decisions in a SDMIS can be a useful tool for both the Supporter(s) and Decider. Finally, a SDMIS can be used to periodically re-evaluate a Decider's evolving needs and adjust the level of support necessary.

VI. SDM Agreements

It is generally a recommended best practice to have a Supported Decision-Making agreement formalized in writing. A SDM agreement is not a contract; rather, it is an authorization for the Supporter to assist the Decider. Of note, a SDM agreement is different from a durable power of attorney in that it goes into effect immediately after execution; whereas a durable power of attorney typically identifies the person who becomes a substitute decision-maker if the Decider becomes incapacitated.

All three states have similar language as far as the scope of the agreement. In New York, for example:

“If a decision-maker voluntarily enters into a supported decision-making agreement with one or more supporters, the decision-maker may, in the agreement, authorize the supporter to provide support to them in making their own decisions in areas they choose, including, but not limited to: gathering information, understanding and interpreting information, weighing options and alternatives to a decision, considering the consequences of making a decision or not making it, participating in conversations with third parties if the decision-maker is present and requests their participation, communicating the decision-maker's decision to third parties if the decision-maker is present and requests their participation, and providing the decision-maker support in implementing the decision-maker's decision.”⁷

Most statutes focus on gathering information to assist the Decider to interpret the information, as well as subsequently facilitating implementation of the decision. A chart illustrating the Scope of Agreement for all three states' SDM agreements may be found in **Appendix B**.

Essential Elements of a Supported Decision-Making Agreement:

Texas and New York have sample Supported Decision-Making Agreements drafted into their legislation. While neither state limits SDM agreements to the statutory examples, Texas law does state that a supported decision-making agreement is valid only if it is substantially similar to the form provided. While California does not have such a statutory agreement, the ACLU has supplied a sample agreement which has been the form widely accepted by most state agencies. For the Elder Law or Special Needs Trust practitioner, it may be prudent to either use the forms as provided or minimally modify them as needed to maximize acceptance. A sample Supported Decision-Making Agreement graciously provided by The Arc of Texas may be found online⁸.

⁷ State of New York Senate Bill S7107B, Cal. No. 540, 2021-2022 Sessions, June 1, 2021

⁸ www.thearcoftexas.org/wp-content/uploads/Blank_SDMA_2016-06.pdf

Of note, New York requires that certain powers of the SDM agreement be reviewed by a “facilitator”:

"Supported decision-making agreements can be an informal arrangement between the decision-maker and his or her supporter or supporters, or one that is in accordance with section 82.11 of this article, which has been reviewed and signed by a facilitator.

A "facilitator" means an individual or entity authorized by the office for people with developmental disabilities that works with and educates the decision-maker and his or her supporter or supporters about supported decision-making and supported decision-making agreements authorized under this article.”⁹

The Essential Elements of a Supported Decision-Making Agreement may be found in **Appendix C**. To summarize, a SDM Agreement should:

- Be written in plain language and in a manner the Decider can understand (to include the use of illustrations when appropriate).
- Identify who will serve as a Supporter and outline their duties or expectations.
- Identify which areas wherein a Decider requests support including education, financial matters, health care, and domicile.
- Identify the kind of support the Decider is seeking. This might involve gathering information, assisting the Decider to weigh alternatives or potential consequences of their actions, communicating decisions to others, or to assist with financial decisions.
- Be executed consistent with the formalities required in the applicable state. For example, California requires the document execution to be in the presence of two witnesses or a notary public.
- Identify when the agreement needs to be reviewed and how it is terminated.

Many states do not require that a SDM Agreement be in writing. However, and as noted above, if the SDM Agreement is informal and verbal (e.g., not written), it is recommended best practice that the SDM Agreement be converted to a written and properly executed document. A written agreement provides a level of assurance to third parties that the Decider’s decisions are informed and supported. Additionally, having the SDM Agreement in writing will protect both the practitioner and third-party (e.g., doctor, trustee, financial planner, etc.) from malpractice and/or liability.

VII. Undue Influence, Conflict of Interest

In general, even if so shielded in a trust instrument, applicable statute, or SDM agreement, fiduciaries cannot be excused from their ethical duties of loyalty and fidelity to their client. Nor may exculpations relieve fiduciaries from liability related to conflict of interest or self-dealing. These same concepts apply to Supporters.

⁹ State of New York Senate Bill S7107B, Cal. No. 540, 2021-2022 Sessions, June 1, 2021

In common law, there are three generally agreed upon key elements of fiduciary responsibility; namely, the duty of loyalty, the duty of care and the duty of full disclosure. At its core, the duty of loyalty requires any fiduciary to act in the best interest of the parties they serve. A fiduciary should never act in their own self-interest or in the interests of parties other than their beneficiaries. For example, it is concluded quite concisely in *Ramsey v. Boatmen's First Nat'l Bank of K.C., N.A.*, 914 S.W.2d 384, 387 (Mo.App. W.D.1996) that trustees are fiduciaries “of the highest order” and are required to exercise “a high standard of conduct and loyalty in administration of [a] trust.” This case goes on to illustrate that this duty of loyalty “precludes self-dealing” which in most cases would be considered a “breach of fiduciary duty.” Self-dealing is the conduct of a trustee or other fiduciary that takes advantage of their fiduciary position in a transaction in which they act in their own interests, oftentimes to the detriment of the person they are serving. Similar definitions of Supporter conflict of interest may be found in state statutes in New York, California and Texas:

California:

“A supporter shall not participate in any life decision in which they have a conflict of interest. This includes, but is not limited to, any decision in which the supporter has a financial or other tangible stake in the outcome.”¹⁰

Texas:

“In order to prevent a conflict of interest, if a determination is made by an adult with a disability that the supporter with whom the adult entered into a supported decision-making agreement is the most appropriate person to provide to the adult supports and services for which the supporter will be compensated, the adult may amend the supported decision-making agreement to designate an alternate person to act as the adult's supporter for the limited purpose of participating in person-centered planning as it relates to the provision of those supports and services.”¹¹

New York:

“if the supporter chosen by the decision-maker is an employee of a provider from whom the decision-maker receives services, the employee and the provider shall follow the requirements set out in regulations promulgated by the office for people with developmental disabilities, or other appropriate regulatory body which address those circumstances, with attention paid to relative labor law and employment obligations and possible conflicts of interest or the appearance of a conflict of interest.”¹²

Additionally, all aforementioned states make it clear that supporters may be held civilly or criminally liable for a breach of duty of a supporter. California section states:

¹⁰ CA Welf. and Inst. Code § 21002(4)

¹¹ TX Est Code, § 1357.0525

¹² State of New York Senate Bill S7107B, Cal. No. 540, 2021-2022 Sessions, June 1, 2021

“This division does not limit a supporter’s civil or criminal liability for prohibited conduct against the adult with a disability, including liability for fraud, abuse, neglect, breach of fiduciary duty, if any exists, coercion, or mistreatment, including liability under the Elder Abuse and Dependent Adult Civil Protection Act.”¹³

VIII. Multidisciplinary Issues

Assisting people with disabilities or seniors inevitably involves a multidisciplinary approach. Specialized knowledge across multiple disciplines such as social work, finance, psychology, and fiduciary administration is crucial to properly serve these individuals. Supporters will inevitably have to plan, educate, and advocate for their Decider and, in order to do so, may require the combined services of several professionals. This will most likely involve interaction by the Supporter and Decider with geriatric care managers, case managers, discharge planners, financial advisors, CPAs, agents under power of attorney, physicians, home health care or respite providers, and the family members and friends of the Decider. All parties in these situations must be aware of inherent ethical issues like the unauthorized practice of law and beneficiary/client confidentiality.

California’s statute specifically addresses when a Supporter has a right to attend such meetings:

“A third party may only refuse the presence of one of more adults, including supporters, if the third party reasonably believes that there is fraud, coercion, abuse, or other action by the individuals requested to be included that the third party is required to report pursuant to the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9).”¹⁴ [emphasis added]

While the Texas and New York statutes do not specifically address the Supporter’s right to be present in meetings, that right could be implied as essential to the Supporter’s role in gathering information to assist the Decider to make an informed decision. As such, planners and their staff should be familiar with state statute and reporting requirements should they suspect that a Supporter has breached their duty to the Decider and where such concern should be filed.

The interplay between such divergent parties can be challenging. Conflict will inevitably arise when a Supporter and Decider disagree with an SNT trustee, for example. In these situations, addressing the discretion and responsibilities of each party is critical. Explaining how well delineated each role is to a non-professional or family member Supporter may prove difficult during times of conflict. Example:

- Adult with a disability (Decider) resides in a trust-owned home.
- Decider requires care support over and above what their Medicaid and waiver programs will furnish. Shortfall is being funded by the SNT.
- Trust is being rapidly depleted (wasting).

¹³ CA Welf. and Inst. Code § 21002(a)

¹⁴ CA Welf. and Inst. Code § 21004(c)

- SNT trustee is forced to look at alternative housing solutions for the Decider and must sell the home to protect the beneficiary's long-term financial interests.
- Decider and Supporter(s) are adamant that Decider remains in the home in consideration of the Decider's health, comfort and well-being.

The trustee is stuck in an untenable position even while properly advocating for the Decider's long-term financial stability. While the trustee's position over the trust's longevity is justifiable, the family member guardian's position to maintain the beneficiary at home in a safe, known environment is extremely valid as well.

In order to solve this issue, the parties have several options at their disposal. The first and most obvious answer would be to simply petition the court for instruction. While this method best protects each party from future liability, it is the costliest. Alternative Dispute Resolution through a qualified arbitrator could also assist in achieving an agreeable outcome. Lastly, the use of other outside professionals throughout the discussions can be a crucial tool in achieving the best outcome for the Decider, and is at the crux of the SDM process. Either party in this scenario would benefit from an opinion letter or recommendation from any of the following:

- Medical professional
- Long Term Care placement advisor
- Social Worker
- Case or Care Manager
- Trust Protector or Trust Advisory Committee (discussed later)
- Investment Advisor (via a trust longevity projection)

However, in pursuing this avenue, all parties must be careful with sensitive or protected information regarding the Decider. For example, ethical rules provide in part that an attorney may not reveal a client's information without that client's consent. The ABA Model Rules of Professional Conduct (2020) (the Model Rules) Model Rule 1.6(c) states that "a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Confidentiality may be lost for any information conveyed by the Decider to the attorney in the presence of any third person not connected with the representation or issue at hand. Whether the Decider (or Supporter) will know when the confidentiality privilege applies is an area of concern - especially where multiple professionals are providing a Decider with information. The Decider may believe their communications with persons in these processes are protected when, in fact, they are not. In these situations, the highest standard of fiduciary care, prudence, and oversight must be practiced. It is crucial to always obtain Decider consent before divulging private or protected information to third parties, especially Health Insurance Portability and Accountability Act ("HIPAA") protected information.

