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Main Conference

October 22-23, 2026

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Main Conference

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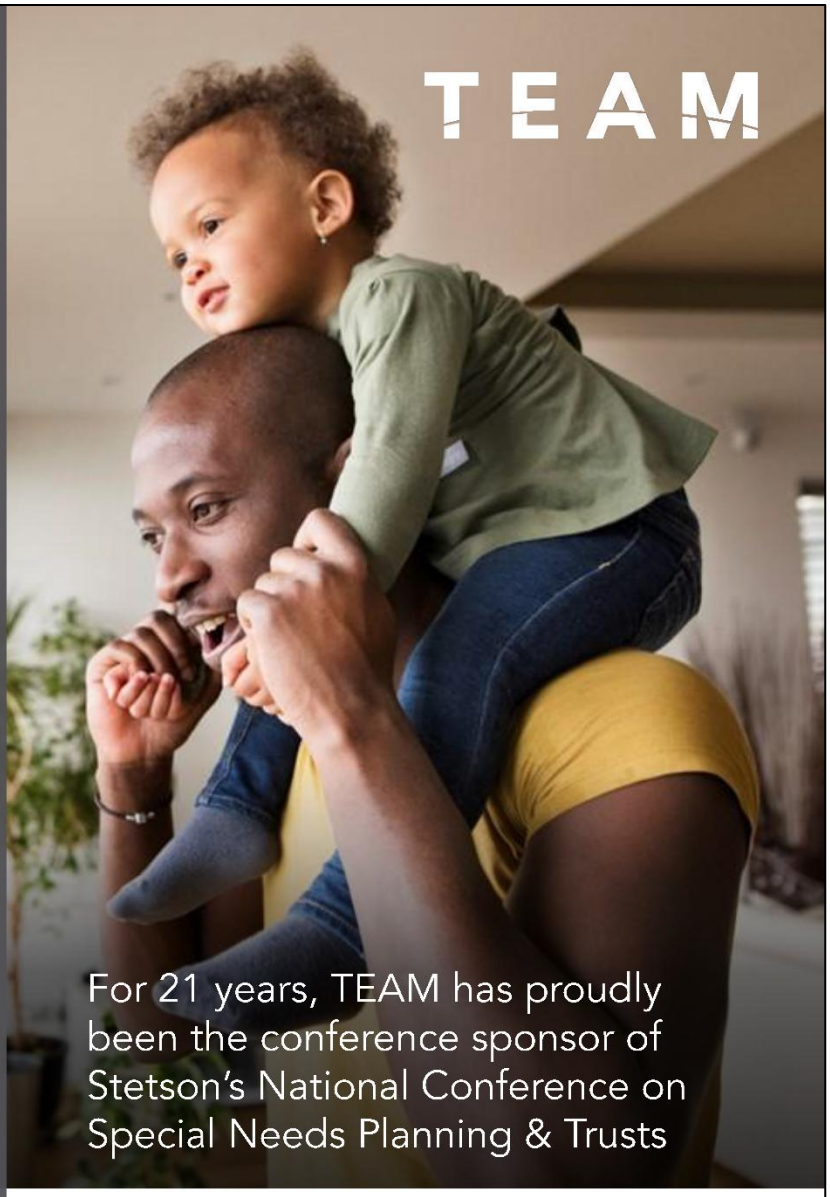
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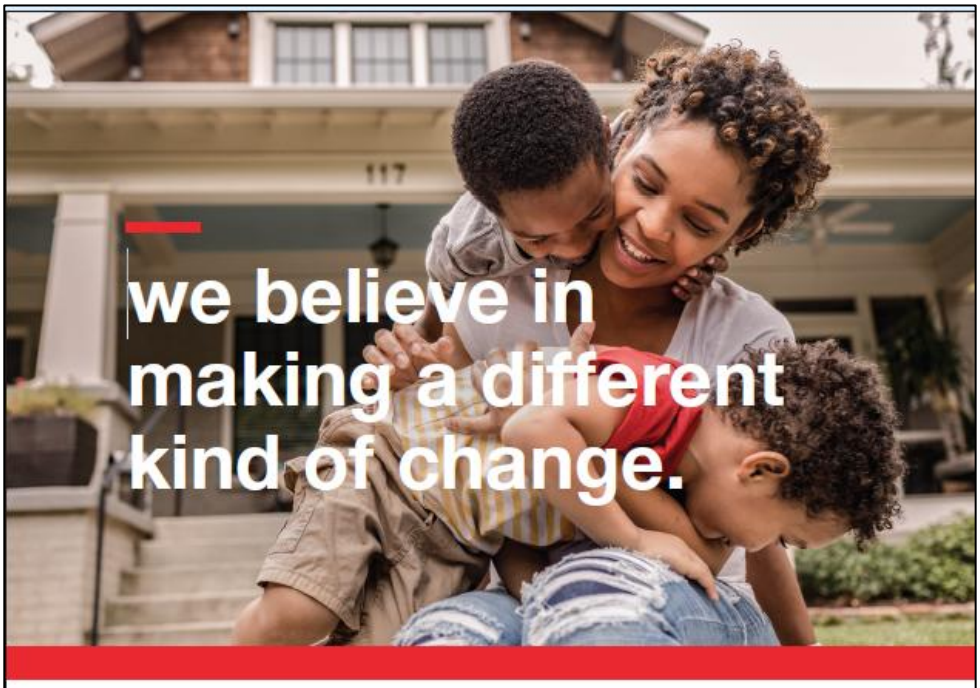
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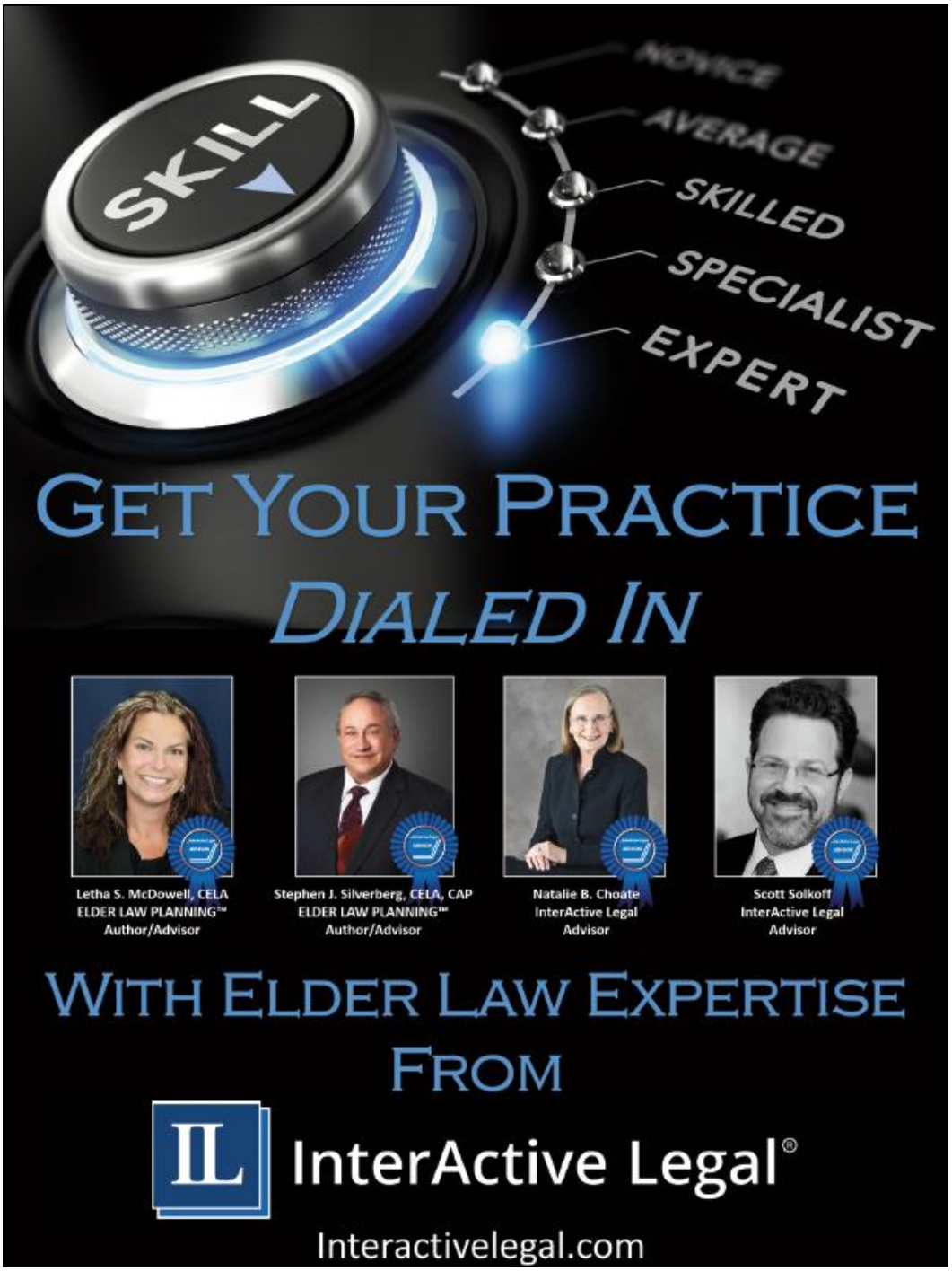
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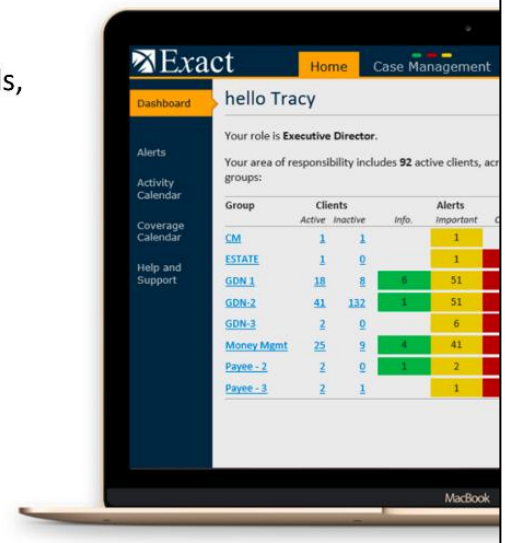
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Are the Machines in Charge? Using AI to Review Trusts and Other Things…

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ARE THE MACHINES IN CHARGE?

Using AI to Review Trusts and Other Things

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2026 National Conference on Special Needs Planning

and Special Needs Trusts

Thursday, October 22, 2026

I. INTRODUCTION AND SCOPE

These materials[1] accompany the session "Are the Machines in Charge? Using AI to Review Trusts and Other Things." They are intended to stand on their own as a reference for practitioners evaluating whether, and how, to use generative artificial intelligence in the review of trust instruments and related estate planning documents.

The scope is deliberately narrow. The session addresses capability and verification, and it asks: What can these tools can do? How can they fail? What should a working verification protocol look like?

The professional responsibility framework, the ethical analysis, the problem of bias against beneficiaries with disabilities, and the profession's broader response to AI are addressed in the companion materials prepared for the afternoon breakout session, "Navigating AI's Wild West: Trends, Ethics, and Backlash in Legal

[1] As many jurisdictions now require attorneys to provide disclosure and/or verification statements for documents prepared with assistance from or containing information generated by generative artificial intelligence, it seems fitting to include a specific and conspicuous disclosure and verification statement here: These materials were prepared with the assistance of generative artificial intelligence. The author used various large language models to organize some parts and subsections; to rephrase some content for brevity; to format citations; to summarize lengthy reports or articles, particularly because they pertain to an area of the law that is NOT the author's area of expertise; and to compile research material. The author certifies that all citations have been manually verified to ensure their existence and confirm their propositions as accurate representations.

However, in Part V.A, the author intentionally included unverified citations to certain changes in the law impacting conference participants. The author invites participants to find incorrect AI outputs!

Practice." To avoid duplication, those subjects are cross-referenced here rather than repeated.

The organizing question is not whether artificial intelligence is useful. It plainly is . . . for some tasks. The question is: for which tasks is the error rate acceptable, given the cost of an error that goes undetected? In special needs practice that cost is unusually high.

II. WHAT THESE TOOLS ACTUALLY DO

A. Prediction v. Retrieval

A large language model generates text by predicting probable continuations of the input it is given. It does not look up authority unless it has been connected to a database and instructed to do so. This matters because the mechanism that produces an accurate summary of Article IV is the identical mechanism that produces a fabricated subsection of the POMS. The practical consequence is that apparent fluency carries no information about accuracy. Practitioners accustomed to evaluating written work product by its polish—a reasonable heuristic when the author is a human partner or associate whose confidence roughly tracks competence.

B. Three Architectures

Practitioners encounter at least three distinct configurations, whose reliability differs substantially. Vendor marketing frequently blurs the distinctions.

1. **General-purpose chat interfaces**. The model responds from its training data alone. No source grounding. Highest fabrication risk, particularly for citations.
2. **Retrieval-augmented legal research tools**. The model is constrained to a curated database and returns citations to source documents the user can open. Fabrication risk is materially lower but not zero; the characterization of a retrieved authority may still be wrong.
3. **Document-grounded review**. The corpus is the instrument the practitioner uploaded. The model's task is extraction and analysis of text in front of it. This is the configuration most relevant to trust review and, for extraction tasks, the most reliable of the three. But the model will still supply legal conclusions from its training data, and those conclusions are ungrounded even though the document analysis is not.

A practitioner who does not know which of these three they are using cannot calibrate their skepticism.

C. Non-Determinism

The same prompt submitted twice will not produce identical output. For reliability this is a defect, but it can also aid in verification. Where two runs of the same prompt diverge, the model is generating rather than reporting, and the divergent passage warrants double-checking.

III. A TASK TAXONOMY FOR TRUSTS AND ESTATES

Organizing by task and not by tool is helpful. The following tiers track the distance between the output and the source text. The further the model must travel from language actually in front of it, the higher the risk.

A. Tier One (Suitable for a First Pass)

Summarizing a lengthy instrument; extracting dispositive terms into a chart; constructing a chronology from a file; translating trust terms into plain language for a family or a beneficiary; comparing two versions of a document; drafting routine correspondence; applying a checklist the practitioner wrote herself. These are extraction and reorganization tasks. The answer is already in the document.

B. Tier Two (Useful, But Requires Independent Review)

Consistency checking across a trust, will, beneficiary designations, and powers of attorney; identifying provisions missing relative to a form; issue-spotting an instrument the practitioner did not draft; generating questions for a client interview. Here, the model can be helpful because checking cross-document consistency is tedious work that humans perform poorly late in the day (or after lunch!), but the output is a range of useful information and not necessarily a conclusion.

C. Tier Three (High Risk)

Conclusions regarding SSI or Medicaid eligibility; application of the POMS; state-specific payback mechanics and state agency practice; early termination analysis; tax characterization. These require the model to supply law from training

data of unknown vintage, apply it to facts, and reach a conclusion. Each step compounds the error rate of the last, and the output is delivered with no indication of accumulated uncertainty.

IV. WHY SPECIAL NEEDS PRACTICE INVERTS THE USUAL DRAFTING NORM

Special needs practice presents a risk that general AI guidance does not anticipate because the drafting conventions look like mistakes to a general-purpose model. They're often the minority pattern in its training data.

A. Discretionary Standards

Ordinary trust drafting favors an ascertainable standard. Health, education, maintenance, and support language appears in an enormous volume of trust instruments, treatises, and form books. Special needs drafting often requires the opposite. A model trained predominantly on ordinary drafting will therefore identify a fully discretionary standard as a drafting defect and helpfully propose to cure it by adding a support standard. This is not a "hallucination" in the usual sense.[2] The model is accurately reproducing the dominant pattern in its training data. It is simply the wrong pattern for this instrument, and following the recommendation can defeat the trust.

[2] We as attorneys should also be cognizant of anthropomorphizing AI. *See* Eric Sentell, *We Must Stop Anthropomorphizing AI,* SUBSTACK (Sept. 23, 2026), https://ericsentell.substack.com/p/we-must-stop-anthropomorphizing-ai.

B. Sole Benefit Restrictions

Sole benefit language reads to a general-purpose model as an unreasonable limitation on the trustee, of the kind that should be relaxed. The same dynamic applies to spendthrift and anti-compulsion provisions.

C. First-Party and Third-Party Trusts

Both trust types appear under similar headings across the secondary literature, and models collapse them with some regularity. The consequences run in both directions. On the one hand, advising that a self-settled trust needs no payback provision would render it countable; on the other, advising that a third-party supplemental needs trust should include one, for consistency, gratuitously surrenders family assets to the state Medicaid agency at the beneficiary's death.

The unifying point is that the model's instinct to improve the document is itself the hazard. The provisions it flags as defects are frequently the provisions that are intentionally nuanced and/or unusual in other fields of the law.

V. RECURRING FAILURES

A. Stale Law

A model reports the law as of some point in the past and will not volunteer which point. Three areas of special needs practice have changed recently enough to make this a live hazard.

1. *Establishment by the Individual*

The Special Needs Trust Fairness Act, enacted as part of the 21st Century Cures Act, Pub. L. No. 114-255, § 5007, 130 Stat. 1033 (2016), amended 42 U.S.C. § 1396p(d)(4)(A) to permit a competent adult beneficiary to establish her own first-party trust.[3] Models continue to recite the pre-2016 list (i.e., parent, grandparent, legal guardian, or court) because that formulation was correct for roughly two decades and appears throughout the older secondary literature. The resulting advice generates unnecessary court petitions, client expense, and delay to cure a defect that does not exist.

2. *In-Kind Support and Maintenance*

The Social Security Administration's final rule omitting food from ISM calculations took effect September 30, 2024.[4] Only shelter-related items are now counted.[5] Models routinely advise trustees to avoid paying for groceries or restaurant meals in order to protect a benefit that is no longer at risk—a restriction on the beneficiary's quality of life grounded in repealed law.

For 2026, the federal benefit rate is $994 for an individual and $1,491 for an eligible couple; the presumed maximum value cap is $351.33; the value of the one-

[3] Ctr. for Medicaid & CHIP Servs., Ctrs. for Medicare & Medicaid Servs., SMD # 17-001, Implications of the Cures Act for Special Needs Trusts (Aug. 2, 2017), https://www.medicaid.gov/federal-policy-guidance/downloads/smd17001.pdf.
[4] Omitting Food From In-Kind Support and Maintenance Calculations, 89 Fed. Reg. 21,199 (Mar. 27, 2024) (codified as amended at 20 C.F.R. pt. 416).
[5] 20 C.F.R. § 416.1130(b) (2025) (defining shelter).

third reduction is $331.33. Practitioners should confirm current figures against the annual cost-of-living adjustment before relying on any of them.[6]

3. ABLE Accounts

The ABLE Age Adjustment Act took effect January 1, 2026, extending eligibility under 26 U.S.C. § 529A to individuals whose disability had onset before age 46, rather than age 26.[7] The 2026 annual contribution limit is $20,000.[8] Up to $100,000 remains excluded from the SSI resource limit.[9] Models commonly report the pre-2026 age threshold, understate the contribution limit, and — more seriously — state that ABLE balances are free of Medicaid recovery. Federal law permits a state claim against the account at the beneficiary's death;[10] a number of states have elected not to pursue it. That state-by-state variation is the kind of nuance a model flattens into a false universal.

B. Fabricated and Miscited Authority

Fabricated citations are the best-known failure mode, and the reported decisions are now numerous.[11]

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[6] *Id.* §§ 416.1131–416.1133 (one-third reduction rule); *id.* §§ 416.1140–416.1145 (presumed value rule).
[7] SECURE 2.0 Act of 2022, Pub. L. No. 117-328, div. T, § 124 (2022) (codified at 26 U.S.C. § 529A(e)(1)).
[8] 26 U.S.C. § 529A(b)(2)(B)(i); Rev. Proc. 2025-32, 2025-44 I.R.B. 1.
[9] Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014, Pub. L. No. 113-295, div. B, § 103, 128 Stat. 4010 (2014); POMS SI 01130.740(D)(1).
[10] 26 U.S.C. § 529A(f); Ctr. for Medicaid & CHIP Servs., Ctrs. for Medicare & Medicaid Servs., SMD # 17-002, Implications of the ABLE Act for State Medicaid Programs (Sept. 7, 2017), https://www.medicaid.gov/federal-policy-guidance/downloads/smd17002.pdf.
[11] For two well-known examples, *see Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023) (sanctioning counsel for a filing containing fictitious AI-generated citations); *Park v. Kim*, 91 F.4th 610 (2d Cir. 2024) (referring counsel for discipline on similar facts).

First, fabricated authority does not look strange. It carries a correct court abbreviation, a plausible reporter volume, a plausible date, and a proposition that fits the argument. Second, a misattributed citation to a real authority is more dangerous than an invented one. A practitioner who recognizes a POMS section number as genuine will often let recognition substitute for verification, and the output attached to it goes unchecked.

C. Invented Rules Without Citation

The hardest failure mode to catch is a confidently stated, state-specific rule supported by no citation at all: For example, a supposed requirement that a trustee obtain court approval for distributions above a specified dollar threshold. Out-of-state practitioners cannot evaluate it. In-state practitioners may assume they have forgotten something. There is no citation to pull.

VI. A WORKING VERIFICATION PROTOCOL

A. Citation Discipline

No citation is accepted that has not been personally opened in the reporter, the statute, or the POMS. This rule admits no exceptions and does not bend for authority that looks familiar.

B. Force the Model Back into the Document

For document review, require the model to quote the operative language verbatim and identify where it appears. Then compare the quotation against the

instrument. This converts an ungrounded assertion into a checkable one and surfaces the cases in which the model is describing a provision that is not there.

C. Re-Run and Compare

Submit the identical prompt in a fresh session and compare the outputs. Passages that are stable across runs are generally grounded in the source. Passages that vary are being generated. This is a low-cost triage mechanism that tells the reviewer where to spend attention.

D. Adversarial Second Pass

Ask the model to argue against its own output: what did you miss; argue that this provision is defective; identify what a state Medicaid agency reviewer would object to. Models are markedly better at critique than at first-pass analysis, and the second pass frequently surfaces what the first omitted.

E. Sequence Matters

AI used as a second reader, after the practitioner's own review, catches the practitioner's misses. AI used as a first reader anchors the practitioner's judgment to the model's framing, and the anchoring effect is substantial. The same tool produces materially different value depending only on when in the workflow it is introduced.

F. Document the Verification

A contemporaneous file note recording what was AI-assisted and what was independently verified costs very little and is the practitioner's best evidence in a later malpractice or surcharge proceeding.

VII. THE OMISSION PROBLEM

Every element of the protocol in Part VI checks what the model said. None of them checks what the model did not say, and omissions are invisible by construction.

Consider a review of a first-party trust funded with a substantial personal injury settlement. A model asked to identify defects will generate a list of defects. It will not reliably raise whether a Medicare Set-Aside or conditional payment resolution was required, whether the settlement was properly allocated among lien claimants, whether the instrument is irrevocable on its face, whether the state agency and the Social Security Administration have reviewed it, whether the beneficiary has capacity, whether the trustee is bonded, what the successor trustee provisions say, or whether anyone asked the beneficiary what she wants. None of these will appear as a gap in the output, because the output contains no gaps—it is a complete-looking list of the issues the model happened to generate.

A practitioner working from the model's issue list inherits the model's blind spots and has no way to detect them. So, generate your own issue list first, then compare. What the model raised that you did not is *the value*. What you raised that the model did not is the measure of *how much you should have trusted it*.

VIII. A DECISION RULE

A single principle organizes everything above: Trust the machine where errors are cheap to detect and cheap to reverse.

Much of ordinary practice satisfies both conditions. A garbled summary is obvious on reading and costs nothing to regenerate. A clumsy first draft of a client letter is visibly clumsy.

Special needs work frequently fails both. An ascertainable standard inserted into a discretionary trust, a payback provision added to a third-party instrument, an unprotected addition after age 65, a defective early termination clause . . . none of these announces itself. Each may remain undetected until a redetermination, an agency review, or the beneficiary's death, by which point the error is often irreversible and the consequence falls on a person with limited ability to detect or contest it.

That asymmetry—and not just generalized skepticism about the technology—is the reason this practice area warrants heightened care. The same tool that is appropriately used with light verification in a commercial matter requires a different discipline here, because the cost of being wrong is borne by someone else and surfaces too late to fix.

IX. CONCLUSION

These tools are genuinely useful for extraction, summarization, translation, and cross-document consistency checking, and practitioners who refuse them entirely will do some tasks worse and slower than colleagues who adopt them

thoughtfully. They are unreliable for legal conclusions in an area whose governing authority changes frequently, whose drafting conventions invert the general pattern, and whose errors are detected late. The professional obligations that attach to that judgment, and the broader question of what the profession owes clients and beneficiaries when it uses these systems, are taken up in the companion materials for the afternoon session.

See Appendix for Verification Checklist

APPENDIX — VERIFICATION CHECKLIST

1. Identify which architecture produced the output: ungrounded chat, retrieval-augmented research tool, or document-grounded review.
2. Open every citation personally. No exceptions for familiar authority.
3. Require verbatim quotation of operative language and confirm it against the instrument.
4. Re-run the identical prompt in a fresh session; treat divergence as a flag.
5. Run an adversarial pass asking the model to argue against its own conclusions.
6. Independently verify any statement of current benefit figures, contribution limits, or age thresholds.
7. Treat every uncited, state-specific assertion as unverified until confirmed in primary authority.
8. Generate your own issue list before reading the model's, and compare the two.
9. Confirm the trust type — first-party or third-party — before accepting any payback analysis.
10. Record in the file what was AI-assisted and what was independently verified.

Are the Machines in Charge?

Using AI to Review Trusts and Other Things

Mason Clark · National Conference on Special Needs Trusts · October 22, 2026

1

FLUENCY ≠ ACCURACY

Is there an analogy?

2

2

Determinism and Outputs

Predict the next words

- **An accurate summary of Article IV**
- **A fabricated subsection of the POMS**

The model draws no internal distinction between recalling and inventing.

3

3

Know which one you are using

1 Chat

Training data only.
No grounding.

HIGHEST RISK

2 Research tool

Constrained to a curated database.

LOWER RISK

3 Your document

The corpus is the instrument you uploaded.

LOWEST RISK

Vendor marketing blurs these.

4

4

SORTING BY TASK (NOT TOOL)

FIRST PASS
Summaries · extraction · chronologies · plain-language translation · version compare

FULL REVIEW REQUIRED
Cross-document consistency · missing provisions · issue-spotting · client questions

HIGH RISK
SSI / Medicaid conclusions · POMS · payback mechanics · early termination · tax

The tiers track one variable: how far the answer sits from the text in front of it.

5

5

CONVENTIONS AND MISTAKES

ORDINARY TRUST

Ascertainable standard

Health, education, maintenance, support.
The dominant pattern in the training data.

MAJORITY PATTERN

SPECIAL NEEDS TRUST

Sole and absolute discretion

No enforceable right to compel.
The provision doing the work.

READS AS A DEFECT

The model offers to "cure" it. That recommendation can defeat the trust.

6

6

The provisions it flags as defects are frequently the nuanced provisions that matter most.

The instinct to improve the document is a hazard.

7

Three dates the model may not have



A model reports the law as of some point in the past—and will not tell you which point. (And mid-2010s gaps!)

8

8

Reasonable Outputs

✗ What the model wrote	✓ The actual rule
One state. **From the date of funding.**	**Every state.** **The whole lifetime.**
Narrower. Favors the client. Rarely checked.	*For a beneficiary covered from birth: decades.*

We scrutinize favorable answers least.

9

9

What a fabricated citation looks like

Hoffman v. Dep't of Health Servs., 2019 WL 4478812 (E.D. Wis. Sept. 18, 2019)

Real court | Plausible WL number | Plausible date | Fits the argument

It does not exist

10

10

The hardest one to catch

"Texas requires court approval for any distribution exceeding $5,000."

No citation	**Out-of-state**	**In-state**
Nothing to pull	Cannot evaluate it	Assume you forgot

An uncited assertion is an unfalsifiable one.

11

11

Protocols

1. Open every citation yourself
2. Make it quote the instrument
3. Re-run it and compare
4. Ask it to attack its own answer
5. Second reader, never first
6. Note what you verified

12

12

Framing

AI FIRST

Model → You

You inherit its framing.
Anchoring is substantial.

AI SECOND

You → Model

It catches your misses.
Your judgment stays yours.

Generate your own work before you read the model's.

13

13

Critiques of Protocol

Never mentioned in a review of a trust funded by an $840,000 settlement:

Medicare Set-Aside	**Lien allocation**	**Irrevocability**	**Agency approval**
Capacity	**Trustee bonding**	**Successor trustee**	**The beneficiary's wishes**

Every verification step checks what it said.
None of them checks what it never raised.

14

14

Trusting the Machine

ERROR FOUND LATER ↓	HARDER TO REVERSE →	
	TRUST IT Caught fast, fixed fast	**VERIFY** Caught fast, hard to undo
	VERIFY Found late, fixed fast	**MOST SNT WORK** Found late, unfixable

Trust it where errors are cheap to detect and cheap to reverse.

15

15

Navigating AI's Wild West
2:25 – 3:15 p.m. (breakout session)

Ethics, bias, and backlash

16

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Thursday
October 22, 2026

SSA Update

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March 23, 2026 | **By Kathleen Romig and Devin O'Connor**

Trump Administration Personnel Policies Harming Social Security Customer Service, Risk Lasting Damage

The Trump Administration deliberately caused the loss of an unprecedented number of workers from the Social Security Administration (SSA) in its first year in office, reducing staffing by roughly 7,500 employees (13 percent) from January 2025 to January 2026.[1] New data from the Office of Personnel Management (OPM) reveal more about how the resulting short-staffing of critical functions is degrading service for the largely older, bereaved, and severely disabled people who most rely on SSA and creating challenges that will be difficult to turn around without major changes. (See Figure 1.)

The loss of thousands of employees hit key customer service positions hard, including a drop of more than 3,000 staff who assist visitors to SSA field offices and callers to SSA's national 800 number. SSA leadership responded by shifting thousands of remaining workers to new roles to help fill the gap the Administration had created. But redistributing the too-few remaining workers to roles where they have little or no experience risks ameliorating one service delivery problem by exacerbating others.

SSA has also pared back the performance metrics it had previously shared publicly each month, such as how long callers to the 800 number must wait on hold or for a call back or how long applicants must wait for an in-person appointment. This loss of transparency may hide from public view critical challenges now facing the agency.

One area of SSA operations affected by both staffing losses and reduced transparency is the large and growing backlog of hearings for people appealing SSA's denial of their application for disability benefits. The number of cases pending rose by more than 73,000 from January 2025 to February 2026, threatening harm for some of the most vulnerable people SSA serves.

Having forced out thousands of experienced employees while blocking virtually all new hiring, SSA now has fewer senior career leaders and fewer early-career staff than at any point in over two decades. These losses mean the Administration's personnel policy will likely affect service to the public for a long time to come.

FIGURE 1



SSA already faced customer service challenges when the Trump Administration took office, as years of underfunding had forced the agency to serve the growing number of beneficiaries with fewer staff.[2] The Administration's personnel policies have made things far worse. While SSA Commissioner Frank Bisignano has promised that SSA will partly compensate for cuts in staffing through improved efficiency, he has yet to explain how it will do so, and the reality is the agency will need to begin hiring significant numbers of new employees now to avoid even greater deterioration in service. The Administration also needs to publish detailed plans for addressing its customer service challenges to help restore confidence in the agency and hold it accountable for delivering on those promises.

Rapid Staffing Losses Hit Critical Customer Service Supports

In its first 12 months, the Administration pushed out more than 7,500 SSA workers without considering their individual performance or the roles they filled, causing SSA's largest one-year staffing reduction on record and compromising its ability to reliably serve seniors, bereaved families, and people with disabilities.[3] By January 2026, SSA had fewer employees than at any time since 1967, when the agency was not yet responsible for administering Supplemental Security Income (SSI) and served 52 million fewer beneficiaries.

The Administration launched this rapid staff exodus, which led over 3,500 SSA employees to leave within the first 100 days, with a combination of incentives and invective aimed at SSA staff.[4] But the Administration lacked a clear plan for how SSA would meet its mission after the loss of so many workers, which created large gaps in customer service — at call centers, local offices, and other critical areas — that continued throughout the year.

More than half of the losses in the Administration's first year occurred in three positions that are crucial for ensuring that applicants and beneficiaries get the service they need, including:

- **Nearly 1,800 social insurance specialists,** who help people apply for Social Security and SSI benefits and process applications.
- **Nearly 1,300 contact representatives,** who provide assistance and fulfill requests for visitors to local SSA offices or callers to SSA's 800 number.
- **More than 1,100 information technology workers,** who maintain the technology systems that allow other staff to receive and process applications and ensure that benefits are delivered.

As thousands of staff abruptly left key roles, SSA service reached a crisis point in the spring of 2025.[5] News reports described lines snaking out the doors of local offices, website crashes, and callers waiting up to two or three hours to get help on SSA's 800 number if they got through at all.[6] In May 2025, the last month for which SSA posted detailed customer-focused performance metrics, callers had to wait about an hour and 45 minutes on hold or for a call back, fewer than half of callers eventually got through to a representative, and most retirees and survivors waited more than 28 days for an appointment.[7]

In response, SSA's leadership focused intensively, and with some success, on shortening the time that callers to SSA's national 800 number spend waiting on hold. They reassigned 1,000 field office staff to the phone lines beginning in July 2025, boosting the number of call center agents by 25 percent, and subsequently reassigned additional staff from across the agency to aid the effort.[8] But the progress has not been as dramatic as they have claimed, with SSA's inspector general finding that average total waits on the phone ranged from 45 minutes to two hours in 2025.[9] (See text box, "Relying on Misleading Phone Metric Overstates Customer Service Improvements.")

Moreover, the reduction in phone answer times doesn't necessarily mean callers are ultimately getting the help they need faster.[10] Many of the reassigned staff have no experience directly serving the public and may not have expertise in SSA program rules relevant to answering calls. Yet they receive only a few hours of training for their new role before interacting with callers, so they may not be prepared to address all of the difficult issues they may encounter.[11]

Also, the reduction in phone answer times has come at the expense of other work that serves the public. Even as waits on the 800 number improved, other retirees, disabled workers, and bereaved families who need help from local offices are facing delays, with thousands fewer workers available to take appointments or follow through on requests. While SSA doesn't publish data on staffing by field office, 40 states and Washington, D.C. each saw a decline of more than 10 percent in the overall number of SSA

staff in the state between January 2025 and January 2026.[12] In fact, some offices have been so short-staffed that they have been forced to close their doors to people seeking in-person service, sometimes for hours and sometimes for weeks or even months.[13]

Relying on Misleading Phone Metric Overstates Customer Service Improvements

After removing from public view many important customer-focused performance metrics that SSA had been publishing monthly, Commissioner Frank Bisignano has frequently cited progress on one particular metric: average speed of answer (ASA), which was 11 minutes in January 2026. Focusing on ASA, however, gives an incomplete and misleading impression of what callers to SSA actually experience.

First, ASA only measures the average speed of answer for those callers *who are able to connect to an agent*, excluding the millions of callers each month who do not get through before hanging up, being disconnected, or receiving a busy signal. An Office of the Inspector General (OIG) report found there were 25 million such callers in 2025, but the time they spent waiting unsuccessfully for help is not counted in ASA.[a]

Second, roughly three-fourths of callers seeking to talk to an agent use the option, introduced in 2024, to receive a call back once an agent is available rather than remaining on hold.[b] But while the typical wait for a call back is over an hour, SSA records the wait as zero minutes, reducing the reported average speed of answer well below callers' actual experience.[c] (SSA no longer publishes time spent waiting for a call back; it was last reported for September 2025 by the OIG.) ASA also doesn't capture what happens to people who call a local field office rather than the national 800 number; they make up roughly 4 in 10 callers to SSA overall.[d]

Finally, ASA sheds no light on other documented challenges callers to SSA have faced over the past year, including struggling to get through AI bots to speak to a human and never receiving a promised call back.[e]

Meanwhile, SSA has avoided publicly reporting the total average wait time callers experience, which ranged from 45 minutes to two hours in 2025, according to data stripped from an OIG report on phone service before the report's publication.[f]

[a] SSA Office of the Inspector General, "Social Security Administration's Telephone Metrics," December 2025, https://oig.ssa.gov/assets/uploads/032517.pdf.

[b] SSA, "Social Security performance," https://www.ssa.gov/ssa-performance.

[c] SSA Office of the Inspector General, *op. cit.*

[d] SSA, "Agency Financial Report, Fiscal Year 2025," January 15, 2026, https://www.ssa.gov/finance/2025/Full%20FY%202025%20AFR.pdf.

[e] Meryl Kornfield and Hannah Natanson, "Callers to Social Security wait for hours to get help. Hear their ordeals," Washington Post, October 28, 2025, https://www.washingtonpost.com/politics/interactive/2025/social-security-wait-hold-callback/.

[f] Meryl Kornfield and Lisa Rein, "Under Trump, the government's watchdogs are losing their independence," Washington Post, March 19, 2026, https://www.washingtonpost.com/politics/2026/03/19/inspector-general-independence-trump/.