Of note, however, is that many states recognize an exception to the presumption that a third-party presence invalidates the attorney-client privilege when a third person is present. Rather, the attorney-client privilege continues to apply if that third person is there in order to assist the client in the legal process and furthers a defendant's legal representation. Certainly, this exception could apply to a Supporter. In determining if the presence of the Supporter compromises the

attorney-client privilege, courts generally consider whether the defendant intended the communications to remain secret and the role of the third party.

Liability of Third Parties:

Texas' statute imposes a good faith standard on third parties and states that "a person who receives the original or a copy of a supported decision-making agreement shall rely on the agreement" and "... is not subject to criminal or civil liability and has not engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a supported decision-making agreement."¹⁵

New York states:

"A person shall not be subject to criminal or civil liability and shall not be determined to have engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a decision made by a decision-maker pursuant to a duly executed supported decision-making agreement created in accordance with this article."¹⁶

As mentioned previously, New York's statute does require that the Supported Decision-Making Agreement must be "signed by a facilitator and following a recognized supported decision-making facilitation or education process, as prescribed by regulations governing the facilitation and education processes promulgated by the office for people with developmental disabilities" in order for the third party to avoid criminal or civil liability. More information on Liability of 3rd Parties may be found in **Appendix E**.

IX. Conservatorships / Guardianships

Conservatorship and guardianship laws have been enacted in all states, with evolving standards over the past half century. This became particularly relevant as deinstitutionalization began across the country. In the past, many states allowed for a person to be conserved and held against their will in an institution without notice or an opportunity to contest the imposition of the conservatorship.

As civil rights groups furiously advocated for due process to occur before a court limited the civil rights of people with mental illness or a developmental disability, most states adopted a "least restrictive alternative" as a standard for courts to follow when contemplating a guardianship or conservatorship. In 1975, the U.S. Supreme Court decision in *O'Connor v. Donaldson* held that "a State cannot constitutionally confine, without more, a non dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends..."¹⁷

¹⁵ TX Est Code § 1357.101

¹⁶ State of New York Senate Bill S7107B, Cal. No. 540, 2021-2022 Sessions, June 1, 2021

¹⁷ *O'Connor v. Donaldson*, 422 U.S. 563 (1975)

The Elder Law or Special Needs Trust practitioner should research their state law to determine if changes have been made to their state's statutes concerning the utilization of Supported Decision-Making as a method to achieve the least restrictive alternative. For example, California's Supported Decision-Making statute, amended Section 416.7 of the California Health and Safety Code¹⁸, stating that a guardian or conservator must work collaboratively with the conservatee (and Regional Centers) as much as possible to develop and implement less restrictive alternatives to conservatorship.

Section 1800.3(c) of the California Probate Code was also amended to state:

“In determining whether a conservatorship is the least restrictive alternative available, and whether to grant or deny a conservatorship petition, the court shall consider the person's abilities and capacities with current and possible supports, including, but not limited to, supported decisionmaking agreements, as defined in Section 21001 of the Welfare and Institutions Code, powers of attorney, designation of a health care surrogate as set forth in Section 4711, and advance health care directives.”

X. Fiduciary Duty

A fiduciary is charged with many responsibilities, but above all else, a fiduciary has the duty of loyalty to those they serve. This duty of loyalty and advocacy is especially relevant in Supported Decision-Making and the population it assists. The duty of loyalty has been referred to as “the essence of the fiduciary relationship” (J.C. Shepherd, *The Law of Fiduciaries* 481 (1981)) and is widely considered to be the most fundamental duty of a trustee. Put simply, this duty requires the fiduciary/Supporter to avoid any self-dealing practices and act in the best interests of those whom they serve.

Fiduciaries also have the duty of care to the people they serve. The duty of care is oftentimes referred to as the duty of prudence. Essentially, this duty requires all fiduciaries to act reasonably, or as any prudent person would. Prudence may be defined as follows:

- *Harvard College v. Amory* 26 Mass. ((9 Pick.) 446 (1830)) - “Observe how [people] of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.”
- *Uniform Probate Code* § 7-302¹⁹ - “The trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent [person] dealing with the property of another....”
- *Uniform Prudent Investor Act* §2(a)²⁰ - “A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements,

¹⁸ CA Health & Safety Code § 416.7 (2022)

¹⁹ Uniform Probate Code, National Conference of Commissioners on Uniform Laws © 1969

²⁰ Uniform Prudent Investor Act, National Conference of Commissioners on Uniform Laws © 1995

and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”

The fiduciary duty of full disclosure requires fiduciaries to appropriately inform those they serve. In fact, the Model Rules require “full disclosure of material facts.” Most states have their own specific requirements in regards to clear and accurate accountings, which may apply to Supporters as well. The frequency of such accountings vary from state to state, as does the expiration of liability after such accountings are provided to the beneficiaries.

Financial accountings are especially relevant when a Supporter is dealing or assisting with the assets of the Decider (investable or otherwise). Additionally, an agent of the Decider may have the duty to act in good faith and invest trust assets prudently.

Supporters may not necessarily consider themselves to be acting in a fiduciary capacity. That said, a Supporter almost certainly has fiduciary liability. Even though the Supporter is only assisting the Decider in making a decision, they hold a heightened influence over the lens through which a Decider views the information provided. A Supporter is almost acting as an agent for the Decider in that they stand in a special relation of trust, confidence and responsibility. And, because they are human, there is always a risk that a Supporter could misinterpret their role by omitting certain information, or coloring their translation of information to guide the Decider to a conclusion that is more inline with the Supporter’s desired outcome or value system. Leading a Decider to a Supporter’s predetermined outcome through issue framing or inaccurate assessment of the Decider’s preferences could open up the Supporter to fiduciary liability. This issue can further be complicated as the Decider’s capacity changes over time.

XI. Drafting

Incorporating SDM concepts into an SNT may prove challenging. Precise drafting is required to reconcile what may be viewed as two diametrically opposed convictions. In essence, an SNT is essentially a spendthrift trust as the trustee has sole and absolute discretion about all distributions and the beneficiary has no authority. Conversely, Supported Decision-Making promotes the person with a disability or senior as the Decider to control their own decisions about their lives with assistance from the Supporter. In many cases, it could be that the primary objective of the settlor is to never allow the beneficiary to control the trust funds or have input into their use. However, a settlor’s objective may instead be to allow the beneficiary to have as much control over their lives as possible. The challenge becomes how to grant some measure of beneficiary control or input without jeopardizing the beneficiary’s eligibility for public benefits. As such, incorporating Supported Decision-Making concepts in planning can be challenging for the SNT practitioner.

Much of this difficulty comes from the need to incorporate the nature of needs-based public benefits such as Supplemental Security Income (SSI) and Medicaid. SNT trustees are tasked with preserving a beneficiary’s vital public benefits. But in order to do so, an SNT must be administered in the sole discretion of a trustee who must be someone other than the beneficiary. Many trustees view the preservation of SSI and Medicaid as their primary goal. For SSI, income

is defined as “any item an individual receives in cash or in-kind that can be used to meet their need for food or shelter”²¹ and may offset an SNT beneficiary’s SSI award amount. Disbursements that do not count as income may include distributions made for educational expenses, therapy, transportation, professional fees, medical services not covered by Medicaid, phone bills, recreation, and entertainment. Disbursements made from the SNT to a third party that result in the trust beneficiary receiving non-cash items (other than food or shelter) are also not considered income if those items would become a totally or partially excluded non-liquid resource if retained in the month after the month of receipt of said item. SNT trustees must also consider resource limits for beneficiaries receiving needs-based public benefits. Resources are considered cash and any other personal property, as well as any real property, that an individual (or spouse) owns, has the right, authority, or power to convert to cash, and is not legally restricted from using for their support and maintenance. An individual (or couple) with countable resources in excess of the statutory limit is not eligible for federal SSI or some federally-administered state supplementary payments. Given the complexity of these SSI rules, if the trust is not properly drafted to incorporate the settlor’s desires, an SNT trustee may focus solely on preserving the beneficiary’s SSI income, to the detriment of empowering the beneficiary/Decider.

Consider the following Example: Enhancing a Beneficiary’s Financial Literacy

- Settlers (parents) wish to enact a plan for their daughter.
- Their daughter was born with Down syndrome, but despite her challenges both parents want her to be as empowered as possible in making decisions about her own life.
- Their daughter is 19 years old, and rather than conserve her, the parents assisted their daughter to set up a Supported Decision-Making Agreement.
- Their daughter is easily influenced by others and is likely vulnerable to financial abuse.
- The daughter subsequently chose three close friends as her Supporters.

While the parents wish to empower their daughter to have as much control over her life as possible, they do have concerns about her financial literacy and financial capability. Their daughter, like many SSI recipients, has never managed any funds. Much of the support she is receiving is based on SSI and Medicaid eligibility, and she has no experience with making expenditures or investments. The parents recognize that their daughter will likely always need financial oversight to protect her from predators. Unfortunately, it is impossible to grant their daughter any real semblance of control (or to direct mandatory distributions for her benefit) from the SNT, as that would cause a loss of SSI or Medicaid benefits.

In order to comply with settlor intent and empower the daughter to have as much say in her affairs as possible, a third party SNT is drafted that incorporates language encouraging the trustee to cooperate with the daughter’s SDM Supporters. The SNT document indicates a preference for the development of an annual distribution plan based on recommendations from the daughter and her Supporters. Based on the plan, it is encouraged that the daughter has access to an administrator-managed prepaid debit card (such as the True Link Prepaid Visa Card) or an ABLE Account to promote her financial independence. All such language is precatory.

²¹ Social Security Administration, Program Operations Manual System (POMS) SI 00810.005

The distribution plan is approved by the trustee, incorporating requests from the daughter and her Supporters. The distribution plan includes pre-approved expenditures, to be executed via the use of a True Link Prepaid Visa Card (True Link Card) by the daughter. The daughter and her Supporters agree to account for her expenditures monthly by submitting receipts. True Link Cards are an allowable vehicle for paying for beneficiary expenses from an SNT without causing a potential loss in public benefits, per SSI:

“If the administrator-managed prepaid card is used to obtain cash, such as at an ATM, the withdrawal counts as unearned income. If the administrator-managed prepaid card pays for food or shelter items, such as charges at a restaurant, the individual will generally be charged with ISM up to the PMV. If the administrator-managed prepaid card pays for non-food, non-shelter items, such as for clothing at a department store, the individual usually does not receive income unless the item received would not be a totally or partially excluded non-liquid resource the following month. The administrator-managed prepaid card is not the trust beneficiary’s resource.”²²

As many people do when given their first opportunity at financial independence, the daughter initially makes inappropriate expenditures, depletes her True Link Card balance in a matter of days, and cannot account for her purchases (e.g., saving and submitting receipts). Thankfully, the trustee allows the daughter to fail at first. After all, doesn’t everyone learn from their mistakes during their lifetimes? Over time, with the help of her Supporters, the daughter gains experience not only making expenditures, but also in keeping receipts and sticking to a budget. In this example, the structure of a Supported Decision-Making Agreement was successful and the daughter gained valuable experiences in making her own decisions, setting her own goals, and being financially prudent. And while the daughter could never directly compel the trustee to continue funding the distribution plan had things gone awry, she or her Supporters could likely ask for the assistance of a trust advisory committee or trust protector to persuade the trustee to comply with settlor intent.

XII. Trust Advisory Committees, Trust Protectors, and Trustees

Like everyone, Deciders have ever-changing lives. As such, any legal and financial plan is variable and should be adaptable. A trust protector or trust advisory committee can be very useful if given the authority to interact with the trustee and SNT beneficiary/Decider. The utilization of such appointments can make for a truly collaborative and empowering administration of a trust.

²² Social Security Administration, Program Operations Manual System (POMS) SI 01120.201 1.1.e

Trust Advisory Committee:

Trust advisory committees have been incorporated in trust documents since the inception of the SNT. It has become common practice for an SNT to incorporate an advisory committee or a trust protector to ensure that settlor intent and the needs of the beneficiary are fulfilled. This can also allow for a system to make changes in the document as laws and policies change, and replacement of the trustee if needed.

Development of a distribution plan may be the primary focus of the trust advisory committee. This allows all parties to provide input, work collaboratively, and potentially pre-approve distributions, giving everyone a clear path to follow while promoting beneficiary independence. It is imperative to be clear about how the trust committee is structured, who is in charge, and when and how the committee members need to act. It is also becoming more common to require the trustee to work with a care manager to create an annual distribution plan to be reviewed by the committee and Supporter(s).

Sample trust advisory committee language graciously provided by Wealth Counsel:

The Trust Advisory Committee shall consist of a minimum of 3 members, but no more than 5 members to be determined by the chairperson(s) then serving. If any member of the Trust Advisory Committee is unwilling or unable, for any reason, to act or continue to act as a committee member, the chairperson(s) then serving may decide whether or not to fill the vacancy. However, there shall be at least three (3) members serving at all times. If there are fewer than 3 members serving and the chairperson(s) then serving are unable or unwilling to appoint a successor committee member, the Trustee may appoint the successors.

The initial Chairpersons for the Trust Advisory Committee shall be:

XXXX
XXXX

<In the event that either XXXX or MaryXXX cannot or will not serve, then the remaining chairperson shall <serve alone/select a successor chairperson/elect whether to select a co chair.>

or

<In the event that neither XXXX nor XXXX is willing to serve, then the remaining advisory committee members shall select a chairperson by majority vote.>

Duties of the Chairperson(s)

The Chairperson(s) primary duty is to ensure that the duties and the timelines of the Trust Advisory Committee are followed, and to make sure that there are at all relevant times the proper number of members on the committee.

Selection of the Remaining Trust Advisory Committee Members

The grantors shall maintain a schedule of successor Trust Advisory Committee members to be updated from time to time to provide guidance for the Trust Advisory Committee for selection of successor Trust Advisory Committee members to maintain the requisite number of committee members.

A Supporter may also potentially be a part of the trust advisory committee. If this is the case, the trustee and their counsel should be vigilant and proactively identify any conflicts of interest between the beneficiary/Decider and the Supporter(s). As per California's SDM statute: "A supporter shall not participate in any life decision in which they have a conflict of interest. This includes, but is not limited to, any decision in which the supporter has a financial or other tangible stake in the outcome."²³ As such, it may be prudent to clearly delineate the duties of the Supporters and the members of the advisory committee.

Trust Protector:

Similar to a trust advisory committee, a trust protector role can be extremely useful. In addition to the duties and rights of trust advisory committees, trust protectors are generally granted the power to amend the trust, either to satisfy settlor intent or to adapt to changes in public benefits regulations. Being able to make such changes without court intervention saves the trust unwarranted and potentially onerous legal fees. Additionally, a trust protector with the power to advise and weigh in on discretionary distribution decisions can be a wonderful tool for managing beneficiary expectations. When the trust protector or trust advisory committee has this right (not duty), it can potentially help to keep family members and Supporters involved in a beneficiary with a disability's life while providing priceless insight and guidance for the trustee.

Below, please find select pertinent provisions relating to Trust Protector or Trust Advisor appointment, graciously provided by Bradley J. Frigon, JD, LL.M (tax), CELA, CAP:

- "Any Trust Protector (including successors) shall have the right to appoint a Successor Trust Protector in writing, such appointment to take effect upon the death, resignation or incapacity of the appointing Trust Protector. If a Successor Trust Protector is named, the appointment of a Successor Trust Protector under this subsection shall take effect only if, and when, all Trust Protectors named in this Agreement fail to qualify or cease to act."
- "The Trust Protector shall have the authority to remove any Trustee with or without cause. Whenever the office of Trustee of a Trust is vacant and no Successor Trustee is effectively named, the Trust Protector shall appoint an individual or a corporate fiduciary to serve as Trustee."
- "The Trust Protector may amend any provision of this Agreement, as it applies to any Trust for which the Trust Protector is serving, pursuant to [subsequent restrictions]. Notwithstanding the foregoing, the Trust Protector may not amend this Agreement in any manner that would make Trust corpus or income available to the Beneficiary for

²³ CA Welf. and Inst. Code § 21002(4)

Medicaid eligibility. Further, the Trust Protector may not limit or alter the rights of the Beneficiary in any Trust assets held by the Trust before the amendment, nor may the Trust Protector remove or add any individual or entity as a beneficiary of any Trust asset.”

- “Any amendment made by any Trust Protector in good faith is conclusive on all persons interested in the Trust. The Trust Protector is not liable for the consequences of making or not making any amendment. Any amendment to this instrument made by any Trust Protector must be made in a written instrument signed by the Trust Protector and delivered to the Beneficiary or the Beneficiary’s Legal Representative and the Trustee of the Trust.”
- “Notwithstanding any other provision in this Agreement to the contrary, the Trust Protector shall not participate in the exercise of a power or discretion conferred under this Agreement that would cause the Trust Protector to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Internal Revenue Code. Specifically, the Trust Protector may not use such powers for his or her personal benefit, nor for the discharge of his or her financial obligations.”
- “The Trust Protector shall have no duty to monitor any Trust created under this Agreement in order to determine whether any of the powers and discretions conferred by this Agreement on the Trust Protector 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 non-exercise of 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.”

Trustee:

It is possible that a Supporter may also serve as trustee (or co-trustee) of an SNT. This structure may prove extremely useful if the Supporter Trustee, in their dual role, is expected to assist the beneficiary with personal decisions and execute on them. In this scenario, potential conflicts of interest must be continuously evaluated and monitored, especially if the Supporter is a remainderperson of the SNT.

Example:

- Supporter Trustee is serving as trustee of an SNT and is not a remainderperson of the trust (thus obviating a potential conflict of interest).
- The SNT beneficiary needs an immediate emergency medical procedure and needs the Supporter to explain all facets of the procedure.

As Supporter, the Supporter Trustee may be present and privy to all facets of the medical procedure and advise on such. As Trustee, the Supporter Trustee can immediately authorize and execute the payment for services.

Of importance, should a Supporter serve in any of these dual capacities (trust advisory committee member, trust protector, or trustee), they would be subject to heightened fiduciary liability.

XIII. Emerging Research & Educational Resources

The effectiveness of Supported Decision-Making and its beneficial outcomes continue to be researched and studied. One of the most prominent research projects in this area is being conducted through a partnership of The Burton Blatt Institute at Syracuse University, the Kansas University Center on Developmental Disabilities, and the Quality Trust for Individuals with Disabilities. The project is examining how a person's decision-making process impacts their level of self-determination and quality of life. It is also studying how SDM affects a Decider's community participation and integration, family dynamics, life satisfaction and positive daily-living outcomes. The study hopes to significantly add to the existing state of evidence-based research on the benefits of SDM.

SDM successes have been lauded nationally and internationally, and one such case even led to the development of the Jenny Hatch Justice Project²⁴. The U.S. Administration on Community Living has also established the National Resource Center on Supported Decision-Making²⁵, which serves as a warehouse for information, education, and research on SDM. Both organizations have an annual national symposium on SDM for families, people with disabilities, professionals, and counsel to continue research, share knowledge and promote the concepts of SDM.

There are also fantastic resources on SDM available through the Arc of Texas²⁶, and continuing education and acceptance of SDM is codified in California statute:

“In developing educational information or training materials on supported decisionmaking or supported decisionmaking agreements, the California Health and Human Services Agency or any departments under its jurisdiction shall do all of the following:

(a) Consider the needs of individuals who have been underserved, including, but not limited to, immigrants, individuals whose preferred language is not English, individuals from rural communities, and individuals living in long-term care facilities.

(b) Consider existing materials and resources on supported decisionmaking and best practices developed nationwide.