In addition, recent reporting and research reveal unprecedented challenges in getting needed help from SSA. The Washington Post reported in December 2025 that record backlogs at SSA are delaying service, appointments take longer to get, and new service restrictions make it harder for people to get help.[14] Widows and children who have lost parents face some of the longest delays, with months-long waits to receive benefits while many struggle to pay bills, food, and rent.[15] And a study based on interviews with

dozens of organizations working with disability applicants found applicants faced problems that included calls that were dropped or answered by people who couldn't provide help, difficulties accessing walk-in services or making appointments in local offices, and applications that "take longer, are denied more often, with more errors along the way."[16]

To help address especially severe understaffing at certain local field offices, SSA leadership is spreading incoming work across field offices to take advantage of where workers may have the most capacity. This is a worthwhile initiative if managed carefully and supported with the right systems improvements, but a source of potential errors, delays, or frustration if not well executed.[17] Likewise, with hundreds fewer processing center staff, responding to claims and other requests may take longer; getting through to agents on the 800 number is less beneficial if more callers hear that their claims and other requests have been held up because the workers who would have fulfilled them are now answering phones.[18]

Elimination of Key Customer Service Metrics May Be Hiding Further Problems

In the summer of 2025, amid bad press on its worsening performance, SSA stopped publicly releasing regular monthly updates of many customer-focused service metrics.[19] SSA restored some of those measures over time but has not restored certain key metrics. For example, SSA no longer shares how long callers wait on hold or for a call back on the 800 number, how long it takes applicants to get an appointment, or how many unfulfilled requests languish in the processing backlog.

Thus, we cannot know how well SSA's efforts to cope with its significant staffing losses are working, or how people who rely on SSA are being affected. But when Commissioner Bisignano released a set of metrics on a one-time basis in response to pressure from Congress, they contained worrying signs. As of August 2025, more than half of retirees and survivors waited over a month for an appointment to apply for benefits. Callers to the 800 number waited over an hour to reach an agent, whether they chose to wait on hold or opted for a call back — much longer than the "average speed of answer" the Commissioner often cites in public.[20]

In addition, the Washington Post's reporting in December found continuing large backlogs and delays in people receiving needed help from SSA. Local offices had over 12 million transactions — such as claims, name changes, and address updates — that workers hadn't yet processed for waiting customers. Meanwhile, the agency's centralized processing centers had 6 million other pending transactions.[21]

Staffing Losses May Be Contributing to Growing Backlog of Disability Hearings

Staff cuts appear to be contributing to the rapid growth in the backlog of disability appeals. The number of disability hearings awaiting resolution has jumped by 24 percent just in the past year.

Between January 2025 and January 2026, SSA lost 13 percent of its administrative law judges (ALJs). The largest one-year drop on record, it led to the fewest ALJs employed by SSA in at least 20 years. SSA also lost hundreds of attorneys and paralegals in 2025, many of whom help ALJs prepare for hearings and write decisions.

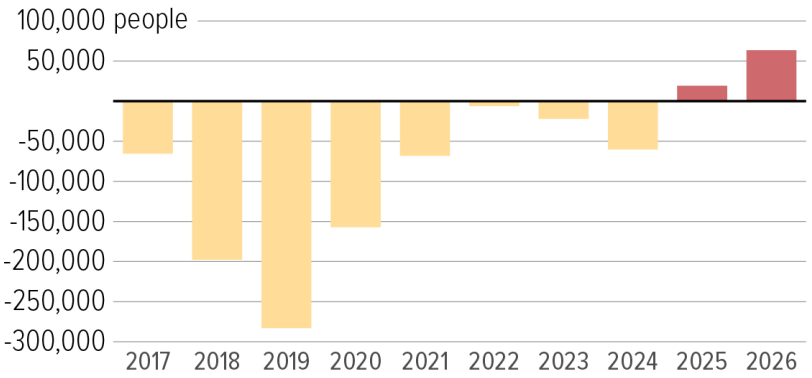
ALJs play a critical role in ensuring fair access to disability benefits, deciding on the outcomes of appeals after applicants for such benefits are initially denied by SSA. ALJs help ensure that claimants' applications are treated fairly and impartially based on the eligibility rules. More than one-third of initially denied applicants request an appeal.[22]

Such appeals are even more important if applicants are concerned that they may not get a fair decision from an overstretched and understaffed SSA.[23] Even in the best of times, lengthy waits for appeals cause hardships for applicants who are unable to work because of their disability but are still awaiting a decision on their benefits.

FIGURE 2

Disability Hearing Backlog Now Rising After Years of Reduction

Change in number of people with disability hearings awaiting resolution



Note: Years are fiscal years; data for 2026 are for the fiscal year to date, Sep. '25 to Feb. '26.
Source: SSA

CENTER ON BUDGET AND POLICY PRIORITIES | CBPP.ORG

The number of disability hearings awaiting resolution rose by more than 73,000 from January 2025 to February 2026, to nearly 344,000.[24] After years of progress in reducing record backlogs (including during the first Trump Administration), 2025 was the first fiscal year since 2016 in which the number of

people awaiting decisions on their appeals increased. (See Figure 2.) The loss of judges needed to decide these appeals will make it even more difficult for SSA to shrink the growing backlog.

Adding to these problems, SSA abruptly stopped publishing more detailed monthly hearings data for the first time in years in September 2025. Restoring transparency on appeals is vital: continued increases in the backlog would mean some of the most vulnerable people that SSA serves — people with severe, potentially work-limiting disabilities who are waiting to begin receiving financial support — are suffering as a result of SSA's personnel policies. This is particularly ominous given the major problems that SSA had with appeals backlogs a decade ago. Backlogs ultimately reached a record high, and SSA was only able to get them under control with significant congressional oversight and dedicated funding.[25]

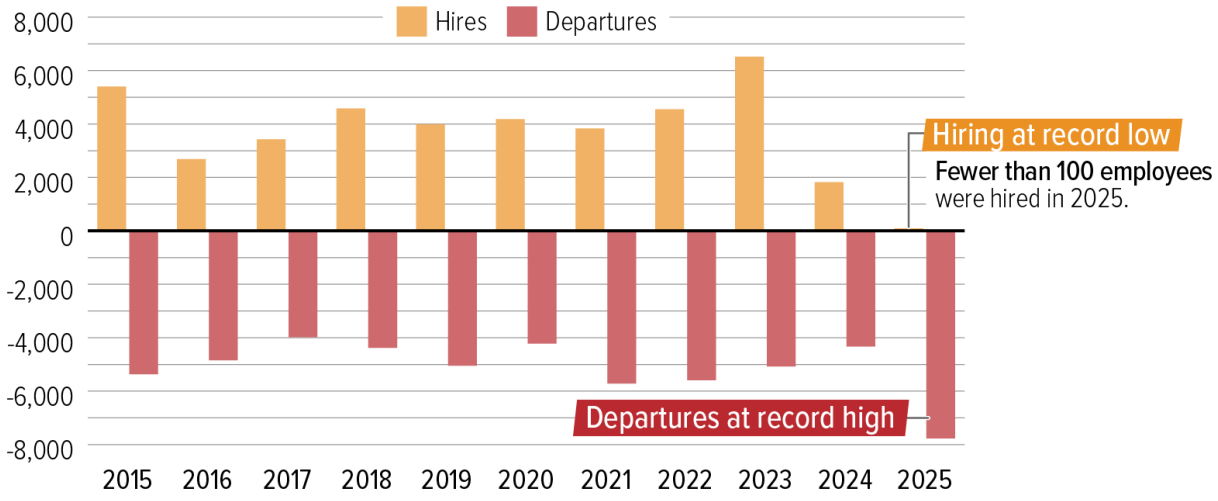
Current Problems Will Likely Have Lasting Consequences

The large, rapid, and haphazard loss of staff last year will likely hamper SSA's performance for years to come. The Administration chased away an unprecedented level of expertise and experience from the agency, including more than a third of its nonpartisan career senior executives.[26] SSA lost more than twice as many senior executives in 2025 as in any other year on record.

While pushing out a historic number of workers, the Administration has also blocked SSA from replacing nearly any of them. (See Figure 3.) The agency hired fewer than 100 employees in all of 2025 — the lowest number on record and less than 2 percent of hiring in an average year.

FIGURE 3

At SSA, Unprecedented Staffing Loss and Record-Low Hiring



Source: OPM EHRI Dynamics dataset. Record highs and lows refer to the period (2005 onward) for which data are available.

The cuts and failure to hire combined to strip the agency of its pipeline of early-career workers training to assist the public when longer-tenured workers leave. At the beginning of 2026, fewer than 850 of SSA's

50,000 employees were in their first two years of federal service and fewer than 7,800 were in in their first five years – both easily the lowest figures on record going back over 20 years. This means SSA will be particularly vulnerable as more employees continue to leave, because the Administration is failing to invest in training their replacements. It typically takes two years for a new claims representative or disability examiner to acquire the technical knowledge necessary to handle a large workload encompassing a range of complex issues.



Early-career employees at SSA are at record lows.
Fewer than 850 of SSA's 50,000 employees are in their first two years of federal service; fewer than 7,800 are in in their first five years.

Failing to hire will particularly hurt the parts of SSA that typically experience the highest turnover, such as call centers and local offices. However, as of March 1, 2026, SSA was publicly recruiting for only *eight* roles at the entire agency, all in information technology. Reporting suggests that SSA aims to "increase its workforce by 1,000 employees" this year, including at least 700 customer service representatives, but it is not clear whether the agency plans to merely hire 1,000 employees or to increase staffing by 1,000 even accounting for further departures.[27] After all, in a typical year about 5,000 workers leave SSA (but are often replaced by new hires). SSA needs to begin hiring significant numbers of new employees now to avoid even greater deterioration in service.

When SSA begins to hire in earnest, it will face new challenges, like the Administration's politicization of hiring and firing government-wide. Agency heads, along with a committee of political appointees, must personally approve every job listing before posting, as well as every selection before hiring.[28] All applicants must answer essay questions about how they will further the President's agenda – even if their day-to-day role is apolitical and focused on serving the public, like answering questions about SSA services, processing benefit applications, or supporting SSA's technology needs. It also may be more difficult to recruit employees to federal service following the Administration's mass firings and denigration of federal workers, and with so many remaining workers carrying the workload of departed colleagues.[29] SSA scored the lowest on employee satisfaction and engagement of any large agency in the Partnership for Public Service's Public Service Viewpoint Survey, which was designed to replace the annual federal personnel survey that OPM cancelled in 2025.[30]

Greater Transparency Essential to Hold SSA Accountable

When President Trump resumed office in 2025, SSA was already straining to deliver for those who rely on it. Years of constrained administrative budgets had caused SSA staffing to gradually fall by roughly 7,300 employees over the preceding decade. For reasons it never fully articulated, the Administration chose to reduce SSA's workforce by another 7,500 employees in a single year without regard for their roles or responsibilities. Predictably, this created unprecedented disruption at SSA and raised serious concerns about the agency's ability to reliably deliver services and benefits to the public.

Given the significant staffing gaps the workforce cuts created in critical functions, SSA is under strong pressure to increase the productivity of its remaining staff quickly. But reassignments, sprints, and shortened training (along with ongoing restrictions on hiring) will not deliver the sustained and lasting improvements SSA needs. Pushing staff to rush through tasks can undermine accuracy and quality, unfairly keeping people from receiving benefits they are entitled to or creating additional headaches for SSA in the future, such as payment errors or lengthy and expensive appeals.

Laudably, SSA is looking to leverage technological improvements or workflow efficiencies to offset some of the lost capacity. But such initiatives will require careful planning and thoughtful implementation, and the Administration's choice to radically cut staff *first* and implement improvements *second* raises serious questions about its judgment and ability to execute these efforts. Public trust in SSA has also been seriously damaged over the past year by DOGE chaos and weaponization of the agency, fake fraud claims, politicization of agency communications, data leaks, and other problems.[31]

Commissioner Bisignano has frequently stated that he wants SSA to be a "digital first" agency; leaked documents show SSA aims to cut the number of people it serves in its field offices in half in 2026.[32] But he has provided few specifics on how he plans to achieve that goal, and what improvements the public should expect to see and when. In fact, SSA's performance plan for 2026 listed "TBD" for many of its most important customer service goals and targets.

The Administration owes Congress and the public a concrete explanation of SSA's planned path forward and transparent measures and benchmarks to hold the agency accountable in making progress toward those goals, such as:

- **Publishing SSA's annual personnel plan**, which the agency was required to submit to OPM and the Office of Management and Budget at the end of 2025. SSA should make that document public, along with a clear and detailed plan for future staffing at SSA.
- **Publishing monthly reports on staffing at each field office and in other critical positions across the agency**. OPM has made welcome improvements in the transparency with which it reports on federal personnel across government. SSA should build on that effort by releasing its own staffing figures.

  If SSA plans to make do with fewer front-line staff or reduced support for those directly assisting the public, it should make clear how it intends to do so and what tradeoffs in service are to be expected. This is especially important given that the loss of experienced personnel could have lasting consequences for the quality of SSA services.
- **Restoring the detailed monthly customer service metrics and hearings statistics SSA ceased posting last year**, and publishing clear targets and timelines for any improvements SSA says it plans to pursue.

Such steps will be critical to help SSA begin to earn back the public's trust and to provide the transparency needed to hold the Administration accountable for the direction it has taken the agency.

[1] According to OPM data, SSA's headcount declined from 57,384 in January 2025 to 49,880 in January 2026. See OPM, "Federal Workforce Data," https://data.opm.gov/.

[2] Paul Van de Water, "SSA Budget Will Worsen Customer Service Crisis, But Investment in 2025 Could Fund Turnaround," CBPP, April 12, 2024, https://www.cbpp.org/blog/ssa-budget-will-worsen-customer-service-crisis-but-investment-in-2025-could-fund-turnaround.

[3] The largest previous one-year decline was approximately 6,334 SSA employees (roughly 8 percent) between 1986 and 1987. Among full-time staff, the gap between the two periods was even greater. The number of full-time staff declined by 6,942 (12 percent) between January 2025 and January 2026, compared to 4,433 (6 percent) in 1986-87). See William Morton, "Social Security Administration (SSA) Staffing Levels: Data Brief," Congressional Research Service, September 29, 2025, https://www.congress.gov/crs_external_products/R/PDF/R48725/R48725.4.pdf.

[4] SSA, "Social Security Announces Workforce and Organization Plans," February 28, 2025, https://www.ssa.gov/news/en/press/releases/2025-02-28.html; SSA, "Social Security Announces Options to its Workforce," February 27, 2025, https://www.ssa.gov/news/en/press/releases/2025-02-27.html; Alex Gangitano, "Musk dominates, disparages federal workers at first Trump Cabinet meeting," The Hill, February 26, 2025, https://thehill.com/homenews/administration/5165273-elizabeth-musk-trump-cabinet/; PBS News, "Trump says 'many' of fired federal workers 'didn't come to work' and are 'being weeded out,'" March 24, 2025, https://www.pbs.org/newshour/politics/watch-trump-says-many-of-fired-federal-workers-didnt-come-to-work-and-are-being-weeded-out; James Politi, "Russell Vought: the man on a 'divine mission' to traumatise US bureaucrats," Financial Times, February 10, 2025, https://www.ft.com/content/2a41b1bd-dd63-4c48-933f-b3000e30e17a.

[5] Lisa Rein and Hannah Natanson, "Long waits, floods of calls, web crashes: Social Security is breaking down," Washington Post, March 25, 2025, https://www.washingtonpost.com/politics/2025/03/25/social-security-phones-doge-cuts/; Jack Healy *et al.,* "'Just a Mess': Staff Cuts, Rushed Changes and Anxiety at Social Security," New York Times, April 8, 2025, https://www.nytimes.com/2025/04/08/us/social-security-trump.html.

[6] Healy *et al., op. cit.*

[7] SSA, "Social Security performance," as archived on May 23, 2025, by Internet Archive, https://web.archive.org/web/20250523091534/https://www.ssa.gov/ssa-performance.

[8] SSA's Office of the Inspector General found that this influx of personnel, aided by the adoption of a more modern phone platform in 2024, helped get calls answered faster. Reporting suggests that SSA reassigned an additional 500 employees from field offices in December 2025; 800 from processing claims and other requests in January 2026; and additional staff who worked on digital services, disability adjudication, and other areas in February 2026. See: SSA Office of the Inspector General, "Social Security Administration's Telephone Metrics," December 2025, https://oig.ssa.gov/assets/uploads/032517.pdf; Natalie Alms and Eric Katz, "Social Security is directing employees who normally process benefits to answer phones instead," Government Executive, February 9, 2026, https://www.govexec.com/workforce/2026/02/social-security-directing-employees-who-normally-process-benefits-answer-phones-instead/411253/.

[9] Meryl Kornfield and Lisa Rein, "Under Trump, the government's watchdogs are losing their independence," Washington Post, March 19, 2026, https://www.washingtonpost.com/politics/2026/03/19/inspector-general-independence-trump/.

[10] Rachel Siegel, Meryl Kornfield, and Hannah Natanson, "The Trump administration is moving staff into jobs they know nothing about," Washington Post, September 4, 2025, https://www.washingtonpost.com/business/2025/09/04/federal-government-job-changes/.

[11] Eric Katz, "'Suicide is only one option': Social Security staff newly assigned to phone duties raise concerns over training," Government Executive, February 13, 2026, https://www.govexec.com/management/2026/02/suicide-only-one-option-social-security-staff-newly-assigned-phone-duties-raise-concerns-over-training/411429/. Hastily retrained employees, thousands of whom are now answering the phones, often start out able to help with only the most basic questions they receive.

[12] OPM, *op. cit.* This figure mirrors findings in a recent Center for American Progress analysis: Molly Westin Williams, "The Social Security Administration Is Bleeding Staff," January 30, 2026, https://www.americanprogress.org/article/the-social-security-administration-is-bleeding-staff/.

[13] Lisa Rein, Meryl Kornfield, and Hannah Natanson, "How Social Security has gotten worse under Trump," Washington Post, December 30, 2025, https://www.washingtonpost.com/politics/2025/12/29/trump-social-security-cuts-customer-service/; SSA, "Closures or Delays Affecting In-Person Service," https://www.ssa.gov/agency/emergency.

[14] Rein, Kornfield, and Natanson, *op. cit.*

[15] Chabeli Carrazana, "Widows are waiting months for the benefits meant to help them after loss," March 18, 2026, https://19thnews.org/2026/03/widows-social-security-survivor-benefits/.

[16] Katie Savin, Callie Freitag, and Matthew Borus, "'In the last year, it's gotten a lot worse': A Qualitative Investigation of Barriers to Disability Benefits in 2025," Disability Rights Education & Defense Fund, March 2, 2026, https://dredf.org/ssa-barriers-2025/.

[17] Jessica Hall, "Social Security is making a change that could disrupt service for millions of Americans," MarketWatch, January 24, 2026, https://www.morningstar.com/news/marketwatch/20260124187/social-security-is-making-a-change-that-could-disrupt-service-for-millions-of-americans.

[18] Eric Katz and Natalie Alms, "Social Security is directing employees who normally process benefits to answer phones instead," NextGov/FCW, February 6, 2026, https://www.nextgov.com/people/2026/02/social-security-directing-employees-who-normally-process-benefits-answer-phones-instead/411256/.

[19] Meryl Kornfield and Hannah Natanson, "Social Security stops reporting call wait times and other metrics," Washington Post, June 20, 2025, https://www.washingtonpost.com/politics/2025/06/20/social-security-wait-times-cuts/.

[20] For the data provided by Commissioner Bisignano, see https://static.foxnews.com/foxnews.com/content/uploads/2025/09/crosscheck-of-ssa-public-metrics-for-sen-warren-091625.pdf. See also Senator Elizabeth Warren, "Disappearing Data: Social Security Administration's Removal of Key Performance Metrics from the Agency's Website," September 5, 2025, https://www.warren.senate.gov/imo/media/doc/warren_report_letter_to_commissioner_bisignano_re_report_on_data_removal.pdf.