²⁴ www.jennyhatchjusticeproject.org

²⁵ www.supporteddecisionmaking.com

²⁶ www.thearcoftexas.org/get-informed/im-a-self-advocate/sdma

(c) Consult with stakeholders to provide input about the information, materials, and training being developed. The stakeholders shall include persons with a disability, including an older adult with a disability, family members of a person with a disability and family members of an older adult living in a long-term care facility, and one representative of each of the following: the State Council on Developmental Disabilities; the protection and advocacy agency described in subdivision (i) of Section 4900; the client's rights advocate described in Section 4433; a disability organization; the California Health and Human Services Agency's Alzheimer's and Related Disorders Advisory Committee, the departments' ombudsperson offices; and an organization representing older adults.”²⁷

XIV. Conclusion

There are many practitioners who have expressed concerns that Supported Decision-Making will eliminate the option and protections that a traditional conservatorship or guardianship provides. To the contrary, to date, Supported Decision-Making has not resulted in a large-scale reduction in the amount of conservatorships or guardianships being granted. As with any significant change in legislation (e.g., ABLE Act, SECURE Act, one year elimination of the estate tax, etc.), planners’ concerns about new tools are generally assuaged over time, and, in fact, promote lively dialog and present new opportunities for beneficiaries and settlors. As such, learning about and embracing the concepts of Supported Decision-Making provides an opportunity for planners to further assist their settlor clients and empower beneficiaries to be more self-reliant than ever. Seeking the least restrictive alternative and not limiting anyone’s civil rights through Supported Decision-Making is becoming a fantastic tool to empower persons with disabilities and seniors to make informed decisions and promote their dignity and financial independence. In the end, Supported Decision-Making is about empowerment and communication - two goals which should be paramount for any advocate for people with disabilities and seniors.

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

²⁷ CA Welf. and Inst. Code § 21008

Supported Decision-Making

Appendix A

Who Can Be a Supporter		
California	Texas	New York
b) An individual shall not be selected as a supporter or continue as a supporter of an adult with a disability in any of the following circumstances: (1) The adult with a disability previously made, or makes, an allegation against the supporter under the Elder Abuse and Dependent Adult Civil Protection Act. (2) The adult with a disability has obtained, or obtains, an order of protection from abuse against the supporter. (3) The supporter is the subject of a civil or criminal order prohibiting contact with the adult with the disability, or is subject to a restraining order with respect to the adult with a disability. (4) The supporter has been removed as the conservator of the adult with a disability, based upon a finding that they did not act in the conservatee's best interest. (5) The supporter is found criminally, civilly, or administratively liable for abuse, neglect, mistreatment, coercion, or fraud.	Sec. 1357.053. TERM OF AGREEMENT. (a) Except as provided by Subsection (b), the supported decision-making agreement extends until terminated by either party or by the terms of the agreement. (b) The supported decision-making agreement is terminated if: (1) the Department of Family and Protective Services finds that the adult with a disability has been abused, neglected, or exploited by the supporter; (2) the supporter is found criminally liable for conduct described by Subdivision (1); or (3) a temporary or permanent guardian of the person or estate appointed for the adult with a disability qualifies.	(b) An individual who has been chosen by the decision-maker to be a supporter, or who has entered into a supported decision-making agreement as a supporter, shall be deemed ineligible to act, or continue to serve as supporter upon the occurrence of any of the following: 1. a court authorizes a protective order or restraining order against the supporter on request of or on behalf of the decision-maker; or 2. the local department of social services has found that the supporter has committed abuse, neglect, financial exploitation, or physical coercion against the decision-maker as such terms are defined in section 82.02 of this article. (c) A supporter may resign as supporter by written or oral notice to the decision-maker and the remaining supporters. (d) If the supported decision-making agreement includes more than one supporter or is amended to replace the supporter who is ineligible under subdivision (b) of this section or resigns under subdivision (c) of this section, the supported decision-making agreement shall survive for the remaining supporters, unless it is otherwise revoked under section 82.07 of this article. (e) If the supported decision-making agreement does not include more than one supporter, and is not amended to replace the supporter who becomes ineligible under subdivision (b) of this section or resigns under subdivision (c) of this section, the supported decision-making agreement shall be considered terminated.

Appendix B

Scope of Agreement		
California	Texas	New York
(a) An adult with a disability may choose to enter into a supported decisionmaking agreement with one or more chosen supporters. Support may include, but is not limited to, helping the adult with a disability obtain and understand information related to a life decision, communicating the decision to others, and assisting the individual to ensure their preferences and decisions are honored. (b) An adult with a disability's signing of a supported decisionmaking agreement does not preclude the adult with the disability from acting independently of a supported decisionmaking agreement and shall not be used by a court or other entity as evidence of incapacity. This subdivision does not limit the admissibility of evidence pursuant to Section 28 of Article 1 of the California Constitution.²⁸	An adult with a disability may voluntarily, without undue influence or coercion, enter into a supported decision-making agreement with a supporter under which the adult with a disability authorizes the supporter to do any or all of the following: (1) provide supported decision-making, including assistance in understanding the options, responsibilities, and consequences of the adult's life decisions, without making those decisions on behalf of the adult with a disability; (2) subject to Section 1357.054, assist the adult in accessing, collecting, and obtaining information that is relevant to a given life decision, including medical, psychological, financial, educational, or treatment records, from any person; (3) assist the adult with a disability in understanding the information described by Subdivision (2); and (4) assist the adult in communicating the adult's decisions to appropriate persons.²⁹	(a) If a decision-maker voluntarily enters into a supported decision- making agreement with one or more supporters, the decision-maker may, in the agreement, authorize the supporter to provide support to them in making their own decisions in areas they choose, including, but not limited to: gathering information, understanding and interpreting information, weighing options and alternatives to a decision, considering the consequences of making a decision or not making it, participating in conversations with third parties if the decision-maker is present and requests their participation, communicating the decision-maker's decision to third parties if the decision-maker is present and requests their participation, and providing the decision-maker support in implementing the decision-maker's decision.

²⁸ CA Welf. and Inst. Code § 21003

²⁹ TX Est Code § 1357.051

Appendix C

Essential Elements of a Supported Decision-Making Agreement		
California	Texas	New York
(a) A supported decision making agreement shall be written in plain language accessible to the adult with the disability and shall include, but not be limited to, all of the following: 1) A list of the areas in which the adult with a disability requests support. (2) A list of the areas in which the supporter agrees to provide the support. (3) The supporter's agreement that they meet each of the requirements specified in Section 21002. (4) Information advising the adult with a disability about their right to file a report under the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9), including, but not limited to, Sections 15656 and 15657. (5) Information and copies of other supported or substituted decisionmaking documents the adult with a disability has in place, including, but not limited to, powers of attorney, authorizations to share medical or educational information, authorized representative forms, or representative payee agreements.	TX Est Code § 1357.056(a) Subject to Subsection (b), a supported decision-making agreement is valid only if it is in substantially the following form: SUPPORTED DECISION MAKING AGREEMENT.³⁰ My supporter is not allowed to make decisions for me. To help me with my decisions, my supporter may: 1. Help me access, collect, or obtain information that is relevant to a decision, including medical, psychological, financial, educational, or treatment records. 2. Help me understand my options so I can make an informed decision; or 3. Help me communicate my decision to appropriate persons. Y/N A release allowing my supporter to see protected health information under the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) is attached. Y/N A release allowing my supporter to see educational records under the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Sec	(a) A supported decision-making agreement may be in any form consistent with the requirements set forth in this article. (b) A supported decision-making agreement must: 1. be in writing; 2. be dated; 3. designate the decision-maker, and at least one supporter; 4. list the categories of decisions with which a supporter is authorized to assist the decision-maker; 5. list the kinds of support that each supporter may give for each area in which they are designated as a supporter; contain an attestation that the supporters agree to honor the right of the decision-maker to make their own decisions in the ways and areas specified in the agreement, respect the decision-maker's decisions, and, further, that they will not make decisions for the decision-maker; 7. state that the decision-maker may change, amend, or revoke the supported decision-making agreement at any time for any reason, subject to the requirements of section 82.06 of this article; 8. be signed by all designated supporters; and 9. be executed or endorsed by the decision-maker in the presence of at least two adult witnesses who are not also designated as supporters, or with the attestation of a notary public. (c) A supported decision-making agreement may: 1. appoint more than one supporter; 2. authorize a supporter to obtain personal information as described in subdivision (e) of section 82.05 of this article; 3. authorize a supporter to share information with any other supporter or others named in the agreement; or 4. detail any other limitations on the scope of a supporter's role that the decision-maker deems important.

³⁰ https://texaslawhelp.org/sites/default/files/supported_decision-making_agreement_2019_3.pdf

California	Texas	New York
21004. (a) Notwithstanding any other provision of this division, an adult with a disability is entitled to have present one or more other adults, including supporters, in any meeting or discussion, or to participate in any written communication, including, but not limited to, individual planning meetings required by state or federal law, service and care planning meetings, discharge planning meetings, meetings with health care providers and individuals who provide residential services or long-term services and supports, and communications with a bank, financial institution, or financial planner. (b) An adult with a disability may indicate that they wish to have one or more adults attend a meeting or discussion or participate in any written communication through oral statement, gesture, or any augmentative or alternative communication method used by the adult with a disability. (c) A third party may only refuse the presence of one of more adults, including supporters, if the third party reasonably believes that there is fraud, coercion, abuse, or other action by the individuals requested to be included that the third party is required to report pursuant to the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9).		(d) A person, entity, or agency that receives a supported decision-making agreement must honor a decision made in accordance with the agreement, unless the person, entity, or agency has substantial cause to believe the supported decision-making agreement has been revoked, or the decision-maker is being abused, coerced, unduly influenced, or financially exploited by the supporter, or that the decision will cause the decision-maker substantial and imminent physical or financial harm.

Appendix D

Limits on a Supporters Authority		
California	Texas	New York
(d) (1) A supporter shall not coerce an adult with a disability. (2) Unless the supporter has a valid legal authorization to do so and the action is within the scope of their authority, a supporter shall not do either of the following: (A) Make decisions for, or on behalf of, the adult with a disability. (B) Sign documents on behalf of the adult with a disability. (3) A supporter shall not obtain information not reasonably related to matters with which the adult with a disability has requested assistance, and shall not use or disclose information for any purpose other than supporting the adult with a disability. (4) A supporter shall not participate in any life decision in which they have a conflict of interest. This includes, but is not limited to, any decision in which the supporter has a financial or other tangible stake in the outcome.	Sec. 1357.0525. DESIGNATION OF ALTERNATE SUPPORTER IN CERTAIN CIRCUMSTANCES. In order to prevent a conflict of interest, if a determination is made by an adult with a disability that the supporter with whom the adult entered into a supported decision-making agreement is the most appropriate person to provide to the adult supports and services for which the supporter will be compensated, the adult may amend the supported decision-making agreement to designate an alternate person to act as the adult's supporter for the limited purpose of participating in person-centered planning as it relates to the provision of those supports and services.	(b) A supporter is prohibited from: 1. making decisions for the decision-maker, except to the extent otherwise granted in an advance directive; 2. exerting undue influence upon the decision-maker; 3. physically coercing the decision-maker; 4. obtaining, without the consent of the decision-maker, information acquired for a purpose other than assisting the decision-maker in making a decision authorized by the supported decision-making agreement; 5. obtaining, without the consent of the decision-maker, or as expressly granted by the supported decision-making agreement, and accompanied by an appropriate release, nonpublic personal information as defined in 15 U.S.C. § 6809(4)(A), or clinical records or information under subdivision (c) of section 33.13 of this chapter; and 6. communicating a decision-maker's decision to a third-party without the participation and presence of the decision-maker.

Reporting Abuse, Coercion, Undue Influence or Financial Abuse		
California	Texas	New York
(a) A supporter is bound by all existing obligations and prohibitions otherwise applicable by law that protect adults with disabilities and the elderly from fraud, abuse, neglect, coercion, or mistreatment. This division does not limit a supporter's civil or criminal liability for prohibited conduct against the adult with a disability, including liability for fraud, abuse, neglect, breach of fiduciary duty, if any exists, coercion, or mistreatment, including liability under the Elder Abuse and Dependent Adult Civil Protection Act ³¹	REPORTING OF SUSPECTED ABUSE, NEGLECT, OR EXPLOITATION. If a person who receives a copy of a supported decision-making agreement or is aware of the existence of a supported decision-making agreement has cause to believe that the adult with a disability is being abused, neglected, or exploited by the supporter, the person shall report the alleged abuse, neglect, or exploitation to the Department of Family and Protective Services in accordance with Section 48.051, Human Resources Code.³²	§ 82.14 Reporting abuse, coercion, undue influence, or financial exploitation. (a) Any person who receives a copy of or an original supported decision-making agreement and has cause to believe the decision-maker is being abused, physically coerced, or financially exploited by a supporter, may report the alleged abuse, physical coercion, or financial exploitation to adult protective services pursuant to section four hundred seventy-three of the social services law. (b) Nothing in this section may be construed as eliminating or limiting a person's duty or requirement to report under any other statute or regulation.

³¹ CA Welf. and Inst. Code § 21002

³² TX Est Code § 1357.102

Appendix E

Liability of 3 rd Parties		
California	Texas	New York
3958. (a) A person who receives the original or a copy of a supported decisionmaking agreement described in Section 3955 shall rely on the agreement and its authority as presented. (b) A person may rely on known supports used by the adult with a disability other than a written supported decisionmaking agreement as described (in this statute)	Sec. 1357.101. RELIANCE ON AGREEMENT; LIMITATION OF LIABILITY. (a) A person who receives the original or a copy of a supported decision-making agreement shall rely on the agreement. (b) A person is not subject to criminal or civil liability and has not engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a supported decision-making agreement.	82.12 Limitations on liability. a) Subdivisions (b), (c) and (d) of this section shall apply only to decisions made pursuant to supported decision-making agreements created in accordance with this article which are signed by a facilitator and following a recognized supported decision-making facilitation or education process, as prescribed by regulations governing the facilitation and education processes promulgated by the office for people with developmental disabilities. (b) A person shall not be subject to criminal or civil liability and shall not be determined to have engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a decision made by a decision-maker pursuant to a duly executed supported decision-making agreement created in accordance with this article. (c) Any health care provider that provides health care based on the consent of a decision-maker, given with support or assistance provided through a duly executed supported decision-making agreement created in accordance with this article, shall be immune from any action alleging that the decision-maker lacked capacity to provide informed consent, unless the entity, custodian, or organization had actual knowledge or notice that the decision-maker had revoked the supported decision-making agreement, or that the supporter had committed abuse, physical coercion, undue influence, or financial exploitation with respect to the decision to grant consent. (d) Any public or private entity, custodian, or organization that discloses personal information about a decision-maker in reliance on the terms of a duly executed supported decision-making agreement created in accordance with this article, to a supporter authorized by the terms of the supported decision-making agreement to assist the decision-maker in accessing, collecting, or

		obtaining that information under subdivision(e) of section 82.05 of this article, shall be immune from any action alleging that it improperly or unlawfully disclosed such information to the supporter unless the entity, custodian, or organization had actual knowledge that the decision-maker had revoked such authorization. (e) This section may not be construed to provide immunity from actions alleging that a health care provider, or other third party, has done any of the following: 1. caused personal injury as a result of a negligent, reckless, or intentional act; 2. acted inconsistently with the expressed wishes of a decision-maker; 3. failed to provide information to either decision-maker or their supporter that would be necessary for informed consent; or 4. otherwise acted inconsistently with applicable law. (f) The existence or availability of a supported decision-making agreement does not relieve a health care provider, or other third party, of any legal obligation to provide services to individuals with disabilities, including the obligation to provide reasonable accommodations or auxiliary aids and services, including, but not limited to, interpretation services and communication supports to individuals with disabilities under the federal Americans with Disabilities Act (42 U.S.C.§12101).
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2023 National Conference on Special Needs Planning and Special Needs Trusts



Supported Decision-Making

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Supported Decision-Making

American Civil Liberties Union (ACLU):

"Supported decision making (SDM) is a tool that allows people with disabilities to retain their decision-making capacity by choosing supporters to help them make choices. A person using SDM selects trusted advisors, such as friends, family members, or professionals, to serve as supporters. The supporters agree to help the person with a disability understand, consider, and communicate decisions, giving the person with a disability the tools to make her own, informed, decisions."

Effective:

- Canada/British Columbia
 - Representation Agreement Act
- United Nations Convention on the Rights of Persons with Disabilities
- Australia, Ireland, Israel
- Sweden, Bulgaria, Croatia, Peru
- 20+ states

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Supported Decision-Making

National Guardianship Association (NGA):

- Guardianship should be utilized only when lesser restrictive supports are not available.
- ...guardianship must be limited, allow the maximum retention of individual rights, and be customized to the individual needs of the person under guardianship.
- Under all circumstances, efforts should be made to **encourage every person under guardianship to exercise his/her individual rights** ...to the maximum extent of the person's abilities, in all decisions that affect him or her, to act on his or her own behalf in all matters in which the person is able to do so, **and to develop or regain his or her own capacity to the maximum extent possible.**
- Every guardianship should be focused on the person and grounded in demonstrating respect for the dignity of all involved.
- A guardian must understand and protect the rights of the person and utilize all the tools available to maximize the participation of the person and enable self-determination.

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Supported Decision-Making:

Goals

- Empowerment of person making the decision (Decider)
 - "least restrictive alternative"
 - assessment of all facets of a decision
 - less costly
 - more person-centered planning opportunities
- Limit guardianship/conservatorship appointments
 - "most restrictive"
 - more costly
 - O'Connor v. Donaldson, 422 U.S. 563 (1975): "a State cannot constitutionally confine, without more, a non dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends..."

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Supporters

- Selected by Decider
- Put in a position of trust (friend, family member, professional) - see **Appendix A in paper** for list of who may serve
- Tasked with information gathering and communication with Decider **not** surrogate decision-maker
- Translator role:
 - plain language
 - visual or audio communication tools
 - extra time to discuss Decisions and implications
 - list of pros and cons
 - role-playing activities
 - attending appointments and meetings
 - note taking

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Supporters

Ineligible to Serve:

- CA & NY: listed in statute
 - Decider subject of protective/restraining order against supporter
- CA: liable for abuse, neglect, mistreatment, coercion, fraud
 - NY: similar, but as found by local dept. of social services
 - TX: similar but as found by Department of Family & Protective Services
- CA: cannot sign documents for Decider unless legally authorized
- See **Appendix D in paper** for limits on Supporter authority

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Supported Decision-Making Inventory System

- Holistic assessment and reference tool
- Shogren and Wehmeyer SDMIS Model:
 - (Shogren, Wehmeyer, Palmer, Forber-Platt, et al. (2014b). *Self-Determination Inventory: Student-report [Pilot Version]*. Lawrence: Kansas University Center on Developmental Disabilities)
 - Interview process with Decider
 - Collects three inventories focusing on Decider's support needs:
 - SDM Personal Factors Inventory: Decider's competency, communication preferences, goals
 - SDM Environmental Demands Inventory: evaluates complexity and nature of decision in key areas - Health, Legal, Financial, Social, Independent/Community Living - and assesses whether there are opportunities or supports available for such
 - SDM Autonomy Inventory: measures Decider's current level of autonomy

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Supported Decision-Making Inventory System

Benefits of a SDMIS:

- Customized written plan for support of a Decider
- Identifies areas where SDN is needed
- Assists in creating short- or long-term plans and types of assistance necessary
- Provides a guide for multiple Supporters as different types of decisions may require different Supporters
- Tracks decisions and their outcomes for future use
 - Decision-making is a practiced skill
- Re-evaluates a Decider's evolving needs and life circumstances.=

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Supporter Decision Making Agreements

- Best practice: formalize in writing
 - Many states do not require as such in writing
 - Formalized agreement provides assurance to third parties
 - May assist with malpractice/fiduciary liability if formally executed
- Not a contract, it's an authorization
- Generally different than a durable POA in that it goes into effect immediately
- Limited:
 - NY: "If a decision-maker voluntarily enters into a supported decision-making agreement with one or more supporters, the decision-maker may...authorize the supporter to provide support to them in making their own decisions..., including, but not limited to: gathering information, understanding and interpreting information, weighing options and alternatives..., considering the consequences of making a decision or not making it, participating in conversations with third parties..., communicating the decision-maker's decision to third parties ..., and providing the decision-maker support in implementing the decision-maker's decision." (State of New York Senate Bill S7107B, Cal. No. 540, 2021-2022 Sessions, June 1, 2021)
- Form:
 - TX, NY and many other states: in statute (TX: or must be substantially similar to statute)
 - ACLU - sample form
 - NY: form must be reviewed by a "facilitator" (individual or entity authorized by the office for people with developmental disabilities that works with and educates the decision-maker and his or her supporter or supporters about supported decision-making and supported decision-making)

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Supporter Decision Making Agreements

A SDM Agreement should:

- Be written in plain language and in a manner the Decider can understand (to include the use of illustrations when appropriate).
- Identify who will serve as a Supporter and outline their duties or expectations.
- Identify which areas wherein a Decider requests support including education, financial matters, health care, and domicile.
- Identify the kind of support the Decider is seeking. This might involve gathering information, assisting the Decider to weigh alternatives or potential consequences of their actions, communicating decisions to others, or to assist with financial decisions.
- Be executed consistent with the formalities required in the applicable state. For example, California requires the document execution to be in the presence of two witnesses or a notary public.
- Identify when the agreement needs to be reviewed and how it is terminated.