[21] Rein, Kornfield, and Natanson, *op. cit.*

[22] National Organization of Social Security Claimants' Representatives, "Daily Dose of Data from SSA," February 26, 2025, https://nosscr.org/article/daily-dose-of-data-from-ssa-2-25/.

[23] Jack Smalligan, "The SSA Says It's Reduced the Disability Claims Backlog. Fewer New Claims and a Higher Denial Rate Could Be Driving the Reduction," Urban Institute, September 12, 2025, https://www.urban.org/urban-wire/ssa-says-its-reduced-disability-claims-backlog-fewer-new-claims-and-higher-denial-rate.

[24] SSA, "Social Security performance," *op. cit.* In January 2025 there were 270,949 hearings pending.

[25] SSA Office of the Inspector General, "The Social Security Administration's Efforts to Eliminate the Hearings Backlog," September 2015, https://oig-files.ssa.gov/audits/full/A-12-15-15005.pdf.

[26] SSA collectively lost over 96,000 years of past federal service from its workforce.

[27] Emily Davies and Meryl Kornfield, "After slashing federal jobs, Trump administration ramps up hiring," Washington Post, March 9, 2026, https://www.washingtonpost.com/politics/2026/03/09/trump-hiring-federal-workers/.

[28] Drew Friedman, "Political appointees to be more involved in recruitment decisions as federal hiring freeze continues," Federal News Network, October 15, 2025, https://federalnewsnetwork.com/hiring-retention/2025/10/political-appointees-to-be-more-involved-in-recruitment-decisions-as-federal-hiring-freeze-continues/.

[29] Ana Altchek, "Federal jobs aren't so hot anymore for recent grads," Business Insider, April 26, 2025, https://www.businessinsider.com/interest-in-government-jobs-not-what-it-was-last-year-2025-4.

[30] Partnership for Public Service, "Federal Public Service in Peril: A Report Card on the Trump Administration's Management of Our Government," March 19, 2026, https://bestplacestowork.org/.

[31] Devin O'Connor, "Social Security Stability Remains at Risk," CBPP, March 31, 2025, https://www.cbpp.org/blog/social-security-stability-remains-at-risk; Josephine Cureton and Kathleen Romig, "Contrary to Administration's Misleading Claims, New Senior Deduction Doesn't Help Low- and Middle-Income Seniors, Does Deplete Social Security Trust Funds," CBPP, July 28, 2025, https://www.cbpp.org/blog/contrary-to-administrations-misleading-claims-new-senior-deduction-doesnt-help-low-and-middle.

[32] Natalie Alms, "Social Security wants about 15 million fewer visits in its field offices," NextGov/FCW, December 1, 2025, https://www.nextgov.com/digital-government/2025/12/social-security-wants-about-15-million-fewer-visits-its-field-offices/409850/.

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The Case for Updating SSI Asset Limits

Raising or Eliminating Limits Would Reduce Administrative Burdens Without Dramatically Increasing Enrollment

By Kathleen Romig, Luis Nuñez, and Arloc Sherman[1]

The Supplemental Security Income (SSI) program for low-income elderly and disabled people has the strictest savings limits of any federal program. Eligibility is limited to people who have only $2,000 (or $3,000 for couples). This is not enough for beneficiaries to weather an emergency, let alone provide stability or save for the future. Administering the resource limit, often referred to as an asset test, is burdensome for both Social Security Administration (SSA) staff and for claimants. Policymakers should increase or even eliminate SSI's resource limit amid growing bipartisan support to do so.

The resource limit is the leading cause of erroneous payments in the SSI program and leads to churn because beneficiaries who go even slightly over the outdated limit are suspended and then terminated. Beneficiaries who exceed the limit typically rack up thousands of dollars in overpayments that are extremely difficult to repay from their meager benefits. Additionally, SSA employees must administer these complex and inefficient rules amid a customer service crisis they are in due to underfunding. Because the value of the limit is not indexed to inflation — and hasn't been updated in decades — its value erodes each year due to inflation. It is now only one-sixth of its 1972 value.

A higher limit would encourage — rather than penalize — saving and allow people to retain savings to use when they really need those resources. Research shows that having a financial cushion leads to greater economic security. A higher limit would also reduce administrative burdens, payment errors, and churn. And easing or eliminating the asset test would mean that more very low-income seniors and people with disabilities could get the income support they need to afford the basics and not be forced to first deplete modest savings. Policymakers have recognized the case for allowing greater savings and have increased or eliminated resource limits in other economic security programs, including the Supplemental Nutrition Assistance Program (SNAP) and Medicaid.

[1] We are grateful to AARP for funding this research. The views expressed are solely those of the authors and should not be attributed to AARP. We thank Joel Eskovitz and Jim Palmieri for helpful comments on an earlier version of this report.

In this brief we analyze several ways to increase SSI's resource limits, including raising them to $10,000 per beneficiary (as proposed in S. 2767 by Sens. Sherrod Brown (D-OH) and Bill Cassidy (R-LA) and H.R. 5408 by Reps. Brian Higgins (D-NY) and Brian Fitzpatrick (R-IL)), raising them to $100,000 per beneficiary (consistent with the limits in ABLE accounts, which don't count against SSI's resource limits), and eliminating resource limits (as other economic security programs have done). We also examine excluding retirement savings from SSI's resource limits (as proposed in the SSI Restoration Act), in combination with each of these options.

We find that increasing SSI's resource limits to $10,000 per beneficiary would increase SSI participation by up to 3 percent. Increasing limits to $100,000 per beneficiary — a fiftyfold increase — would increase participation by about 5 percent, while eliminating limits would increase participation by about 6 percent. Excluding retirement accounts would only slightly increase participation. Even radical changes in SSI's resource rules would not dramatically increase program participation, because few people who meet SSI's other criteria have substantial savings. SSI beneficiaries must have very low incomes to qualify, and that means they have little margin for savings. In addition, they either have a disability that substantially limits their earnings, or they are over age 65.

SSI Provides Subsistence Benefits to Elderly and Disabled People Most in Need

Created in 1972, SSI provides monthly cash assistance to people who are disabled or elderly and have little income and few assets. Similar to the Old-Age, Survivors, and Disability Insurance program, commonly known as Social Security, SSI is administered by SSA. In May 2023, 7.5 million people collected SSI benefits. Most SSI beneficiaries — 85 percent — are eligible due to a severe disability (including blindness).[2]

Eligibility criteria for SSI are strict. All applicants must meet SSI's stringent financial criteria, and applicants for disability benefits must also meet the same rigorous medical criteria used for Social Security Disability Insurance (SSDI). About 60 percent of applications for SSI benefits were denied in 2018-2020, after all levels of appeal.[3] Those who qualify are subject to regular financial redeterminations to ensure continued compliance with SSI's strict income and asset rules, and regular continuing disability reviews to ensure continued medical eligibility.

The basic federal SSI benefit is about three-fourths of the poverty line for a single person. Thus, while SSI alone is not enough to lift someone living independently above the poverty line, it reduces hardship and lessens the need for support from family members. But roughly half of all beneficiaries had incomes below the federal poverty line even with their SSI benefits in 2016.[4] In addition to providing modest cash benefits, SSI is an important pathway to health coverage, as beneficiaries in most states are automatically eligible for Medicaid. In addition to medical care, Medicaid provides

[2] Social Security Administration (SSA), "SSI Monthly Statistics, May 2023," June 2023, https://www.ssa.gov/policy/docs/statcomps/ssi_monthly/index.html.

[3] CBPP, "Policy Basics: Supplemental Security Income," updated February 21, 2023, https://www.cbpp.org/research/social-security/supplemental-security-income.

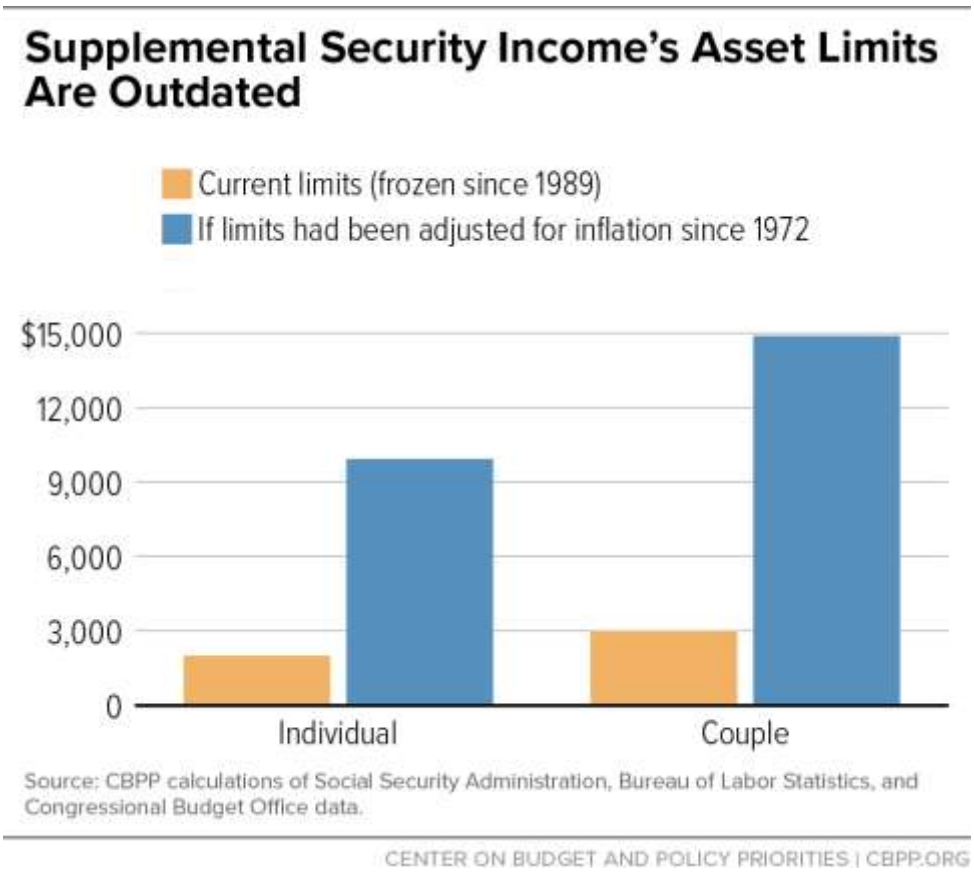
[4] Matt Messel and Brad Trenkamp, "Characteristics of Noninstitutionalized DI, SSI, and OASI Program Participants, 2016 Update," April 2022, https://www.ssa.gov/policy/docs/rsnotes/rsn2022-01.html.

essential long-term services and supports, allowing more elderly and disabled people to live in their homes and communities instead of in institutions.

SSI's Resource Limits Have Stagnated at Low Levels for Decades

SSI has extraordinarily low resource limits. Applicants who exceed the limits are ineligible for any benefits from the program. Current beneficiaries who exceed the limits are suspended and then terminated from program participation if their savings remain above the limits, and they must repay any benefits paid while they are over the limit. SSI beneficiaries are limited to only $2,000 in assets of any kind. For married couples or two-parent families with SSI beneficiary children, the limit is $3,000, which creates a marriage penalty because the couple limit is 25 percent less than the limit for two individuals. (See Figure 1.) Countable resources include cash, bank accounts, retirement savings, stocks, mutual funds, savings bonds, life insurance, household goods, burial funds, and more, as well as the resources of parents, spouses, and immigration sponsors, in many cases. Primary residences and vehicles do not count against the resource limits.

FIGURE 1



SSI's resource limits have changed little since the program's establishment, even though the value of the limits has eroded dramatically. When policymakers created the program in 1972, they set resource limits of $1,500 for individuals and $2,250 for couples. Policymakers then gradually raised these resource thresholds between 1985 and 1989 to $2,000 for individuals and $3,000 for couples — the only resource increase since SSI was enacted over 50 years ago. Still, it only partially accounted for the effects of inflation up to that point. Had resource limits been indexed to inflation

since 1972, when the law first passed, they would be $9,929 for an individual and $14,893 for a couple in 2023 — about five times as high as they are today.[5]

Most SSI beneficiaries are well under the resource limit. More than two-thirds of SSI beneficiaries have no savings at all, and about 92 percent have less than $500 in savings, according to our analysis. Few people with incomes low enough to qualify for SSI have many resources, because they have little margin for saving, research shows.[6]

Federal Treatment of Savings Has Evolved Since 1972

After SSI was enacted, federal policy began to encourage workers to accumulate savings to fund their retirements — even as it continued to penalize SSI beneficiaries if they managed to save anything at all, either for emergencies or for retirement. Individual retirement accounts (IRAs) were created in 1974 and 401(k)s in 1978 — after SSI and its resource limits were established. Today, far fewer workers are offered traditional workplace pensions, which don't count against SSI's resource limits, and far more are offered workplace retirement savings accounts, which do count against the resource limits.

The number of workers participating in "defined contribution" retirement accounts has risen nearly eightfold since the mid-1970s. As of 2020, there were seven times more defined contribution plans than traditional "defined benefit" plans, while the number of workers participating in defined benefit plans has dwindled. (See Figure 2.)[7] The recently enacted Securing a Strong Retirement Act of 2022 (known as SECURE 2.0) will automatically enroll more workers, including working SSI beneficiaries, into workplace retirement savings accounts.[8]

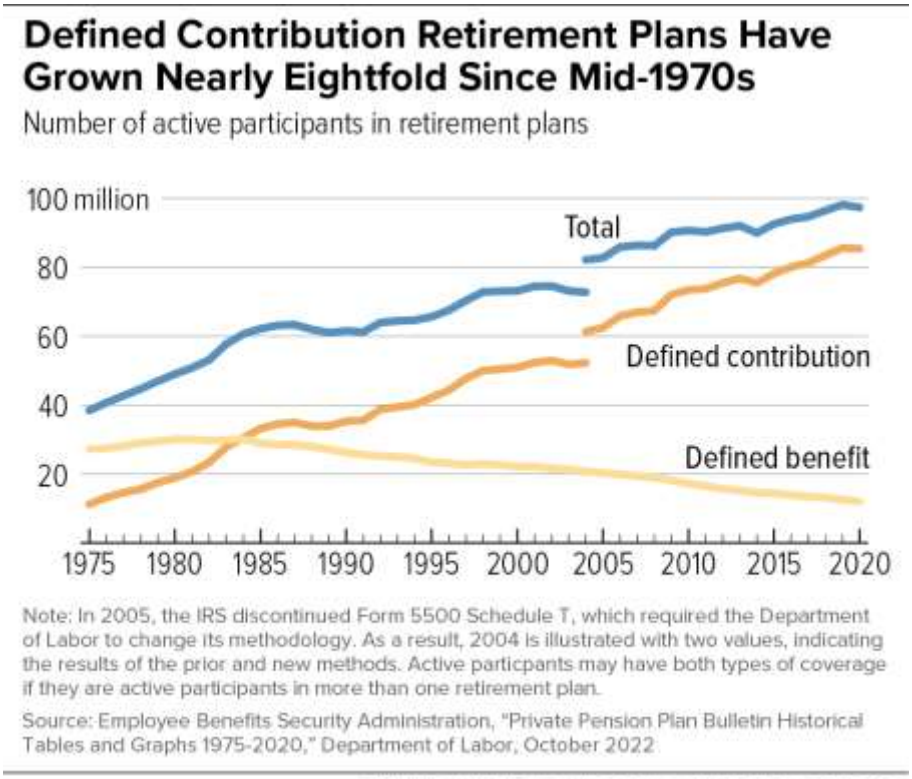
[5] CBPP calculations of SSA, Bureau of Labor Statistics, and Congressional Budget Office data.

[6] Paul S. Davies *et al.*, "Modeling SSI Financial Eligibility and Simulating the Effect of Policy Options," *Social Security Bulletin*, Vol. 64, No. 2, September 2002, https://www.ssa.gov/policy/docs/ssb/v64n2/v64n2p16.pdf.

[7] Employee Benefits Security Administration, United States Department of Labor, "Private Pension Plan Bulletin Historical Tables and Graphs, 1975-2020," October 2022, https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf.

[8] Securing a Strong Retirement Act of 2022, H.R. 2954, https://www.congress.gov/bill/117th-congress/house-bill/2954.

FIGURE 2



The Achieving a Better Life Experience (ABLE) Act of 2014 allows states to create tax-advantaged savings programs for eligible people with disabilities; these accounts do not count toward SSI's resource limits and other economic security programs. SSI beneficiaries are allowed to hold up to $100,000 in ABLE accounts, essentially raising the resource limit by fiftyfold for participating beneficiaries. People who became disabled by age 26 are eligible for ABLE accounts. They account for about 44 percent of SSI beneficiaries, as many have developmental or congenital disabilities.[9] The accounts can be used by parents or other family members to provide for disabled relatives' futures without jeopardizing their future eligibility for means-tested benefits. Funds from ABLE accounts may be used by beneficiaries to pay for a very broad set of "qualified disability expenses," including housing, transportation, health, and basic living expenses.[10] The ABLE Age Adjustment Act was adopted as part of the SECURE 2.0 retirement savings package. It will expand eligibility for ABLE accounts to include people disabled by age 46, which would include a majority of SSI beneficiaries.

Though eligibility for ABLE accounts among SSI beneficiaries is broad — currently including nearly half of participants, and soon to include the substantial majority — participation is very limited. To date, only about 130,000 ABLE accounts have been set up, including for people who are

[9] William R. Morton and Kirsten J. Colello, "Achieving a Better Life Experience (ABLE) Programs," IF10363, Congressional Research Service, March 17, 2017, https://crsreports.congress.gov/product/pdf/IF/IF10363.

[10] SSA Program Operations Manual System (POMS), SI 01130.740, Achieving a Better Life Experience (ABLE) Accounts, https://secure.ssa.gov/poms.nsf/lnx/0501130740.

not SSI beneficiaries.[11] That accounts for significantly less than 1 percent of SSI beneficiaries who are eligible under the current rules. A forthcoming study by the University of Chicago's Inclusive Economy Lab sheds light on ABLE account usage and knowledge. Less than half of respondents heard about ABLE accounts, and among those who had, a majority misunderstood or underestimated their connection with SSI and its financial advantages.[12] Wealthier households were much more likely to know about ABLE accounts and to open them. This lack of awareness and understanding, as well as the additional administrative burden of opening a specialized account, limits the utility of ABLE accounts. By contrast, beneficiaries would not have to do anything to avoid penalties if SSI had higher resource limits.

Raising SSI's Resource Limits Would Reduce Churn and Payment Errors

Administering the program's extremely low resource limits creates significant challenges for applicants, beneficiaries, and SSA, which is underfunded and overworked. Applicants must answer dozens of questions about their resources and provide detailed documentation, which SSA employees review and process. Federal law requires SSA to verify applicants' cash, bank accounts, stocks, mutual funds, savings bonds, property, life insurance, vehicles, household goods, burial funds, and more.[13] Because the resources of spouses, parents, and immigration sponsors can also be "deemed" to the beneficiary, SSA staff must examine those as well. The time spent producing and reviewing documents often delays the start of much-needed benefits; some applicants give up because they can't produce paperwork that shows how little they own.