See **Appendix C in paper** for the Essential Elements of a SDM Agreement

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Conflict of Interest

- Occurs when any person (e.g., a fiduciary) is in a position to personally benefit from their actions made in their appointed capacity
- Putting own needs/desires ahead of beneficiary
- Self-dealing

Texas: "In order to prevent a conflict of interest, if a determination is made by an adult with a disability that the supporter with whom the adult entered into a supported decision-making agreement is the most appropriate person to provide to the adult supports and services for which the supporter will be compensated, the adult may amend the supported decision-making agreement to designate an alternate person to act as the adult's supporter for the limited purpose of participating in person-centered planning as it relates to the provision of those supports and services." (TX Est Code § 1357.0525)

California: "A supporter shall not participate in any life decision in which they have a conflict of interest. This includes, but is not limited to, any decision in which the supporter has a financial or other tangible stake in the outcome." (CA Welf. and Inst. Code § 21002(4))

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Liability

California: criminal or civil liability for breach
 "This division does not limit a supporter's civil or criminal liability for prohibited conduct against the adult with a disability, including liability for fraud, abuse, neglect, breach of fiduciary duty, if any exists, coercion, or mistreatment, including liability under the Elder Abuse and Dependent Adult Civil Protection Act." (CA Welf. and Inst. Code § 21002(a))

Texas: "If a person who receives a copy of a supported decision-making agreement or is aware of the existence of a supported decision-making agreement has cause to believe that the adult with a disability is being abused, neglected, or exploited by the supporter, the person shall report the alleged abuse, neglect, or exploitation to the Department of Family and Protective Services in accordance with Section 48.051, Human Resources Code. (TX Est Code § 1357.102)

See **Appendix D in paper** for more information on Reporting Abuse, Coercion, Undue Influence or Financial Abuse

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Multidisciplinary Issues

SDM inherently involves multidisciplinary focus across social work, finance, criminal justice, psychology, fiduciary administration, public benefits, etc., to include consultations with:

- Social workers
- Geriatric care managers
- Case managers
- Discharge planners
- Financial advisors
- CPAs
- Agents under POA
- Doctors

TX Model Rule 1.05

- (a) "Confidential information" includes both "privileged information" and "unprivileged client information."
- (b) "...a lawyer shall not knowingly:
- (1) Reveal confidential information of a client or a former client to:
 - (i) a person that the client has instructed is not to receive the information; or
 - (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm."
 - (a) A lawyer may reveal confidential information:
 - (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
 - (2) When the client consents after consultation.
 - (3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client."

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Multidisciplinary Issues

California: "A third party may only refuse the presence of one of more adults, including supporters, if the third party reasonably believes that there is fraud, coercion, abuse, or other action by the individuals requested to be included that the third party is required to report pursuant to the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9)." [emphasis added] (CA Welf. and Inst. Code § 21004(c))

Privilege:

- many states recognize an exception to the presumption that a third-party presence invalidates the attorney-client privilege when a third person is present
- attorney-client privilege continues to apply if that third person is there in order to assist the client in the legal process and furthers a defendant's legal representation
- in determining if the presence of the Supporter compromises the attorney-client privilege, courts generally consider whether the defendant intended the communications to remain secret and the role of the third party

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Multidisciplinary Issues

Case Study:

- Adult with a disability (Decider) resides in a trust-owned home
- Decider requires care support over and above what their Medicaid and waiver programs will furnish. Shortfall is being funded by the SNT
- Trust is being rapidly depleted (wasting)
- SNT trustee is forced to look at alternative housing solutions for the Decider and must sell the home to protect the beneficiary's long-term financial interests
- Decider and Supporter(s) are adamant that Decider remains in the home in consideration of the Decider's health, comfort and well-being

Potential Solutions:

- Petition court
- ADR
- Attorney letter of opinion
- Professional opinion letter
- Non-judicial Settlement Agreement

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Multidisciplinary Issues

Third Party Liability:

Texas: good faith standard imposed on 3rd parties - "a person who receives the original or a copy of a supported decision-making agreement shall rely on the agreement" and "... is not subject to criminal or civil liability and has not engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a supported decision-making agreement." (TX Est Code § 1357.101)

New York: "A person shall not be subject to criminal or civil liability and shall not be determined to have engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a decision made by a decision-maker pursuant to a duly executed supported decision-making agreement created in accordance with this article." (State of New York Senate Bill 57107B, Cal. No. 540, 2021-2022 Sessions, June 1, 2021)

See **Appendix E** in **paper** for more information on Third Party Liability

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Overview

Duty of Loyalty

- Act in the best interest of the person you serve
- "the essence of the fiduciary relationship" (J.C. Shepherd, *The Law of Fiduciaries* 481 (1981))

Duty of Care/Prudence

Act reasonably as any prudent person would

- Note: When someone has held themselves out as a professional in certain areas, a higher standard of care applies (esp. in litigation).
- *Harvard College v. Amory* 26 Mass. (19 Pick.) 446 (1830) - "Observe how [people] of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."

Duty to Account

Accountings/reports to beneficiaries, remainder persons, interested parties, courts, public benefits agencies, etc.

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

Latin: fiduciarius, from fiducia - "trust"



Ramsey v. Boatmen's First Nat'l Bank of K.C., N.A., 914 S.W.2d 384, 387 (Mo.App.W.D.1996) —

Trustees are fiduciaries "of the highest order" and are required to exercise "a high standard of conduct and loyalty in administration of [a] trust." The duty of loyalty "precludes self-dealing," which in most cases would be considered a "breach of fiduciary duty."

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Drafting

Types of Arrangements:

- SNT = spendthrift trust with trustee sole discretion
- SDM = promotes beneficiary independence

Preservation of public benefits is only one reason for an SNT:

- Undue influence
- Fraud protection
- Lack of beneficiary financial awareness
- Beneficiary may have never been self-reliant

Consider settlor intent and the need for flexibility!

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Case Study:

- Settlor(s) wish to enact a plan for their daughter.
- Their daughter was born with Down syndrome, but despite her challenges both parents want her to be as empowered as possible in making decisions about her own life.
- Their daughter is 19 years old, and rather than conserve her, the parents assisted their daughter to set up a Supported Decision-Making Agreement.
- Their daughter is easily influenced by others and is likely vulnerable to financial abuse.
- The daughter subsequently chose three close friends as her Supporters.
- SDMs and trustee are directed to design a distribution plan collaboratively
- Daughter initially makes inappropriate financial decisions
 - "dignity of risk"



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Trust Advisory Committee

- Promotes settlor intent and beneficiary involvement
- May weigh in on discretionary distributions
- May be tasked with development of distribution plan
- Supporters may act as part of Committee
 - Best Practice: identify any conflicts of interest (e.g., remainderperson, housemate, etc.)

From Wealth Counsel:

"The Trust Advisory Committee shall consist of a minimum of 3 members, but no more than 5 members to be determined by the chairperson(s) then serving. If any member of the Trust Advisory Committee is unwilling or unable, for any reason, to act or continue to act as a committee member, the chairperson(s) then serving may decide whether or not to fill the vacancy. However, there shall be at least three (3) members serving at all times. If there are fewer than 3 members serving and the chairperson(s) then serving are unable or unwilling to appoint a successor committee member, the Trustee may appoint the successors."

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Trust Protector

- Promotes settlor intent and beneficiary involvement
- May remove trustee
- May amend trust document for changes in law, public benefits, etc.
- May weigh in on discretionary distributions
- Supporters may act Trust Protector
 - Best Practice: identify any conflicts of interest (e.g., remainderperson, housemate, etc.)

From Bradley J. Frigon, JD, LL.M (tax), CELA, CAP:

"The Trust Protector may amend any provision of this Agreement, as it applies to any Trust for which the Trust Protector is serving, pursuant to [subsequent restrictions]. Notwithstanding the foregoing, the Trust Protector may not amend this Agreement in any manner that would make Trust corpus or income available to the Beneficiary for Medicaid eligibility. Further, the Trust Protector may not limit or alter the rights of the Beneficiary in any Trust assets held by the Trust before the amendment, nor may the Trust Protector remove or add any individual or entity as a beneficiary of any Trust asset."

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Trustee/Co-Trustee

- Promotes settlor intent and beneficiary involvement
- Sole authority for discretionary distributions
- Supporters may act Trustee/Co-Trustee
 - Best Practice: identify any conflicts of interest (e.g., remainderperson, housemate, etc.)

Case Study:

- Supporter Trustee is serving as trustee of an SNT and is not a remainderperson of the trust (thus obviating a potential conflict of interest).
- The SNT beneficiary needs an immediate emergency medical procedure and needs the Supporter to explain all facets of the procedure.

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Emerging Research

- Prominent research by the Burton Blatt Institute at Syracuse University, the Kansas University Center on Developmental Disabilities, and the Quality Trust for Individuals with Disabilities studying impact on Decider's:
 - level of self-determination
 - quality of life
 - community participation and integration
 - family dynamics
 - daily-living outcomes
- Jenny Hatch Justice Project
- U.S. Administration on Community Living - National Resource Center on Supported Decision-Making
- **The Arc of Texas**

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Resources:

1. [Access to Information Under Supported Decision-Making Statutes](#): American Bar Association
2. [Jenny Hatch Justice Project](#)
3. [National Resource Center on Supported Decision-Making](#): U.S. Administration on Community Living -
4. [Fact Sheet: Alternatives to Guardianship, Supported Decision-Making Agreements](#): The Arc of Texas
5. [Supported Decision-Making](#): Partners Resource Network (video)
6. [Supported Decision-Making in the Lone Star State](#): NYU Law Review

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Case Law



In the Matter of the Accounting of J.P. Morgan Chase Bank, N.A., and H.J.P. as Co-Trustees of the Mark C.H. Discretionary Trust of 1995 v. Marie H., 956 N.Y.S.2d 856 (N.Y. Surr. Ct., 2012).

Trustee's affirmative duty to be proactive in researching, documenting and providing for SNT beneficiary's needs.

- Third-party discretionary trust for the benefit of young man on the autism spectrum living in a group home
- Neither co-trustee (corporate co-trustee and attorney co-trustee) had visited beneficiary in five years.
- Court determined that Mark lacked any type of advocacy for his ongoing needs, save \$3,525 expended from the trust for a care manager. The vast majority of the distributions from Mark's trust were fees for the trustee and their counsel.
- Trustee's "excuse for inaction was its lack of institutional capacity to ascertain or meet the needs of this severely disabled...young man."
- Trustee's "failure to fulfill their obligations should result in denial or reduction of their commissions for the period of inaction."
- Highly publicized in The Village Voice

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Thank You!

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STETSON LAW

Pooled Trusts Intensive

October 22, 2025

2025 Legislative Update/Call to Action



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LAW

*Center for
Elder Justice*

Access and Justice For All®

1. *Brief Overview/Explanation of:*

- a. FMAP –Federal Medical Assistance Percentage
- b. Medicaid Expansion
- c. Why is this information important to people w/disabilities and the OBBB?

2. *Biggest Issues Facing People w/Disabilities in OBBB*

Medicaid Cuts will occur: 2028-2032

- a. Work Reporting Requirements (beginning 2027- with possible extension)
 - i. Exemptions
 - ii. If pooled trust beneficiaries aren't working why is this an issue?
 - iii. Discussion of new paperwork/applications and GA's issues implementing <https://www.msn.com/en-us/health/other/federal-watchdog-report-on-georgia-s-medicaid-program-raises-concerns-about-administrative-costs/ar-AA1MQ3il?ocid=entnewsntp&pc=U531&cvid=cc1ee68463a74fcccb266c7cee683711&ei=26>
- b. Redetermination every 6 months (2027)
 - i. Expansion population-but will there be confusion?
 - ii. An impact on caregivers/low wage workers (those supporting who we support)
 - iii. Other likely impacts
- c. Cost Sharing Requirements (July 2028)
 - i. Exemptions
 - ii. Impact on caregivers/low wage workers
- d. State Financing Changes
 - i. Impact on funding home-based services, group homes etc.
- e. Immigrant Access (documented)
 - i. Complete loss of access?
 - i. Exemptions
 - ii. Impact on caregivers/low wage workers

Biden Era Rules

- f. Rules Relating to Enrollment in Medicare Savings Program (MSP)
 - i. Nine-year ban on implementing improvements to Medicare Savings Program (MSPs)
 - ii. People will be less likely to access programs to make Medicare more affordable
- g. Staffing standards in LTC facilities

Stetson 2025 National Conference
Legislative Update Outline
Roxanne Chang, David Goldfarb, Kerry Tedford-Coles

- i. OBBB has blocked the implementation of national minimum staffing requirements for nursing homes

Other Medicaid Items

- h. Defunding of Planned Parenthood (being litigated)
 - i. Impact on those with conditions that are exacerbated with pregnancy/high risk
- i. Expanded Home Care Options for states starting 2028
 - i. What does this look like?
- j. Rural Health Transformation Program
 - i. What does this look like? Will this provide any positive change for those living in rural areas w/little care?
- k. Move to 1-month retroactive coverage

Food Assistance Programs- \$295 billion in federal cuts over 10 years

- l. Increases associated with overall inflation
- m. State funding requirements
 - i. Lead to waitlists, change in eligibility requirements, wait lists
- n. Work Requirements (2029)
- o. Limit to Shelter Expense Reductions

ABLE Enhancements

- p. Extended contribution limits (2026)
- q. Permanent Savers Credit (2026)
- r. Rolling unused 529 plan funds into ABLE accounts (immediately)

3. What do we do next?

- a. What kind of education can Pooled Trust Administrators Provide:
 - i. Legal partnerships
 - ii. Educating individuals with disabilities parents to plan for changes
 - iii. Educating the general public re: the importance of waiver programs
 - iv. Tracking state Medicaid programs response
 - v. Connecting others to organizations providing opportunities for advocacy

SNA Reconciliation Bill Summary Analysis:

Threats and Implications for Individuals with Special Needs

On July 4th, President Trump signed into law H.R. 1 – the *One Big Beautiful Bill Act (OBBBA)*. The legislation is expected to mark the most sweeping package of healthcare reforms since the enactment of the Affordable Care Act (ACA) 15 years ago. The bill was finalized after months of intense negotiation within the Republican party, advancing out of both chambers by razor thin margins. The OBBBA has the potential to significantly impact individuals with disabilities and their families. This memo outlines the most pressing risks, relevant positive provisions, and recommended strategies for how SNA members can remain engaged and aware. For general information on Medicaid and health provisions, the National Health Law Program (NHeLP) released [high-level](#) and [detailed](#) charts of select implementation and funding provisions.

Key Provisions Affecting Clients with Special Needs

Medicaid Changes (Most Significant Impact)

- **Overall Cuts:** \$715 billion in Medicaid funding reductions over the next 10 years, potentially resulting in at least 13.7 million people losing health coverage according to estimates from the Congressional Budget Office (CBO).
- **Work Requirements:** New Medicaid work requirements for beneficiaries ages 19–64 will begin by *January 1, 2027*. While exemptions technically exist for individuals with disabilities, confusing and burdensome paperwork processes often result in eligible individuals losing coverage.
- **Documentation Requirements:** Immediate proof of citizenship or immigration status will be required for all Medicaid recipients beginning *October 1, 2026* – raising serious barriers for many families and individuals with cognitive impairments or limited document access.
- **Eligibility Reviews:** Mandatory redeterminations every 6 months (instead of annually) for the expansion population will begin by *January 1, 2027*, significantly increasing the administrative burden on individuals and caregivers.
- **Cost-Sharing:** Introduction of fees up to \$35 per Medicaid-covered service for the expansion population beginning *October 1, 2028* – posing an economic barrier to care for many low-income beneficiaries.
- **Home Equity Limits for Long-Term Care:** Maximum home equity limit is lowered to one million dollars beginning *January 1, 2028*.
- **Retroactive Coverage:** Retroactive coverage is reduced to 30 days for the expansion population and 60 days for the non-expansion population beginning *January 1, 2027*, limiting retroactive coverage for individuals newly eligible for Medicaid services.

- **Coverage for Immigrants:** Medicaid and Children's Health Insurance Program (CHIP) funding is restricted to U.S. citizens, lawful permanent residents, Cuban/Haitian individuals, lawful residents under the Compact of Free Association, and residents of a U.S. state, the District of Columbia, or a territory beginning *October 1, 2026*, excluding and potentially removing individuals and their children with other immigration statuses from the programs.

SNAP (Supplemental Nutrition Assistance Program) Funding

- \$295 billion in federal SNAP funding cuts over ten years.
- Expanded work requirements for recipients ages 18–64 beginning *January 1, 2029*.
- Restriction of caregiver exemptions to parents with children under age 14 excluding those caring for older children with disabilities beginning *January 1, 2029*.

Positive Provisions

While limited in scope, the bill includes several potentially beneficial provisions for individuals with disabilities:

ABLE Account Enhancements:

- Extended contribution limits beginning *January 1, 2026*
- Permanent Savers Credit for ABLE contributions beginning *January 1, 2026*
- Permanent ability to roll unused 529 plan funds into ABLE accounts tax-free *effective immediately*

These changes may provide expanded planning opportunities for families and practitioners.

Potential Consequences

Reduced Federal Medicaid Funding

Caps on Medicaid growth and restrictions on state funding mechanisms could pressure states to reduce service levels and limit eligibility.

Implication: Loss of critical services such as in-home support, day programs, and residential placements.

Threats to Provider Tax Structures

Limits on provider taxes, which are a major funding tool for states, could destabilize state Medicaid budgets.

Implication: Potential drop in provider participation and quality of care.

Eligibility and Administrative Barriers

Increased documentation and more frequent redeterminations will create significant access barriers.

Implication: Individuals may be wrongly disenrolled or discouraged from seeking services.

Family Caregiver Burden

With reduced HCBS and respite options, families may be forced to take on greater caregiving responsibilities.

Implication: Risk of caregiver burnout, job loss, and long-term economic insecurity.

Secondary Risks to SSI and Related Programs

Although SSI is not directly changed, the Medicaid-related disruptions may cascade into eligibility and access challenges for other linked benefits.

Next Steps and Legal Practice Implications

Special needs attorneys should anticipate the following impacts:

- 1. Increased Demand for Appeals and Documentation Assistance:**
Clients will need more support contesting benefit denials and navigating complex re-verification procedures.
- 2. More Complex Medicaid Eligibility Determinations:**
Attorneys may need to provide more robust planning and compliance strategies to address heightened verification and work requirement standards.
- 3. Potential Reduction or Elimination of HCBS Services:**
Funding shortfalls could result in cuts to waiver programs, group home funding, or personal care assistance.
- 4. Guidance on Work Requirement Exemptions:**
Attorneys will need to proactively identify exemption categories and help clients document eligibility.
- 5. Expanded Demand for ABLE Account Planning:**
The proposed enhancements will increase the utility of ABLE accounts as a legal and financial planning tool.

Special needs attorneys should consider the following next steps:

- A. Monitor State Developments:**
Track how your state Medicaid program is responding to potential federal cuts and prepare clients accordingly.

B. Engage Clients and Families Early:

Alert clients to possible administrative hurdles and prepare documentation strategies in advance.

C. Support National Advocacy:

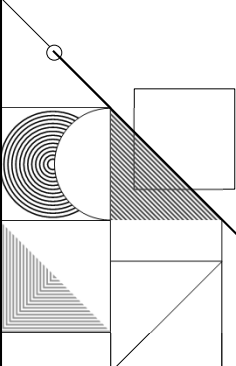
SNA is working with coalition partners to engage policymakers and media. Members are encouraged to share anonymized client stories and data to inform advocacy efforts.

D. Update Legal Planning Strategies:

Prepare contingencies in case of service reductions or eligibility loss—particularly for Medicaid-dependent clients.

E. Leverage Positive Provisions:

Begin client outreach on the expanded ABLE account opportunities and incorporate them into long-term financial plans.



LEGISLATIVE UPDATE-2025

KERRY TEDFORD-COLES
ROXANNE CHANG
DAVID GOLDFARB

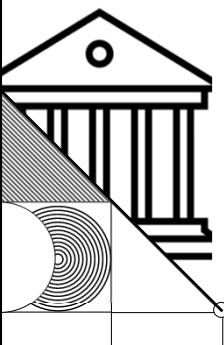
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AGENDA

*Overview of Federal Medical Assistance Percentage (FMAP) & Medicaid Expansion

*Issues Facing People with Disabilities in the *One Big Beautiful Bill*

2



WHAT IS THE FEDERAL MEDICAL ASSISTANCE PERCENTAGE (FMAP)?