The requirement to prove their continued compliance contributes to "churn" in program participation. SSA must redetermine each beneficiary's financial eligibility every one to six years and each time their circumstances change.[14] In addition, exceeding the resource limit is the leading cause of overpayments in SSI, which leads to future payments being cut or clawed back.[15] When a beneficiary goes over SSI's resource test — even by a small amount — their entire benefit is not payable for that month. Typically, SSA lags in detecting and addressing overpayments, so beneficiaries are usually overpaid for months, racking up thousands of dollars that must be repaid. Most SSI beneficiaries have little to no other income, making it extremely difficult to repay these debts.

As a result of these strict resource rules, each year an average of 70,000 beneficiaries have their benefits suspended. Beneficiaries lose their entire benefit during suspensions, during which they must spend down their resources to reestablish eligibility, which can force beneficiaries to spend resources more quickly than is wise to ensure continued income assistance and the Medicaid benefits

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[11] National Association of State Treasurers, ABLE (Achieving a Better Life Experience), https://nast.org/able/.

[12] Guglielmo Briscese, Michael Levere, and Harold Pollack, "Improving Financial Security for People with Disabilities through ABLE Accounts," presentation at Household Finance Research Seminar, February 16, 2023.

[13] SSA, Application for Supplemental Security Income (SSI), https://www.ssa.gov/legislation/Attachment%20for%20SSA%20Testimony%207_25_12%20Human%20Resources%20Sub%20Hearing.pdf.

[14] SSA, "Understanding Supplemental Security Income Redeterminations — 2023 Edition," https://www.ssa.gov/ssi/text-redets-ussi.htm.

[15] SSA, Agency Financial Report for Fiscal Year 2022, Other Reporting Requirements, https://www.ssa.gov/finance/2022/Other%20Reporting%20Requirements-.pdf.

that come with it. After 12 months of suspension, they are terminated. On average, 40,000 beneficiaries have their benefits terminated each year for exceeding the resource limit, after which they must start the application process again.[16] In some cases, beneficiaries exceed the limit only temporarily — for example, by accruing interest in an emergency savings account that was previously below the limit. In other cases, they remain below the limit but can't produce the necessary documentation to prove it.

Administering SSI's complicated rules consumes a large portion of SSA's budget and staff time, during a time when both are highly constrained. Administration of SSI absorbs 35 percent of SSA's administrative outlays.[17] In contrast, 19 percent of SSA's spending goes toward administering SSDI benefits, even though nearly 1.4 million more people receive those benefits than receive SSI.[18] At the same time, Social Security's operating budget has been starved, even as demands on the agency increase. Between 2010 and 2023, the agency's workload expanded dramatically, with the number of Social Security beneficiaries increasing by 12 million, or 22 percent.[19] However, the agency's customer service budget shrank 17 percent after taking inflation into account, and its staff by 16 percent — to the lowest level in 25 years.[20]

If resource limits were updated, fewer beneficiaries would exceed them, reducing administrative burdens on both SSI beneficiaries and SSA staff. If limits were increased, SSA would continue using the same burdensome processes to determine a beneficiary's resources. But significantly fewer beneficiaries would be subject to overpayments, suspensions, and terminations for exceeding the limits. Eliminating the resource limit would get rid of these burdens entirely, significantly simplifying administration.

Raising SSI's Resource Limits Would Improve Income Security

SSI has the steepest savings penalty of any federal program, despite a large and growing body of evidence on the importance of savings. People with little to no savings are more likely to have subprime credit scores, struggle to pay bills, and have lower financial well-being.[21] They spend their

[16] SSI Annual Statistical Report, 2021, Tables 76 and 77, https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2021/sect11.html.

[17] SSA, "Justification of Estimates for Appropriations Committees Fiscal Year 2024," March 2023, https://www.ssa.gov/budget/assets/materials/2024/FY24-JEAC.pdf.

[18] *Ibid.*

[19] CBPP calculations of SSA, Bureau of Labor Statistics, and Congressional Budget Office data; SSA, "Number of beneficiaries receiving benefits on December 31, 1970-2022," https://www.ssa.gov/oact/STATS/OASDIbenies.html.

[20] SSA, "Annual Statistical Supplement, 2022," Table 2.F3, December 2022, https://www.ssa.gov/policy/docs/statcomps/supplement/2022/2f1-2f3.html#table2.f3; Kathleen Romig, "Long Overdue Boost to SSA Funding Would Begin to Improve Service," CBPP, March 30, 2023, https://www.cbpp.org/blog/long-overdue-boost-to-ssa-funding-would-begin-to-improve-service.

[21] Caroline Ratcliffe *et al.*, "Emergency Savings and Financial Security Insights from the Making Ends Meet Survey and Consumer Credit Panel," CFPB Office of Research Data Point No. 2022-01, March 2022, https://files.consumerfinance.gov/f/documents/cfpb_mem_emergency-savings-financial-security_report_2022-3.pdf.

money on current debts, such as unpaid bills. Having savings significantly reduces material hardship for low-income families.[22]

Living with a disability — as at least 85 percent of SSI beneficiaries do — also imposes additional costs. Households with a disabled member need about $18,000 more per year, on average, just to have the same standard of living as a similar household without a member with a disability, research shows.[23] Many of the additional costs of living with a disability are expensive and require savings to purchase, such as customized wheelchairs, home and automobile modifications, and other medical equipment not covered by Medicaid.

A higher asset limit would ensure that if an SSI applicant or current beneficiary has modest savings, they can qualify for SSI's income assistance and they can keep those assets in hand to use when they need to, such as for expenses related to their health conditions, for repairs to cars or homes, or for family needs.

Raising SSI's resource limits would also provide stability for beneficiaries who rely on other public benefits to meet their health care and housing needs. Going over the resource limit not only causes beneficiaries to lose SSI benefits, but also in many cases Medicaid, SNAP, and other benefits where eligibility is tied to receipt of SSI.

Policymakers Have Proposed Increases to SSI's Resource Limits

The Supplemental Security Income Restoration Act of 2021, first introduced by Rep. Raúl Grijalva (D-AZ) (H.R. 3824) and Sen. Brown (S. 2065), would comprehensively update the SSI program. The bill would increase SSI's resource limit for individuals to $10,000, restoring it to approximately the same amount as if it had been indexed to inflation since 1972; it would also increase the couple limit to $20,000, thus eliminating the marriage penalty. The bill would also automatically increase the limits each year with inflation and exclude retirement accounts from the resource test. It also included other provisions to raise benefits and to allow beneficiaries to keep more of their earnings and Social Security benefits, among other things.

The bipartisan SSI Savings Penalty Elimination Act (S. 2767), introduced by Sens. Brown and Cassidy, as well as Reps. Fitzpatrick and Higgins, includes only the Supplemental Security Income Restoration Act provisions to raise the resource limits to $10,000 and $20,000 and index them to inflation.[24] Raising the program's resource limits as proposed by the SSI Savings Penalty Elimination Act would restore the program to policymakers' original intentions 50 years ago, by adjusting the individual threshold for the inflation that has occurred since 1972 and keeping its value intact in future years. It would also eliminate the marriage penalty.

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[22] Signe-Mary McKernan *et al.*, "Building Savings, Ownership, and Financial Well-Being," Urban Institute, April 9, 2020, https://www.urban.org/research/publication/building-savings-ownership-and-financial-well-being.

[23] Zachary Morris *et al.*, "The Extra Costs Associated with Living with a Disability in the United States," October 14, 2020, https://www.nationaldisabilityinstitute.org/wp-content/uploads/2020/10/extra-costs-working-paper.pdf.

[24] SSI Savings Penalty Elimination Act, S. 2767, https://www.congress.gov/bill/118th-congress/senate-bill/2767 and H.R. 5408, https://www.congress.gov/bill/118th-congress/house-bill/5408?q=%7B%22search%22%3A%22ssi+savings+penalty+elimination+act%22%7D&s=2&r=1.

The Supplemental Security Income Restoration Act also proposed to change the treatment of retirement savings accounts, which did not yet exist when SSI was established. Despite a dramatic shift in retirement income in the last 50 years — away from traditional pensions and toward individual accounts such as 401(k)s and IRAs — SSI's resource test still penalizes low-income older and disabled people who hold retirement savings. Other programs, including SNAP, exclude retirement savings accounts from resource limits. Policymakers could similarly exempt retirement savings from the SSI resource test.

Additional Options to Improve SSI's Savings Policy

Beyond the measures that policymakers have already introduced, there are a wide range of additional options to reduce or eliminate SSI's penalties on savings. To better align with the intentions — if not the effect — of ABLE accounts, policymakers could also adopt a more generous $100,000 resource test. This would address the fact that only a small fraction of SSI beneficiaries eligible for ABLE accounts have managed to set them up. It would also afford the advantages of those accounts to beneficiaries who don't have the knowledge or resources to open them by automatically allowing them to save more without losing eligibility.

Finally, policymakers could repeal SSI's resource limits altogether. The Affordable Care Act prohibited states from applying resource limits to most Medicaid beneficiaries, including children, parents, pregnant people, and adults who became eligible for Medicaid under the law's Medicaid expansion. In other economic security programs, federal policymakers have given states significant discretion to ease or eliminate resource limits, and nearly every state has used it. For example, most states now have no resource limits for their SNAP and Low-Income Home Energy Assistance Program (LIHEAP) benefits.[25]

Higher Resource Limits Would Improve Access to SSI Benefits

If SSI's resource limits were increased, more people would qualify for and maintain their benefits. Some applicants who would be rejected under current rules for having too much in savings would become eligible. Some current beneficiaries who would otherwise be suspended or terminated for having excess assets would be able to continue receiving benefits. Using Census Bureau data for 2014, we estimate that about 3 percent (224,000) more people would participate in SSI if the resource test were increased to $10,000 (and $20,000 for couples), as shown in Table 1 and Figure 3 below. If, in addition, SSI's asset test excluded retirement accounts, about 39,000 more people (263,000 total) would participate.

Raising SSI's resource test well above $10,000 — or eliminating it altogether — wouldn't dramatically affect participation, the estimates suggest. Even if the resource test were raised to $100,000 per beneficiary — 50 times the current limit for individuals — about 5 percent (380,000) more people would qualify for benefits. Raising the limit to $100,000 and excluding retirement accounts would expand participation by another 23,000 people (403,000 total). And eliminating the asset test altogether would expand participation by 6 percent (462,000 total).

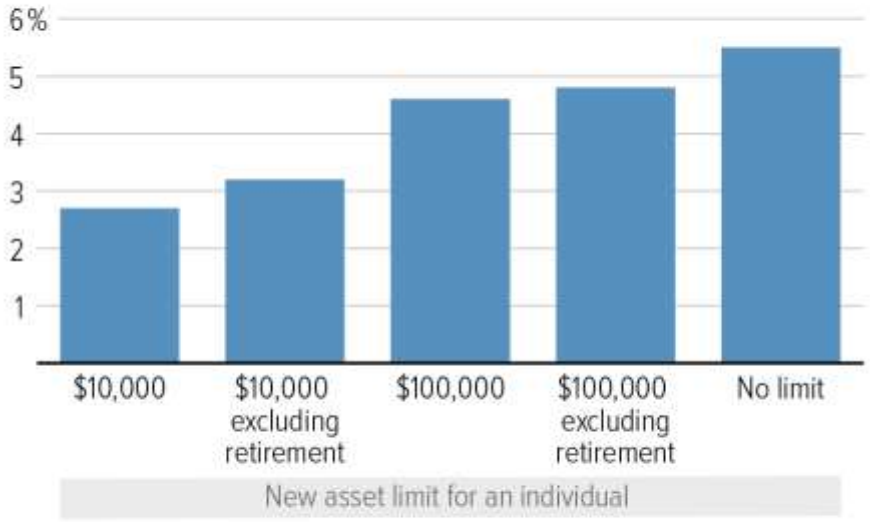
[25] Prosperity Now Scorecard, Financial Assets and Income, Asset Limits in Public Benefit Programs, https://scorecard.prosperitynow.org/data-by-issue#finance/policy/savings-penalties-in-public-benefit-programs.

Even large changes in SSI's resource rules would not dramatically increase program eligibility, because few people who meet SSI's other criteria have substantial savings. The large majority have a disability that substantially limits their earnings. For the same reasons, few SSI beneficiaries have managed to accumulate substantial retirement savings, so excluding retirement accounts from the asset test would make very little difference in program eligibility.

FIGURE 3

Even Radical Changes to SSI's Asset Limit Do Not Dramatically Change Projected Participation

Percent change in SSI beneficiaries at higher asset limits



Note: SSI = Supplemental Security Income. Under current law, SSI eligibility is limited to those who have only $2,000 in assets, or $3,000 for married couples. "Excluding retirement" refers to the exclusion of retirement account balances in determining asset eligibility. For each proposal, the new asset limit for married couples would be twice the limit for individuals.

Source: CBPP analysis of Survey of Income and Program Participation data for 2014

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TABLE 1

Estimated Number of New Beneficiaries at Higher SSI Asset Thresholds

	$10,000	$10,000 excluding retirement	$100,000	$100,000 excluding retirement	No limit
Age group					
Total, all ages	224,000 (3%)	263,000 (3%)	380,000 (5%)	403,000 (5%)	462,000 (6%)
Children, under 18	23,000 (2%)	23,000 (2%)	47,000 (4%)	47,000 (4%)	49,000 (4%)
Adults, aged 18-64	154,000 (3%)	176,000 (4%)	248,000 (5%)	257,000 (5%)	298,000 (6%)
Elderly, aged 65 and over	n/a	n/a	86,000 (4%)	99,000 (5%)	115,000 (5%)
Race/Ethnicity					
White	153,000 (4%)	188,000 (5%)	247,000 (6%)	269,000 (7%)	316,000 (8%)
Black	30,000 (2%)	30,000 (2%)	39,000 (2%)	39,000 (2%)	39,000 (2%)
Asian	n/a	n/a	30,000 (9%)	30,000 (9%)	36,000 (10%)
Latino	28,000 (2%)	32,000 (2%)	41,000 (3%)	41,000 (3%)	41,000 (3%)

Note: Percent change from current law is indicated in parentheses. "Excluding retirement" refers to the exclusion of retirement account balances in determining asset eligibility. For each proposal, the new asset limit for married couples would be twice the limit for individuals. Figures are rounded to the nearest 1,000. N/a indicates reliable data are not available due to small sample size. Figures may not sum to totals due to lack of reliable data and/or rounding. Latino may be of any race, and other races/ethnicities refer to those groups alone and not Latino. Latino includes all people of Hispanic, Latino, or Spanish origin regardless of race. See the methodology appendix for more details.

Source: Center on Budget and Policy Priorities analysis of Survey of Income and Program Participation (SIPP) data for 2014

The impact of raising SSI's resource limits varies by age and race. Higher asset limits would expand participation for elderly beneficiaries more than for younger beneficiaries, likely because older adults will have had more time to accumulate savings than younger beneficiaries. In addition, some older beneficiaries qualified based on age alone — not disability — so having a disability did not limit their ability to work and save, though given their current income, it is likely that they worked in low-paid jobs during their working-age years.

The impact of raising SSI resource limits also reflects the well-documented racial wealth gap. White and Asian American beneficiaries are more likely to become eligible for SSI under higher asset limits because they have higher savings, on average. Black and Latino people are less likely to have savings than white people — and, when they do, their value is substantially less. They are also less likely to be offered workplace retirement plans and likelier to work in low-paid jobs with little margin for savings.[26] That said, all SSI beneficiaries, regardless of race, must have very low incomes and assets to qualify.

[26] Alicia H. Munnell and Christopher Sullivan, "401(k) Plans and Race," IB#9-24, Center for Retirement Research at Boston College, November 2009, https://crr.bc.edu/briefs/401k-plans-and-race/.

Changing SSI's Resource Limits Would Have Modest Impact on Projected Program Costs

Raising or even eliminating SSI's resource limits would not dramatically increase program participation or costs. SSA's actuaries have estimated that increasing the resource limits to $10,000 for individuals and $20,000 for couples would increase SSI costs by about $8 billion over ten years, or about 1 percent of program costs over that period.[27] They estimate that excluding retirement accounts from the resource test would have a "negligible" impact on SSI costs. Increased SSI participation would also increase Medicaid costs, because in most states SSI beneficiaries are automatically eligible for Medicaid.

Our participation estimates are based on a different model than the actuaries' cost estimates, so they are not directly comparable. We would expect the percentage increase in participation and costs to be roughly proportional. However, it is likely that costs would not increase as much as participation. That is because people with assets of more than $2,000 generally have higher incomes and are more likely to be married than the average SSI beneficiary, because those factors allow more opportunity to save. The new beneficiaries in our simulation have somewhat higher average non-SSI income compared to current beneficiaries, which means their SSI benefits would be lower. SSI benefits are substantially reduced based on other sources of income — by $1 for every $2 of earnings, after the first $65 per month, and dollar-for-dollar after the first $20 of any other form of income, including Social Security benefits. A disproportionate share of the new beneficiaries in our simulation are married to other beneficiaries, which — because of SSI's marriage penalty — results in a 25 percent lower benefit.

Few elderly or disabled people who meet SSI's very low income criteria have much in savings, so even dramatically changing SSI's resource rules doesn't result in large participation or cost increases. Even fewer SSI beneficiaries have savings set aside specifically for retirement, so excluding retirement accounts from SSI's resource rules would not be costly. However, it could be particularly helpful for working beneficiaries — a growing number of whom will be automatically enrolled in workplace retirement savings plans after the implementation of the SECURE 2.0 retirement savings legislation.

For a relatively small change in program costs, raising — or eliminating — SSI's resource limits could improve both beneficiaries' well-being and the program's efficiency. It would also ease administrative burdens, simplify program administration, and increase access for beneficiaries who are above the limits — or who are below the limits but have difficulty furnishing the paperwork to prove it.

Eliminating resource limits would markedly simplify applications and processing, reducing paperwork requirements and associated regulations. It would also reduce churn — a major problem for the more than 100,000 SSI beneficiaries who exceed the program's low resource limits each year — which often triggers thousands of dollars of overpayments that are exceedingly difficult for beneficiaries to repay on their very low incomes. It would reduce the penalties for saving, especially

[27] SSA, Office of the Chief Actuary, "Estimated Change in Federal SSI Program Cost from Enacting S. 2065, the 'Supplemental Security Income Restoration Act of 2021,' introduced on June 16, 2021, by Senators Brown, Warren, Sanders, and others," July 16, 2021, https://www.ssa.gov/OACT/solvency/SSIRestorationAct_20210716.pdf.

for working beneficiaries. Finally, beneficiaries would no longer exceed the resource limits, thus reducing the number of errors.

Appendix: Methodology and Technical Note

Estimates in this brief are from Center on Budget and Policy Priorities analysis of data for 2014 from the Census Bureau's Survey of Income and Program Participation (SIPP). The analysis is limited to individuals with countable income low enough to qualify for SSI. Spouses' and parents' income is deemed as indicated under program rules.