The statutory formula that determines the federal government's share of state Medicaid and other social service spending

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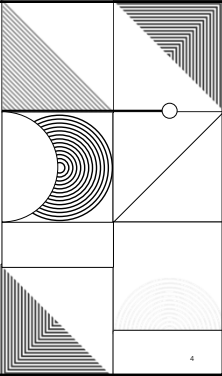
HOW DOES IT WORK?

Formula:
The FMAP is determined using a formula that compares a state's per capita income to the national average.

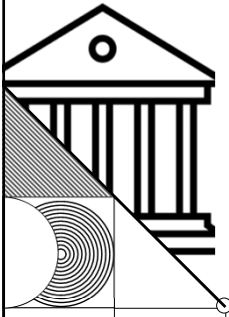
Federal Matching:
For every dollar a state spends on Medicaid services, the federal government contributes a specific percentage, which is its FMAP rate.

Varying Rates:
The FMAP varies by state, with states having a lower per capita income generally receiving a higher matching rate.

Minimum Rate:
By law, the FMAP rate cannot be less than 50% for any state.



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A BRIEF OVERVIEW OF MEDICAID EXPANSION

A provision of the Affordable Care Act (ACA) that allows states to expand Medicaid coverage to nearly all low-income adults

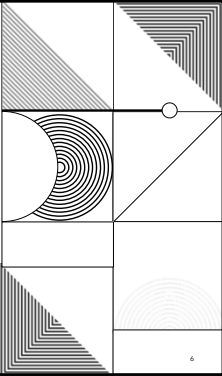
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HOW DOES IT WORK?

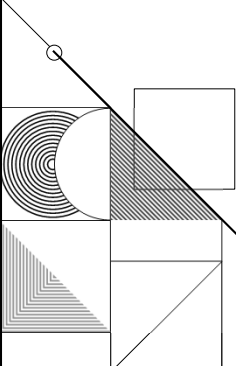
Eligibility:
The ACA's Medicaid expansion covers adults with incomes below 138% of the Federal Poverty Level, a threshold that previously excluded many low-income adults who were too poor for private insurance but too wealthy for traditional Medicaid. (single household in 2025 = \$21,597)

Federal Funding:
The federal government covers the majority of the cost for expansion-eligible populations, providing a high matching rate (90%) for states.

State Option:
States can choose to adopt the expansion. In states that have not expanded Medicaid, a "coverage gap" exists for adults who earn too much for Medicaid but not enough to afford health insurance through the Marketplace.

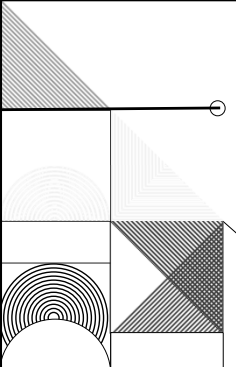


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WHY IS FMAP & MEDICAID EXPANSION IMPORTANT TO PEOPLE W/DISABILITIES/OBBB?

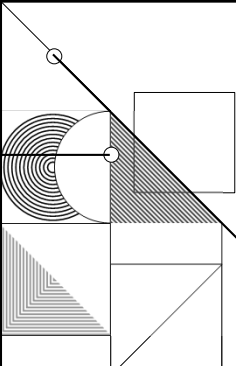
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ONE BIG BEAUTIFUL BILL ACT- 119TH CONGRESS (2025-2026)

How will this impact our beneficiaries?

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MEDICAID CUTS WILL OCCUR 2028-2032

Major Reductions in Medicaid Spending and Healthcare Coverage

The Congressional Budget Office (CBO) estimates Medicaid and healthcare cuts of \$1 trillion over ten years, resulting in 10 million individuals losing health coverage

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NEW MEDICAID WORK / COMMUNITY ENGAGEMENT REQUIREMENTS

Requirements:

80 hours a month applies to
"abled bodied" adults under
Medicaid expansion

Exemptions:

Parents/guardians of
dependent children up to
age 13 and disabled
individuals

Implementation:

Requirements will be optional
for states immediately, but
mandatory starting December
31, 2026

States can delay
implementation until
December 1, 2028, if they
show good faith efforts

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MEDICAID REDETERMINATION EVERY 6 MONTHS (2027)

Requirements:

Expansion population only

Processing:

How will states prepare to
review all of these
applications?
Will there be confusion as to
who must do the paperwork?

Impact on our Population:

Low wage workers/caregivers
may lose benefits

If states need to hire more staff
will they cut other areas?

11

11

COST SHARING REQUIREMENTS (2028)

Requirements:

Medicaid expansion adults
w/100-138% of FPL to pay
cost share up to \$35

Processing:

How will states implement
this? Will they need new
billing systems?

Impact on our Population:

Low wage workers/caregivers
forced to pay higher co-pays

If states need to hire more staff
will they cut other areas?

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12

STATE FINANCING CHANGES

Expectations:	Impact on our Population:
States will have less flexibility to draw down federal Medicaid funding	Less funds may mean states will reduce their payments, potentially impacting home care for seniors and disability services
Expected reduction of federal contributions to Medicaid by over \$375 billion over 10 years.	

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States will have less flexibility to draw down federal Medicaid funding

Expected reduction of federal contributions to Medicaid by over \$375 billion over 10 years.

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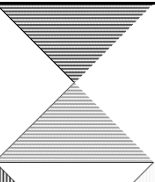
IMMIGRANT ACCESS

Access to Care: Elimination of Medicaid, Medicare, and ACA subsidies for refugees and asylees	Impact on our Population: Low wage workers/caregivers forced to pay higher co-pays
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Elimination of Medicaid, Medicare, and ACA subsidies for refugees and asylees

Low wage workers/caregivers forced to pay higher co-pays

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BIDEN ERA RULES

Medicare Savings Program (MSP)

- *Nine-year ban on implementing improvements.*
- People will be less likely to access programs to make Medicare more affordable

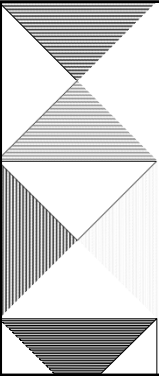
Staffing Standards in LTC Facilities

- OBBA has blocked the implementation of national minimum staffing requirements for nursing homes.

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- *Nine-year ban on implementing improvements.*
- People will be less likely to access programs to make Medicare more affordable

- OBBB has blocked the implementation of national minimum staffing requirements for nursing homes.



OTHER MEDICAID ITEMS

Expanded Home Care Options

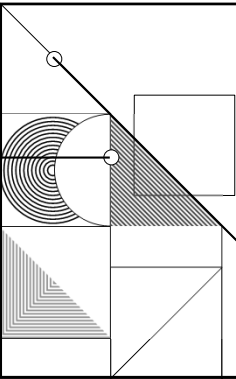
- States can expand home care services to individuals that don't need a nursing home level of care starting in 2028. (optional)

Rural Health Transformation Program

- States will be provided with funding to address rural health challenges

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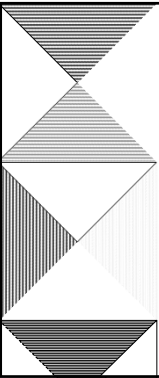


FOOD ASSISTANCE KEY CHANGES

- * New Limits on future SNAP growth
- * States will spend more to run SNAP
- * Expanded work rules
- * Limits of what counts toward SNAP eligibility and benefits calculations

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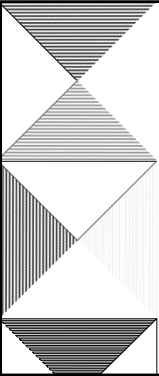
SNAP LIMITS ON BENEFIT GROWTH

New cap on the Thrifty Food Plan which is used to set SNAP benefit levels. The new cap will tie SNAP benefits to overall rates of inflation, not actual costs of food.

This can cause an increase in seeking assistance from food pantries or funds in the trust

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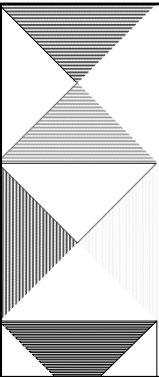
STATES WILL SPEND MORE TO ADMINISTER SNAP

Starting in fiscal year 2027 states must cover 75% of admin costs (an increase from 50%)

In 2028 and 2029 there will be a correlation between high payment error rates and state cost share.

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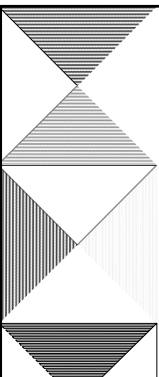
SNAP AND EXPANDED WORK RULES

Able-bodied adults up to age 65 (including parents of teens 14+) must work or participate in training to keep their benefits

There will be no exceptions for high unemployment areas. The US Department of Agriculture (USDA) can no longer waive work rules even in struggling economies

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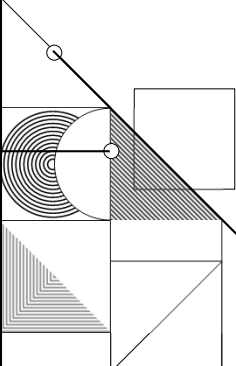
LIMITS ON WHAT COUNTS TOWARD SNAP ELIGIBILITY

Utility deductions (such as heating costs) will mostly be restricted to households w/seniors or people with disabilities.

State energy assistance counts as income. Internet costs are banned from being counted as part of shelter deductions.

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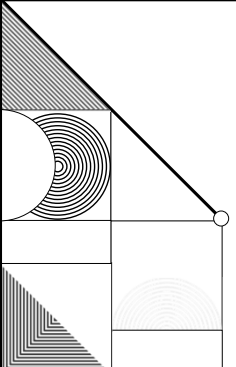
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ABLE ENHANCEMENTS

- *Extended contribution limits (2026)
- Permanent Savers Credit (2026)
- Rolling unused 529 plan funds in ABLA accounts (immediately)

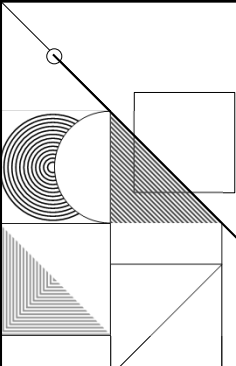
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FINAL TIPS & TAKEAWAYS

- * Build more legal partnerships
- * Educate parents of children with disabilities to plan for changes
- * Educate the public on the importance of waiver programs
- * Track your state Medicaid program's response

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THANK YOU

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 Kerry Tedford-Coles- ktedford-coles@planofct.org

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