Participation in SSI requires applying to the program and meeting income, asset, age, and disability tests. To be eligible based on disability, SSI requires participants to demonstrate that they have a severe medical impairment that is expected to last at least 12 months or result in death, and (for adults) be unable to engage in any substantial gainful activity. The same disability test is used by Social Security Disability Insurance (SSDI); people who do not meet SSI's asset test may nonetheless be eligible for SSDI if they have a prior work history.

For people who meet SSI's income test, our analysis uses SIPP data (and "probit" regression equations) to predict the combined likelihood of applying for SSI and/or SSDI and meeting the disability test. The resulting estimated population of would-be participants is then divided into those who meet SSI's strict asset test under current law (i.e., simulated current participants) and those who would participate in SSI if their level of assets were allowed.

Predictors in this model include countable income and countable assets (both expressed using natural logarithms) and a variety of disability questions available on SIPP (such as "Does ... have a physical, mental or other health condition that limits the kind or amount of work they can do?" and "Does ... have a serious physical or mental condition or a developmental delay that limits ordinary activity?"), as well as race, education level, age, citizenship, health, and marriage status. All steps of the analysis are carried out separately for three age groups (under age 18, ages 18 through 64, and ages 65 and older) and omit people who are not income-eligible or for whom key income, asset, and program participation data on the survey file were not supplied by the household but were imputed by the Census Bureau. (Many SSI participants with imputed data in SIPP appear to have ineligible asset levels, a result that may to a large degree reflect inaccurate imputations.) The specific predictors differ by age group as some disability questions are asked to specific age ranges, and because predictors are dropped if they are not significantly predictive of participation for that age group at the 95 percent confidence level ($p < 0.05$).

For example, for the largest age group, those aged 18 to 64, this analysis uses the following equation to predict the likelihood of SSI participation for those who are income-eligible and who responded to all key survey questions (that is, data were not imputed):

Likelihood of SSI and/or SSDI participation =

0.18 x (natural logarithm of SSI countable income)

- 0.04 x (natural logarithm of SSI countable assets)

+ 0.02 x (age)

+ 0.79 x (reported being prevented from work)

+ 0.28 x (reported having difficulty doing errands alone)

- 0.19 x (reported having serious difficulty walking or climbing stairs)

+ **0.37 x** (reported having at least one of six core disability measures: hearing, seeing, cognitive, ambulatory, self-care, and/or independent living)

+ **0.62 x** (reported having a physical, mental, or other health condition that limits the kind or amount of work they can do)

+ **0.53 x** (reported receiving income due to a disability or health condition at any time during the reference period)

- **0.32** x (educational level categorized into less than a high school diploma, high school diploma to associate degree, and bachelor's degree or more)

- **0.37 x** (married)

- **0.94** x (not a U.S. citizen)

The prediction is converted into a probability of participating in SSI and/or SSDI for those considered income eligible, and that probability is applied to each individual's monthly survey weights. The resulting population of simulated current and would-be SSI participants (identified by survey weights multiplied by the probability of participating in SSI and/or SSDI) is divided into those with countable positive assets below $2,000 ($3,000 if married), others below $10,000 ($20,000 if married), others below $100,000 ($200,000 if married), and those with $100,000 ($200,000) or more. Those with assets below $2,000 ($3,000) are simulated to be current SSI participants. A final weighting adjustment (which mainly serves to counteract the effect of dropping imputed data, and which consists of a single adjustment factor for each age group, applied to all simulated participants or potential SSI participants) brings the number of simulated current participants in each age group to actual SSI totals for 2014 from administrative records. The final weighting adjustment — multiplying by 1.51 — brings the simulated participants aged 18 to 64 under current law from 3.25 million to 4.91 million.

Note that inaccuracies in reported income, assets, and SSI and SSDI program participation, and other imperfections in the modeling, may affect the size and composition of the simulated eligibility group. A 2020 analysis from the Census Bureau on the dataset used for this analysis suggests that bias may under- or over-estimate participation in government programs, earnings, and income among other variables.[28] The inclusion of logged assets in the predictive model means that we are implicitly assuming that people with higher assets are less likely to apply and participate, an assumption that fits our data on current SSI and SSDI participants well but is somewhat speculative with regard to future SSI participants.

Six questions are used in the Census Bureau's major surveys to measure disability. The Survey on Income and Program Participation (SIPP) and Current Population Survey also ask additional disability questions. These survey questions cannot fully capture the medical-vocational criteria used to determine SSI disability eligibility. For example, they do not ask about the specific diagnosis, expected length of the disability, its severity, or the respondent's ability to perform substantial gainful activity. As a result, our estimates of who meets SSI's disability criteria are necessarily less precise than those of who meets its financial criteria.

[28] Anthony G. Tersine, Jr., Memorandum to Carolyn M. Pickering, Survey Director, Associate Director for Demographic Programs, August 17, 2020, https://www2.census.gov/programs-surveys/sipp/tech-documentation/complete-documents/2014/2014_SIPP_Wave_2_Nonresponse_Bias_Report.pdf.

Some studies use different data. For example, an Institute of Medicine study uses SSA administrative data and the National Survey of Children's Health, which asks about specific diagnoses.[29] However, these data are not available to non-governmental researchers. Though using these data has advantages, it also has significant limitations in estimating who meets SSI and SSDI's strict disability definition.

SIPP is a leading source of data on income and wealth, which allowed us to closely replicate SSI's disregards when determining financial eligibility. Our definitions of "countable income" and "countable assets" take into consideration SSI's disregards, such as the value of the home serving as the principal place of residence, SSI's earned and unearned income exclusions, and many others.

[29] Thomas F. Boat and Joel T. Wu, "Mental Disorders and Disabilities Among Low-Income Children," National Academies Press, October 28, 2015, https://www.ncbi.nlm.nih.gov/books/NBK332882/.

Center on Budget and Policy Priorities

Off the Charts
POLICY INSIGHT
BEYOND THE NUMBERS

July 29, 2026, 10:57 am

Outdated SSI Asset Limits Pose Real Problem for Children With Disabilities Hoping to Benefit From Trump Accounts

By Kathleen Romig and Devin O'Connor

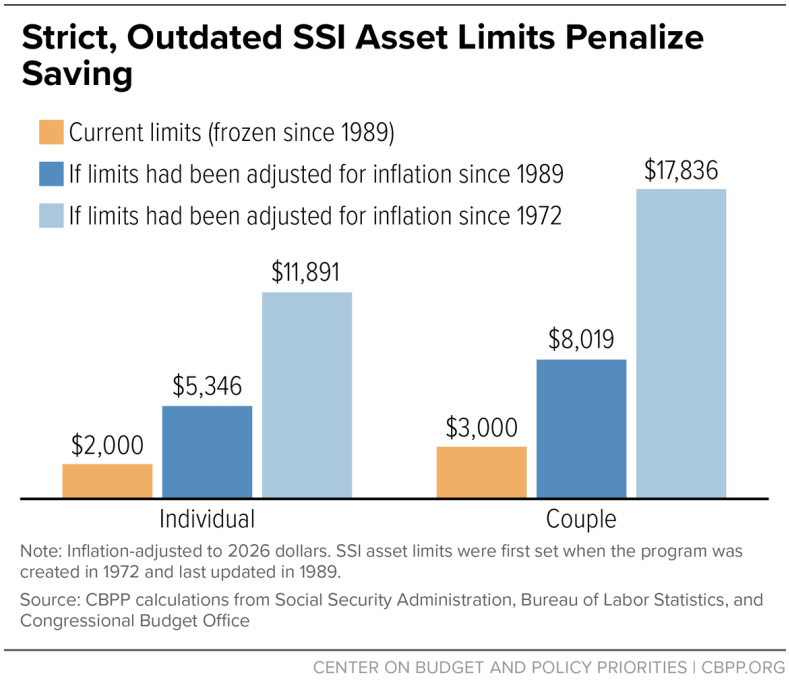
Starting this month, families can open Trump Accounts for their children. Those welcoming new babies between 2025 and 2028 will qualify for a $1,000 federal contribution to seed the account. But for some families caring for disabled children — who will need savings the most as they come of age — the accounts could create big problems. That's because once account holders reach adulthood, the money saved in their Trump Accounts will likely run afoul of the extraordinarily strict asset limits in the Supplemental Security Income (SSI[1]) program for low-income disabled people. If those savings exceed the cap — just $2,000 — it will lead not only to the loss of needed monthly income support from SSI, but could also jeopardize their eligibility for health care and community-based services through Medicaid.

The real problem here is that the asset limits in SSI are far out of date and too low, both for young adults and others. Congress should raise SSI asset limits to prevent families from worrying that their efforts to save for their children's futures will cost them essential support from SSI and Medicaid as a result. There is strong bipartisan support for this approach, notably the SSI Savings Penalty Elimination Act, which would raise the limit for a single beneficiary to $10,000 and index it to inflation.

> "Congress should raise SSI asset limits to prevent families from worrying that their efforts to save for their children's futures will cost them essential support from SSI and Medicaid as a result. [2]

SSI's asset limits have been frozen at $2,000 (or $3,000 for couples), with no adjustment for inflation, for nearly 40 years. There is a good chance that many disabled children with Trump Accounts will be at risk of exceeding this extremely low threshold when they reach adulthood. Babies born between 2025 and 2028 are eligible for a $1,000 contribution from the federal government — to which children's families and others

can add. Even if there are no further contributions, an initial $1,000 contribution would exceed the $2,000 SSI asset limit level if it grows as little as 4 percent each year for 18 years (well below the historical average annual return for the default fund, an S&P 500 index).



As CBPP has described before[3], the tight SSI asset limit — the most restrictive of any federal program — does not allow for beneficiaries to have savings that can help them weather an emergency, let alone provide stability or save for the future. Policymakers have recognized the case for allowing greater savings and have increased or eliminated resource limits in other economic security programs, including the Supplemental Nutrition Assistance Program (SNAP) and Medicaid.

Trump Account balances don't count towards the asset limit for children receiving SSI while they're still minors. But the entire value of their Trump Accounts will count against the limit starting on their 18th birthday — unless their parents are savvy enough to take advantage of a *one-time* opportunity to transfer[4] Trump Account balances into a special savings vehicle for people with disabilities (known as ABLE accounts) at age 17. But it's unlikely that many families will take advantage. To date, only about 246,000 ABLE accounts[5] have been set up, including for people who are not SSI beneficiaries. That's significantly less than 5 percent of SSI beneficiaries who are eligible under the current rules.

The conflict between SSI asset limits and Trump Accounts will have significant consequences not just for disabled children in low-income families receiving SSI now, but also for disabled children in middle-income families who may become eligible when they turn 18.

About half[6] of disabled children receiving SSI continue to receive benefits into adulthood. If their assets exceed $2,000 — including not only Trump Accounts, but also any other savings or checking accounts, college funds, and more — their benefits will be suspended and then terminated. And if the Social Security Administration doesn't suspend their benefits promptly — as is often the case — these young adults will likely rack up thousands of dollars in overpayments that will be extremely difficult to repay from their meager

benefits. But it will be too late to transfer Trump Account balances into little-known ABLE accounts to avoid these negative consequences, since that one-time opportunity will have already expired.

Families whose children with severe disabilities are not currently eligible for SSI benefits because of their families' incomes and savings will be in a similar position. By the time those children reach young adulthood and apply for SSI benefits after turning 18, their Trump Account balances will likely be too high for them to qualify — and it will be too late to take advantage of the opportunity to transfer Trump Account balances into an ABLE account, either.

There are many other good reasons to increase outdated asset limits, which we have described[7] previously. A higher limit would encourage — rather than penalize — saving and allow people to retain savings to use when they really need those resources. It would also help relieve families of disabled kids of the need to jump through hoops to transfer Trump Account savings to a different account — which most are unlikely to do. In addition to raising SSI asset limits, Congress should consider allowing families who do wish to transfer Trump Account balances to ABLE accounts to do so at any age.

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[1] /research/social-security/ssi-a-lifeline-for-children-with-disabilities

[2] https://bsky.app/intent/compose?text=Congress%20should%20raise%20SSI%20asset%20limits%20to%20prevent%20families%20from%20worrying%20that%20their%20efforts%20to%20save%20for%20their%20children%E2%80%99s%20futures%20will%20cost%20them%20essential%20support%20from%20SSI%20and%20Medicaid%20as%20a%20result. https%3A%2F%2Fwww.cbpp.org%2Fblog%2Foutdated-ssi-asset-limits-pose-real-problem-for-children-with-disabilities-hoping-to-benefit&text=

[3] /research/social-security/the-case-for-updating-ssi-asset-limits

[4] https://www.congress.gov/crs-product/R48910

[5] https://nast.org/national-able-data/

[6] /research/social-security/low-income-disabled-youth-face-significant-challenges-upon-coming-of-age

[7] /research/social-security/the-case-for-updating-ssi-asset-limits

Social Security Administration Update

Kathleen Romig

Senior Fellow

Center on Budget and Policy Priorities - cbpp.org

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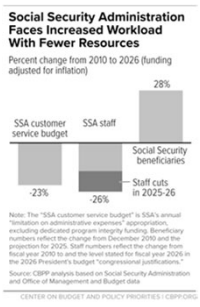
SSA Customer Service: Staff Cuts and Signs of Strain

October 7, 2026

1

SSA: Doing More With Less

Since 2010, SSA has gradually lost funding and staff while serving a growing population. In 2025-26, the agency cut dramatically more staff.

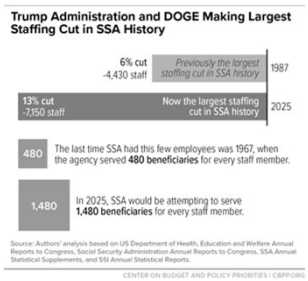


October 7, 2026

2

Huge Staff Cuts Straining Service

The staff losses in 2025 were the largest in SSA history, more than double the previous percent cut, bringing the total down to 1967 levels.

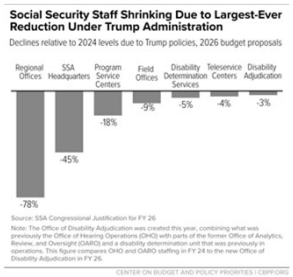


October 7, 2026

3

Regional Offices, HQ, and Processing Hit Especially Hard

Specialists are particularly hard to find; many have left or been reassigned

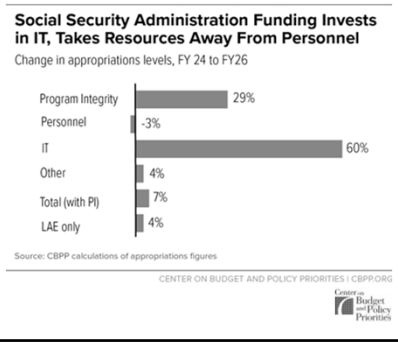


October 7, 2026

4

Following the money: IT and program integrity

- Away from staffing, toward IT
- Away from customer service, toward program integrity



October 7, 2026

5

Moving fast and breaking things

Short-staffing in key areas risks current and future problems

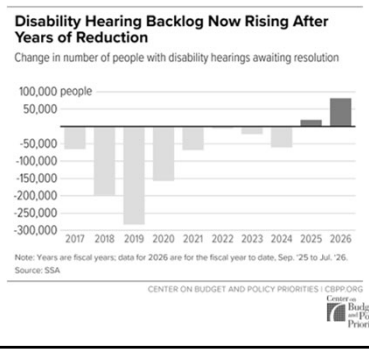


October 7, 2026

6

Hearings backlogs coming back

More SSA judges left in 2025 than any previous year; agency has no plans to hire more. Could be a sign of brewing trouble.



October 7, 2026

7

Push toward "Digital First"

Agency leadership hoping to ease pressure by automation and moving more services online; learn more from Jen Burdick at breakout session!



October 7, 2026

8

Legislative Outlook for Social Security

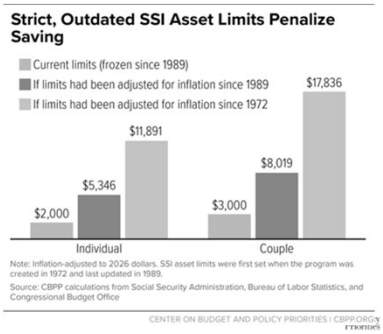
9

Key Social Security Bills Under Consideration

- SSI Savings Penalty Elimination Act
- We Can't Wait (not be confused with Stop the Wait)
- Annual appropriation

10

SSI's Resource Limits Have Stagnated at Low Levels for Decades



11

The Case for Raising SSI Asset Limits

- Federal treatment of savings has evolved since 1972, both in means-tested programs and in retirement preparedness
- Raising SSI's resource limits would reduce churn and payment errors; now leading cause of overpayments
- Raising SSI's resource limits would improve stability and security for recipients
- Higher resource limits would improve access to SSI benefits; more people would qualify and maintain benefits
- Harmonious with SNTs

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The Case for Raising SSI Asset Limits

- Federal Treatment of Savings Has Evolved Since 1972
- Raising SSI's Resource Limits Would Reduce Churn and Payment Errors
- Raising SSI's Resource Limits Would Improve Income Security
- Higher Resource Limits Would Improve Access to SSI Benefits
- Harmonious with SNTs

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SSI Savings Penalty Elimination Act

- **Would update savings limits for SSI:**
- Raise them to $10,000 (or $20,000 for a couple)
- Index to inflation
- Eliminate marriage penalty in limit
- **Bipartisan bill with a real chance:**
- Led by outgoing Senator Bill Cassidy (R-LA)
- Pushing to pass by year's end

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Trump Accounts & SSI

- **Eligible kids should take the free money!**
- **Most kids auto-enrolled in Trump Accounts this month — sort of**
- Custodians must take active steps to claim them
- Most accounts have $0
- **Accounts with balance are likely to exceed SSI asset limits at age 18**
- Trump Accounts don't count for minors
- One-time change to roll into ABLE at age 17 (vast majority probably won't)
- At 18, will disqualify applicants or lead to suspension if balances (together with other savings) exceed $2,000
- Also jeopardizes health care and community-based services through Medicaid

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Eliminating SSDI Waiting Period

- **Disability advocates have long sought to end 5-month waiting period for SSDI**
- Biden and other candidates campaigned on ending it for all in 2020
- Two bills:
  - Stop the Wait (first introduced in 2019)
  - We Can't Wait (first introduced in 2023)
- Disease groups lobbying for carveouts
  - Bipartisan legislation eliminated it for ALS starting in 2020
  - Metastatic breast cancer bill

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We Can’t Wait vs. Stop The Wait

	We Can't Wait	**Stop the Wait**
Which period?	SSDI only	SSDI & Medicare
Who's affected?	Opt-in	Universal
Pay-for?	Reduce monthly benefits	None
Budget score?	Net neutral	None yet (but $$$)
Who supports it?	Bipartisan group led by Sen. Collins	Democratic group led by Rep. Doggett

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Annual Appropriations

- **Very likely more of the same**
  - Trump Administration didn't ask for more money (and Bisignano testified he doesn't need more staff)
  - Appropriators have not proposed more
- **No budget deal yet**
  - Continuing resolution through December 11
  - Even if government shuts down again, SSA is not much affected

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Questions or comments



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Thank You

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Inherited IRAs and Trusts:
Understanding and Applying the Current Rules

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Inherited IRAs and Trusts:
Understanding and Applying the Current Rules

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I. Introduction

An Individual Retirement Account ("IRA") is a retirement savings vehicle that allows the owner to contribute money to an account that the owner controls.[2] Earnings and growth in value of assets in an IRA are not taxable as long as the assets stay within the IRA.[3] Said differently, the assets in an IRA compound income tax free.

IRAs are one type of retirement account. Other retirement accounts may be 401(k) plans, 403(b) plans, governmental 457(b) plans, profit-sharing plans, defined benefit pension plans, money purchase pension plans, and other qualified plans under I.R.C. § 401(a). While there are some technical differences between IRAs and these qualified plans (for example, different contribution limits, different rules regarding loans, and different creditor protection), the Required Minimum Distribution rules under I.R.C. § 401(a)(9) that are the focus of this paper generally apply in a similar manner to all of these retirement vehicles. Therefore, unless the context indicates otherwise, references to "IRA" in this paper include these other types of retirement accounts. Defined benefit plans and retirement annuities are not discussed in this paper.

There are two types of IRAs: traditional IRAs (those funded with pre-tax dollars, which means that an income tax deduction was taken on the amount contributed to the IRA[4]), and Roth IRAs (those funded with after-tax dollars, where there was not an income tax

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[2] See I.R.C. § 408(a) (defining individual retirement accounts).

[3] I.R.C. § 408(e)(1).

[4] I.R.C. § 219.

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deduction taken on the contribution to the IRA[5]). Some qualified plans also offer designated Roth accounts (DRACs) with similar tax treatment to Roth IRAs.[6] Distributions from traditional IRAs are taxable to the recipient as ordinary income,[7] while distributions from a Roth IRA are generally not taxable if certain requirements are met.[8]

For many people approaching retirement age, a substantial portion of their wealth may be held in retirement accounts, including IRAs. An attorney providing estate planning or public benefit planning services will frequently encounter retirement assets and must understand them in order to properly advise the clients.

This paper focuses primarily on the laws that apply to IRAs, plus some other retirement accounts (other than defined benefit plans and retirement annuities) upon the account owner's death, and what the options are for maximizing the value of the retirement account and minimizing the income tax liability. The applicable statutes and regulations use the word "employee" or "participant" to refer to a retirement account owner. For ease of reference, this paper refers to the retirement account owner as the "IRA owner."

II. Update on SECURE Act, SECURE 2.0 Act of 2022, and 2024 Final and Proposed Regulations

A. SECURE Act: The Setting Every Community Up for Retirement Enhancement Act of 2019[9] (SECURE Act) was signed into law on December 20, 2019 as part of the Further Consolidated Appropriations Act, 2020. It is located in Division O, Title IV – Revenue Provisions, and the Section mostly described in this paper is in Section 401, entitled "Modification of Required Distribution Rules for Designated Beneficiaries."[10] This has been primarily codified in I.R.C. § 401(a)(9) by amending subparagraph (E) and adding a new subparagraph (H). Throughout this paper the Internal Revenue Code is referred to as the "Code" or "I.R.C."

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[5] I.R.C. § 408A.

[6] I.R.C. § 402A.

[7] I.R.C. § 408(d)(1).

[8] I.R.C. § 408A(d). See infra Section XI, D.

[9] Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, div. O, 133 Stat. 2534, 3137 (December 20, 2019).

[10] Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, div. O, 133 Stat. 2534, 3176 (December 20, 2019).

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Among other changes, Section 401 of the SECURE Act created a new class of Designated Beneficiaries called "Eligible Designated Beneficiaries" and limited the ability to pay out any annual Required Minimum Distributions over the lifetime of a beneficiary to those who qualify as an Eligible Designated Beneficiary. Everyone else has to completely withdraw the IRA using the 10-Year Rule (and in one instance, using the 5-Year Rule). The Act also left many unanswered questions and made it more difficult to adequately plan for how to best utilize IRAs when planning what happens upon the IRA owner's death.

B. 2022 Proposed Regulations for SECURE Act: Proposed regulations relating to Section 401 of the SECURE Act were published in the Federal Register on February 24, 2022.[11]

C. SECURE 2.0 Act of 2022: The SECURE 2.0 Act of 2022 was signed into law on December 29, 2022, as Division T of the Consolidated Appropriations Act, 2023.[12] From the perspective of the focus of this paper, there are a few changes to previously existing law that should be mentioned.

1. Age Increase for Required Beginning Date: The age used for determining the Required Beginning Date, the date when an IRA owner must start taking Required Minimum Distributions from an IRA, was increased to age 73 starting in 2023 and to age 75 in 2033. This change is discussed later in the section of this paper explaining the Required Beginning Date.[13]

2. Modification of Required Minimum Distribution Rules Allowing a Charity to be a Beneficiary of an AMBT: In a major change to the current rules, beginning January 1, 2023, Section 337 of the SECURE 2.0 Act of 2022 allows a qualifying charity to be named as a remainder beneficiary of a trust established for the benefit of an individual who is "Disabled" or "Chronically Ill" as defined in the SECURE Act (referred to as an "Applicable Multi-Beneficiary Trust" (AMBT) in the Code and regulations) without negatively affecting the beneficiary's ability to take Required Minimum Distributions out over the beneficiary's life expectancy. Under the previous rules, if a residual beneficiary was not an individual, the trust did not qualify

[11] 87 Fed. Reg. 10504 (February 24, 2022).

[12] SECURE 2.0 Act of 2022, Pub. L. No. 117-328, div. T, 136 Stat. 4459, 5275 (December 29, 2022).

[13] See infra Section V, A, 2.

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as a see-through trust and therefore would not qualify as an AMBT. This is covered in more detail later in this paper.[14]

3. Reduction in Excise Tax for Failure to Take Required Minimum Distributions: Section 302 of the SECURE 2.0 Act of 2022 amends I.R.C. § 4974 and reduces the excise tax that is imposed if an IRA owner does not draw a Required Minimum Distribution (RMD) by the deadline. This excise tax is now 25% of the amount of the RMD that was not withdrawn. Previously this had been 50%. In addition, if a failure to distribute the complete RMD is corrected in a timely manner, the excise tax is further reduced to 10%. This is covered in more detail later in this paper.[15]

4. Changes for Surviving Spouses: Section 327 of the SECURE 2.0 Act of 2022 amends I.R.C. § 401(a)(9)(B)(iv) and, beginning January 1, 2024, allows the surviving spouse to elect to be treated as though the surviving spouse were the "employee" (referred to as "IRA owner" throughout this paper), which allows the spouse to delay taking RMDs until the year the employee would have attained the employee's Applicable Age. Also, the Uniform Lifetime Table (instead of the Single Life Table) is used when determining the surviving spouse's Applicable Denominator (life expectancy).[16]

5. Increased Age for ABLE Account Eligibility: Although not related to inherited IRAs, Section 124 of the SECURE 2.0 Act of 2022 increases the age before which an individual must be disabled in order to have an ABLE account from 26 years to 46 years. This became effective on January 1, 2026.[17] ABLE accounts are not discussed any further in this paper.

D. 2024 Final Regulations for SECURE Act Including Some Provisions of SECURE 2.0: After considering all comments received on the 2022 proposed SECURE Act regulations, the IRS published final regulations on July 19, 2024.[18] These final regulations substantially followed the 2022 proposed regulations, with some exceptions. The final regulations have answered many questions raised by the SECURE Act and SECURE 2.0,

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[14] See infra Section XV, C, 2.

[15] See infra Section IX, D.

[16] See infra Sections V, A, 2 (contains definition of Applicable Age); VI, E; and VII, F.

[17] SECURE 2.0 Act of 2022, Pub. L. No. 117-328, div. T, § 124, 136 Stat. 4459, 5314.

[18] 89 Fed. Reg. 58886 (July 19, 2024).

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although some of those answers may not be what everyone wanted to hear. One of those is explained below.

Annual Distributions are Required if IRA Owner Died After Required Beginning Date: One of the surprises in the 2022 proposed regulations that was carried over to the final regulations is the requirement that annual minimum distributions from a traditional inherited IRA be made to beneficiaries subject to the 10-Year Rule if the IRA owner died on or after the owner's Required Beginning Date. After the SECURE Act was enacted, most commentators had concluded from its legislative history that these distributions were not required.

However, the actual wording of the SECURE Act did not carry out this alleged legislative intent. As a result, the IRS has taken the position that Required Minimum Distributions must be paid from an inherited IRA if the IRA owner died on or after the owner's Required Beginning Date and the beneficiary is subject to the 10-Year Rule, but this is not required if the IRA owner died prior to the Required Beginning Date. This is because the SECURE Act did not amend I.R.C. § 401(a)(9)(B)(i).

I.R.C. § 401(a)(9)(B)(i) states that if an IRA owner dies on or after the owner's Required Beginning Date (RBD) and the IRA has not been totally distributed, then the IRA must continue to distribute "at least as rapidly as under the method of distributions being used...as of the date of [the IRA owner's] death" (often referred to as the "at least as rapidly rule"). This does not apply if the IRA owner died before the owner's RBD.

The SECURE Act did not change this section of the Code; it changed I.R.C. § 401(a)(9)(B)(ii) and (iii). As a result, according to the final regulations,[19] if the IRA owner dies on or after the owner's RBD, distributions from the IRA after the IRA owner's death must satisfy the "at least as rapidly" requirement of I.R.C. § 401(a)(9)(B)(i). Essentially, after the IRA owner's Required Beginning Date (RBD) the owner must start taking RMDs. When the owner dies, the RMDs continue, which is why there are RMDs required the year after the owner's death. However, often the Applicable Denominator will change and be based on a life expectancy other than the deceased IRA owner's remaining "ghost" life expectancy.

This means the beneficiary's Applicable Denominator (based on the greater of the beneficiary's life expectancy under the Single Life Table and the deceased IRA owner's "ghost" life expectancy) is used to determine the minimum amount that

[19] Treas. Reg. §§ 1.401(a)(9)-5(d)(1)(i), 1.401(a)(9)-5(a)(2)(i) and (ii), and 1.401(a)(9)-5(d)(3)(iv).

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must be distributed to the beneficiary for years 1 through 9 after the IRA owner's death. By the end of year 10, the total amount held in the inherited IRA must be withdrawn by the beneficiary.

E. 2024 Proposed Regulations for SECURE 2.0: On July 19, 2024, the same day the IRS published the final regulations for the SECURE Act (which included final regulations for some of the provisions found in SECURE 2.0 Act of 2022), it also published proposed regulations for other provisions of the SECURE 2.0 Act of 2022.[20] The comment period closed September 17, 2024.

F. 2025 and 2026 IRS Announcements: Following the 2024 proposed regulations, the IRS issued two announcements regarding the applicability date of the regulations proposed in 2024. Initially the IRS issued Announcement 2025-2[21] (the amendments were anticipated to apply no earlier than the 2026 distribution calendar year, with good-faith interpretation in the interim) and this was followed by Announcement 2026-7[22], which further postponed the anticipated applicability date. Section III of Announcement 2026-7 states:

> Final regulations amending §§ 1.401(a)(9)-4, 1.401(a)(9)-5, and 1.401(a)(9)-6, issued pursuant to the 2024 proposed regulations, are anticipated to apply for purposes of determining required minimum distributions for the distribution calendar year that begins no earlier than 6 months after the date that final regulations are issued in the Federal Register. For periods before the applicability date of these regulations, taxpayers must continue to apply a reasonable, good-faith interpretation of the statutory provisions underlying the regulations.[23]

The announcements address only the proposed amendments to §§ 1.401(a)(9)-4, -5 and -6. The other changes in the 2024 proposed regulations, including the proposed amendments to §§ 1.401(a)(9)-8 (separate accounts for see-through trusts) and 1.401(a)(9)-9(c) (the extended Uniform Lifetime Table), are not mentioned in either announcement and remain proposed.

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[20] 89 Fed. Reg. 58644 (July 19, 2024).

[21] I.R.S. Announcement 2025-2, 2025-2 I.R.B. 305 (Jan. 6, 2025).

[22] I.R.S. Announcement 2026-7, 2026-11 I.R.B. 697 (Mar. 9, 2026).

[23] Id. (emphasis added)

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As of the date of these materials, the IRS has not finalized the regulations proposed in 2024. Stay tuned.

III. Important IRA Dates and Deadlines

Listed below are dates and deadlines imposed throughout I.R.C. § 401. It is important to comply with these deadlines. Failure to do so will cause adverse consequences.

A. Date IRA owner died

1. Date of the IRA owner's death determines the calendar year that is the starting point for many of these important dates.

2. This is the date by which a Designated Beneficiary must be sufficiently disabled[24] or otherwise qualified[25] to be an Eligible Designated Beneficiary.[26]

B. December 31 of the year the IRA owner died

1. If the IRA owner was required to receive a RMD during the year the IRA owner died, the entire amount must be distributed from the IRA by this date.[27]

2. If the IRA owner did not receive all the RMD prior to dying, then undistributed RMD must be distributed to the beneficiary of the IRA by this date.[28] But see below for an exception.

[24] Treas. Reg. § 1.401(a)(9)-4(e)(4)(i). See also Treas. Reg. § 1.401(a)(9)-4(e)(9)(iii)(contains example illustrating this).

[25] Treas. Reg. § 1.401(a)(9)-4(e)(1).

[26] I.R.C. § 401(a)(9)(E)(ii).

[27] Treas. Reg. § 1.401(a)(9)-5(c)(1); Treas. Reg. § 1.401(a)(9)-5(d)(1)(i).

[28] Id.

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C. The date the IRA beneficiary files a personal income tax return for the year that the IRA owner died

1. If the deceased IRA owner's RMD is not fully distributed by December 31 of the year the IRA owner died, the regulations say that the beneficiary of the IRA has until the date the beneficiary files their income tax return for the year the IRA owner died to receive the undistributed RMD.[29]

2. Failure to receive the deceased IRA owner's RMD that was not distributed to the IRA owner while living by this date will result in an excise tax equal to 25% of the undistributed portion of the RMD being imposed on the beneficiary.[30]

D. September 30 of the year following the year the IRA owner died

1. This is the date when all beneficiaries of the IRA are finalized.[31] It is referred to as the "Beneficiary Finalization Date" throughout this paper, a phrase not used in the Code or regulations.

2. It is possible to remove beneficiaries prior to this date by qualified disclaimer or by distributing sufficient assets to them so they are no longer a beneficiary.[32]

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[29] Treas. Reg. § 54.4974-1(g)(3)(iii).

[30] Treas. Reg. § 54.4974-1(a). This may be reduced to 10% if the beneficiary satisfies the provisions of Treas. Reg. § 54.4974-1(a)(2).

[31] Treas. Reg. § 1.401(a)(9)-4(c)(1).

[32] Treas. Reg. § 1.401(a)(9)-4(c)(2); Treas. Reg. § 1.401(a)(9)-4(c)(3).

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E. October 31 of the year following the year the IRA owner died — No longer applies to IRAs

1. This was the deadline for (i) the trustee of a see-through trust to provide the IRA trustee, custodian, or issuer with a copy of the trust document or a satisfactory list of the IRA beneficiaries[33] and (ii) the beneficiary or someone else to provide the IRA administrator with documentation establishing that a beneficiary of the IRA is sufficiently Disabled or Chronically Ill to qualify as an Eligible Designated Beneficiary.[34]

2. However, the final regulations now say that **this documentation "need not be provided to the IRA trustee, custodian, or issuer**."[35] According to the Preamble of the final regulations, commenters on the 2022 proposed regulations had objected that custodians are not experts in state trust law and are not qualified to read a trust instrument to determine who the beneficiaries are, and that custodians should not be asked to receive or review medical records. The Treasury Department and the IRS responded by simplifying the requirement for plans and eliminating it for IRAs.[36]

3. But this only applies to IRAs, not to qualified plans described in § 401(a), § 403(a) annuity plans, or § 457(b) plans.[37] Since this paper only focuses on IRAs, this will be the only mention that the plan administrator of one of those plans will need to receive this documentation by this date.

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[33] Treas. Reg. § 1.401(a)(9)-4(h)(1)(ii) and (h)(3). The plan administrator decides which of the two must be provided. For IRAs, § 1.408-8(a)(3) treats the IRA trustee, custodian or issuer as the plan administrator.

[34] Treas. Reg. § 1.401(a)(9)-4(e)(7).

[35] Treas. Reg. § 1.408-8(b)(4)(i) and (ii), applicable for calendar years beginning on or after January 1, 2025. Treas. Reg. § 1.408-8(j). This provision was not in the 2022 proposed regulations.

[36] T.D. 10001, 89 Fed. Reg. 58886 (July 19, 2024). The explanation appears in Section IV of the Summary of Comments and Explanation of Revisions.

[37] Treas. Reg. § 1.401(a)(9)-1(a)(1); Treas. Reg. § 1.457-6(d). The treatment of a § 403(b) contract is less clear. Treas. Reg. § 1.403(b)-6(e)(2) applies the provisions of § 1.408-8 to § 403(b) contracts except as otherwise provided in § 1.403(b)-6(e), and the exceptions listed there do not include § 1.408-8(b)(4).

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4. Lastly, just because the documentation does not need to be provided does not mean it does not need to be available if needed. If the distribution treatment of an inherited IRA is later questioned, the trustee or the beneficiary will need to prove these facts. Practitioners should therefore continue to obtain the trust certification and the medical documentation and keep them in the file, even though no one is required to send them to the custodian. An IRA custodian remains free to ask for the trust document as a matter of its own account administration, and many still do.

F. December 31 of the year following the year the IRA owner died

1. If the beneficiary is required to receive annual RMDs, the first one must be distributed to the beneficiary no later than this date.[38]

   There is an exception if the IRA owner died before the owner's RBD and the sole beneficiary of the IRA is the IRA owner's surviving spouse.[39]

2. This is the deadline for establishing separate accounts for an IRA.[40]

IV. Steps To Analyze and Understand IRAs

In order to understand the rules regarding IRAs and when distributions must be made, it is necessary to understand six things. The first four are questions to ask and answer that will categorize the IRA so the appropriate rules will be able to be located and applied. The fifth is additional questions if a trust is named as beneficiary of an IRA. The sixth is how every IRA needs to now be analyzed in order to know when distributions must be made from the IRA and when the IRA must be completely distributed.

1. Is the IRA Owner Living or Deceased?

a. If the IRA owner is living, there are specific rules that apply. These are not covered in this paper.

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[38] Treas. Reg. § 1.401(a)(9)-3(c)(4).

[39] Treas. Reg. § 1.401(a)(9)-3(d).

[40] Treas. Reg. § 1.401(a)(9)-8(a)(1)(ii).

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b. If the IRA owner is deceased, then the next question must be asked.

2. If the IRA owner is Not Living, when did the IRA owner die?

a. There are two options -
   1) Before the IRA owner's Required Beginning Date, or
   2) On or after the IRA owner's Required Beginning Date.

b. There are different rules that apply depending on when the IRA owner died.

3. What type of beneficiary will ultimately end up with distributions from the IRA?

a. There are seven potential different types of ultimate beneficiaries of an IRA. These are:
   1) Not a Designated Beneficiary,
   2) A Designated Beneficiary who is not an Eligible Designated Beneficiary (sometimes referred to in this paper as "Only a Designated Beneficiary"),

   <u>An Eligible Designated Beneficiary who is</u> –
   3) The IRA owner's surviving spouse,
   4) A child of the IRA owner who is under the age of 21 (a "minor" child),
   5) A person who is sufficiently Disabled,
   6) A person who is sufficiently Chronically Ill, or
   7) A person who is not more than 10 years younger than the IRA owner and does not fit into any of the other EDB categories.

b. There are different rules for each type of beneficiary, and

c. These rules are different depending on whether the IRA owner died before, or on or after, the IRA owner's Required Beginning Date.

4. Is the IRA beneficiary a trust?

a. If the IRA beneficiary is not a trust, then the questions stop and the analysis moves to number 6, below.

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b. If the IRA beneficiary is a trust, then the following questions must be asked and answered.

5. If a trust is the initial beneficiary of the IRA, then the following applies:

a. **Does the trust qualify as a "see-through" trust?**
   1) If not, then the trust is treated as a beneficiary that is not a Designated Beneficiary and the IRA must be distributed accordingly.

b. If the trust qualifies as a see-through trust, then **what type of see-through trust is it?** There are three different possibilities:
   1) Conduit Trust
   2) Accumulation Trust
   3) Applicable Multi-Beneficiary Trust (AMBT), which can be a conduit or accumulation trust.

c. After the type of see-through trust is determined, it is necessary to look through the trust to see **which of the seven possible types of beneficiaries will ultimately receive distributions from the IRA**.
   1) There are different rules for each type of beneficiary, and
   2) Different rules depending on whether the IRA owner died before, or on or after, the owner's Required Beginning Date, and
   3) Different rules depending on the type of trust.

6. How to analyze and track IRA distributions

After the IRA is properly classified based on the answers to the above questions, then for all IRAs it is now necessary to look at distributions from the IRA in two different ways:

a. Annual Distributions:

Based on the answers to the above questions, there may or may not be annual distributions that must be made from the IRA. These are referred to in this paper as "RMDs" and "annual RMDs" (Required Minimum Distributions).

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b. End Date:

Based on the answers to the above questions, there are different dates when an IRA must be completely distributed. This is when the final Required Minimum Distribution (RMD) must be made. This is referred to in this paper as the "End Date."

After covering some definitions and concepts that apply to inherited IRAs, this paper first focuses on rules that apply if an IRA distributes upon the death of an IRA owner directly to a beneficiary, and then on the rules that apply if a trust is named as the beneficiary of an IRA. In addition, there are a few random final planning thoughts at the end of this paper. Also, Appendix A contains a chart summarizing the various distribution options that apply to IRAs depending on when the IRA owner died and the type of beneficiary receiving the IRA.

V. Definitions and Concepts Applicable to Inherited IRAs

A. General Definitions:

1. Inherited IRA and IRA Owner: An "inherited IRA" is an IRA that is received by a beneficiary following the death of the person who owned the IRA (who is referred to as the "IRA owner" in this paper and "employee" in the regulations). The phrase "Beneficiary IRA" is also used by some people and companies.

2. Required Beginning Date (RBD): The Required Beginning Date (often referred throughout this paper as "RBD") is the date an IRA owner must begin taking distributions from a traditional (non-Roth) IRA during the IRA owner's lifetime. Currently, the RBD is April 1 of the calendar year following the later of:

a. the calendar year during which the IRA owner attains their "applicable age" and

b. the calendar year during which the IRA owner retires from employment with the employer maintaining the retirement plan.[41]

In the past, this age was set forth as a number in the statute (for example, it used to be 70½ and was changed to 72 by the SECURE Act). However, SECURE 2.0 Act of 2022 established one age to be effective on January 1, 2023, and an older age to be

[41] I.R.C. § 401(a)(9)(C); Treas. Reg. § 1.401(a)(9)-2(b)(1).

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effective on January 1, 2033. As a result, the phrase "applicable age" is now used to describe the age that triggers an IRA owner's RBD. This paper uses "Applicable Age." The current Applicable Ages are set forth below:

- Age 73, for people who attain age 72 after December 31, 2022, and attain age 73 before January 1, 2033 (or said differently, are born in years 1951 through 1958); and

- Age 75, for people who attain age 74 after December 31, 2032 (or said differently, are born in 1960 or later).[42]

- Note: Due to a drafting error in SECURE 2.0, the Applicable Age for individuals born in 1959 was skipped. The proposed regulations published on July 19, 2024, addressed this by inserting age 73 as the Applicable Age for people born in 1959.[43]

This is effective for distributions required to be made after December 31, 2022.[44] There is an exception for IRA owners who retire after their respective Applicable Age from an employer who maintains a defined contribution plan.[45]

An example of the law as it was changed by the SECURE 2.0 Act of 2022 is this: if an IRA owner's 72nd birthday is May 28, 2024, then the IRA owner's Required Beginning Date is April 1, 2026 (April 1 of the calendar year following the calendar year 2025 within which the IRA owner turns age 73).

This is important when discussing an inherited IRA because the inherited IRA being distributed to a beneficiary after an IRA owner dies will be treated differently depending on whether the IRA owner died (i) before, or (ii) on or after, the IRA owner's Required Beginning Date.

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[42] SECURE 2.0 Act of 2022, Pub. L. 117-328, div. T of the Consolidated Appropriations Act, 2023, Sec. 107, (December 29, 2022) amending Section 401(a)(9)(C) by adding a new subsection (v). See also, Treas. Reg. § 1.401(a)(9)-2(b)(2).

[43] Prop. Treas. Reg. § 1.401(a)(9)-2(b)(2)(v), 89 Fed. Reg. 58644, 58650 (July 19, 2024).

[44] Id. § 107(e). But See IRS Notice 2023-54, 2023-31 I.R.B. (July 14, 2023)(provided transitional relief and guidance related to certain 2023 distributions in light of the new RMD rules).

[45] I.R.C. § 401(a)(9)(C)(i)(II); Treas. Reg. § 1.401(a)(9)-2(b)(1)(ii).

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3. Required Minimum Distribution (RMD): The Required Minimum Distribution (RMD) refers to the minimum amount that must be withdrawn each calendar year from an IRA. Occasionally, this is referred to as "Minimum Required Distribution."[46] The RMD applies to the IRA owner during their lifetime, and often also applies to an inherited IRA after the IRA owner is no longer living.

The RMD is calculated by dividing the value of the IRA on December 31 of the year immediately preceding the calendar year for which the RMD must be made (the "account balance"[47]) by the "Applicable Denominator."[48]

4. Applicable Denominator: The Applicable Denominator is generally the remaining life expectancy of a Designated Beneficiary; however, if the IRA owner died on or after the owner's Required Beginning Date, the Applicable Denominator is the greater of the Designated Beneficiary's remaining life expectancy or the deceased IRA owner's remaining ("ghost") life expectancy.[49] Prior to the 2022 proposed regulations, the phrase "applicable distribution period" was used to describe this number. This was changed in the 2022 proposed regulations and maintained in the final regulations.[50]

The Applicable Denominator can be found by utilizing the appropriate life expectancy table provided by the IRS.[51] The table used when calculating the RMD that applies to an inherited IRA is the Single Life Table. The other two life expectancy tables (the Uniform Lifetime Table and the Joint and Last Survivor Table) are used during the IRA owner's lifetime.[52] There is one exception when the IRA owner's surviving spouse elects to be "treated as the employee" and can use the

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[46] Treas. Reg. § 1.401(a)(9)-5(a).

[47] Treas. Reg. § 1.401(a)(9)-5(b).

[48] Treas. Reg. § 1.401(a)(9)-5(a)(1).

[49] Treas. Reg. Preamble § E.3.b, 89 Fed. Reg. 58886, 58897 (July 19, 2024); Treas. Reg. § 1.401(a)(9)-5(c) and (d); and Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

[50] Id.

[51] Treas. Reg. § 1.401(a)(9)-5(c) and (d); Treas. Reg. § 1.401(a)(9)-9(a).

[52] There is one exception to this. If the IRA owner's surviving spouse takes the IRA as an inherited IRA and elects to be "treated as the employee," then the Uniform Lifetime Table is used to calculate the spouse's Applicable Denominator even after the IRA owner is no longer living. See infra Sections VI, E and VII, F for more information.

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Uniform Lifetime Table. These tables were revised for distribution years beginning January 1, 2022 and can be found in subsections (a), (b), and (c), respectively, in Treas. Reg. § 1.401(a)(9)-9. This is more fully explained later in this paper.[53]

B. Beneficiaries of an Inherited IRA:

1. Generally: An IRA owner can name any of the following as beneficiaries of the IRA: (i) the IRA owner's estate, (ii) one or more charities, (iii) one or more individuals, or (iv) one or more trusts, whether testamentary or living.

All beneficiaries of an inherited IRA are divided into two broad categories: those who are a Designated Beneficiary (DB) and those who are not (referred to in this paper as Not a Designated Beneficiary (NDB)). In addition, Designated Beneficiaries are further divided into two categories: those who are Only a Designated Beneficiary (ODB) and those who are an Eligible Designated Beneficiary (EDB).

2. Designated Beneficiary (DB): In all cases except one, a Designated Beneficiary must be an individual designated by the IRA owner to be a beneficiary of the IRA.[54] In other words, the general rule is that Designated Beneficiary must be a living human being. Neither an estate, a trust that is not a "see-through" trust, nor a charity (with one exception) qualifies as a Designated Beneficiary because they are not an individual and do not have a life expectancy.[55] The one exception applies to an AMBT, where a qualifying charitable organization that is not a donor advised account or a supporting organization is deemed to be a Designated Beneficiary. This is more fully explained later in this paper.[56]

3. Not a Designated Beneficiary (NDB): If a beneficiary of an inherited IRA is not a Designated Beneficiary, then it is referred to in this paper as Not a Designated Beneficiary (NDB). An NDB is a beneficiary who is not a human being (with the one exception of a qualifying charity that is a beneficiary of an AMBT). Examples of common NDBs are entities such as a corporation, probate estate, charity (unless named a beneficiary of an AMBT), and a trust that is not a "see-through" trust.

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[53] See infra Section VIII.

[54] I.R.C. § 401(a)(9)(E)(i); Treas. Reg. § 1.401(a)(9)-4(a)(1).

[55] Treas. Reg. § 1.401(a)(9)-4(b).

[56] See infra Section XV, C, 2.

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4. Only a Designated Beneficiary (ODB): The SECURE Act established a new subset of Designated Beneficiaries, referred to as "Eligible Designated Beneficiaries"[57] (often referred to throughout this paper as "EDB").

This means there are now two types of Designated Beneficiaries:

(i) a Designated Beneficiary who is not an Eligible Designated Beneficiary, and

(ii) a Designated Beneficiary who is an Eligible Designated Beneficiary.

In an attempt to distinguish between these two types of Designated Beneficiaries, this paper will often refer to the first type (a Designated Beneficiary who is not an Eligible Designated Beneficiary) as Only a Designated Beneficiary (ODB) (a phrase not used in the Code or regulations) and the second type as an Eligible Designated Beneficiary (EDB).

5. Eligible Designated Beneficiary (EDB): An Eligible Designated Beneficiary (EDB) is a Designated Beneficiary who, as of the date of the IRA owner's death,[58] satisfies additional criteria and, as a result, is treated differently than a person who is only a Designated Beneficiary (ODB). An EDB is "eligible" to use the Life Expectancy Rule. This means the mandatory distributions that must be made annually from the IRA (Required Minimum Distributions (RMDs)) are usually smaller because they are drawn out over the beneficiary's life expectancy. And to make things even more interesting, the IRA distributable to each different type of EDB is treated differently. There are different criteria to qualify and different rules that must be followed for the IRAs received by each type of EDB.

a. People Who Qualify to be an Eligible Designated Beneficiary (EDB): There are five different types of EDBs.[59] These are:

1) the surviving spouse of the IRA owner;

2) a child of the IRA owner who has not reached the age of majority (which is set at age twenty-one (21) in the

[57] I.R.C. § 401(a)(9)(E)(ii); Treas. Reg. § 1.401(a)(9)-4(e).

[58] Treas. Reg. § 1.401(a)(9)-4(e)(1).

[59] I.R.C. § 401(a)(9)(E)(ii); Treas. Reg. § 1.401(a)(9)-4(e)(1).

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regulations[60]). "Child" includes a naturally born child, stepchild, legally adopted child, and an eligible foster child.[61] An eligible foster child is "an individual who is placed with the [IRA owner] by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction.";[62]

3) a Designated Beneficiary who is Disabled within the meaning of Section I.R.C. § 72(m)(7);[63]

4) a Designated Beneficiary who is Chronically Ill within the meaning of I.R.C. § 7702B(c)(2);[64] and

5) a Designated Beneficiary not described above who is not more than ten (10) years younger than the IRA owner.[65] For example, if the IRA owner turned age 74 on May 28, 2026, then this EDB must be age 64 or older on this date.

b. When a Person Must Satisfy the Criteria to be an EDB: The determination of whether a Designated Beneficiary qualifies to be an Eligible Designated Beneficiary is made as of the date of the IRA owner's death.[66]

c. If a Person Qualifies for Multiple Types of EDB Status: It is possible for a person to qualify as more than one type of an Eligible Designated Beneficiary. For example, an IRA owner's surviving spouse or minor child may also be Disabled or Chronically Ill.

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[60] Treas. Reg. § 1.401(a)(9)-4(e)(3).

[61] Treas. Reg. § 1.401(a)(9)-4(e)(1)(ii), which defines "child" of the IRA owner by referring to I.R.C. § 152(f)(1).

[62] I.R.C. § 152(f)(1)(C).

[63] See infra Section XV, A, 2 (contains clarification of what is required to be Disabled).

[64] See infra Section XV, A, 3 (contains clarification of what is required to be Chronically Ill).

[65] Treas. Reg. § 1.401(a)(9)-4(e)(6) ("Whether a designated beneficiary is not more than 10 years younger than the employee is determined based on the dates of birth of the employee and the beneficiary. Thus, for example, if an employee's date of birth is October 1, 1953, then the employee's beneficiary is not more than 10 years younger than the employee if the beneficiary was born on or before October 1, 1963.").

[66] I.R.C. § 401(a)(9)(E)(ii); Treas. Reg. § 1.401(a)(9)-4(e)(1).

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This probably will not make much difference to a surviving spouse because the spouse is eligible for a lifetime payout of the IRA merely by being a surviving spouse. However, a minor child is only an Eligible Designated Beneficiary (EDB) as a "minor child of the IRA owner" until the child attains age twenty-one (21). After that the child's EDB status ends, the 10-Year Rule applies, and the inherited IRA must be fully distributed by the end of the year when the minor child turns age thirty-one (31). But if the child is also sufficiently disabled to qualify as an EDB who is Disabled, then the child will qualify for lifetime payout of the IRA. However, in order to qualify as "disabled" the child must have been sufficiently disabled on the date of the IRA owner's death.[67]

While the regulations for the SECURE Act require that the documentation that the Designated Beneficiary is sufficiently disabled to qualify as an EDB who is Disabled be provided to the plan administrator no later than October 31 of the calendar year following the year of the IRA owner's death, **that requirement does not apply to an IRA.**[68] It continues to apply to other types of retirement plans.

The beneficiary must still actually have been Disabled as of the date of the IRA owner's death. The documentation should therefore still be obtained and kept, because the trustee or the beneficiary will have to prove that fact if the distribution treatment of the inherited IRA is later questioned.

6. Beneficiary Finalization Date (BFD): Exactly who or what is a beneficiary of an inherited IRA is not finalized until September 30 of the year following the year of the IRA owner's death.[69] This paper refers to this date as the "Beneficiary Finalization Date (BFD)," a phrase not found in the Code or regulations.

7. Beneficiaries Usually Must Be Same Type: With a few exceptions, an IRA is treated as though there are no Designated Beneficiaries if there is any countable beneficiary of the IRA that is not an individual, even if there are also individuals

[67] Treas. Reg. § 1.401(a)(9)-4(e)(4)(i).

[68] Treas. Reg. § 1.408-8(b)(4)(i). See supra Section III, E.

[69] Treas. Reg. § 1.401(a)(9)-4(c)(1).

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named as beneficiaries.[70] For example, if an IRA names a charity and two individuals as beneficiaries, the IRA is treated as not having a Designated Beneficiary because the charity is not a Designated Beneficiary (NDB). This also applies to Eligible Designated Beneficiaries. If there are two EDBs plus another beneficiary who is only a Designated Beneficiary (ODB), then the IRA is treated as not having any EDBs. However, there are exceptions to this. How multiple beneficiaries are treated is more fully explained later in this paper.[71]

8. Post-Death Changes of IRA Beneficiaries: During the time between the IRA owner's death and September 30 of the year following the year of the IRA owner's death (the Beneficiary Finalization Date), it is possible to alter the beneficiaries of an IRA to obtain better tax treatment of the inherited IRA. This can be helpful, for example, if an NDB (such as a charity or non-see-through trust) is named as a beneficiary of an IRA along with ODBs or EDBs, or if an ODB is named along with an EDB.

In this situation, the beneficiary who is causing the problem can take action to be removed as a beneficiary of the inherited IRA before the Beneficiary Finalization Date. This can be accomplished by (i) the beneficiary executing a qualified disclaimer, or (ii) the IRA owner's estate or trust distributing sufficient other assets to the beneficiary so the beneficiary has received what the beneficiary is entitled to and is no longer eligible to receive anything from the IRA owner's estate or trust (and thus no longer a beneficiary of the IRA).[72] Alternatively, the problem beneficiary does not have to be removed if the IRA is divided into separate accounts, one for each beneficiary, no later than December 31 of the year following the year of the IRA owner's death. (If the IRA is payable to a trust, this is available only if the trust qualifies under Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(B).) The beneficiary who is an NDB then affects only its own separate account, not the other beneficiaries' accounts.[73] This is further described later in this paper.[74]

If the inherited IRA is distributing to a trust, then additional options to consider taking prior to the Beneficiary Finalization Date are (i) exercising or restricting a power of appointment, if one is granted in the trust document, (ii) reforming the

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[70] Treas. Reg. § 1.401(a)(9)-4(b).

[71] See infra Section X.

[72] Treas. Reg. § 1.401(a)(9)-4(c)(2) and (3).

[73] Treas. Reg. § 1.401(a)(9)-8(a)(1)(i)-(ii).

[74] See infra Section X, D and E.

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trust pursuant to local law, or (iii) decanting the trust into one that has different beneficiaries.[75] This is further described later in this paper.[76]

C. Concepts That Apply to Inherited IRAs:

1. Three Ways an Inherited IRA Can Be Distributed: There are three different ways an inherited IRA can be distributed. These are described below.

a. 5-Year Rule: Since the enactment of the SECURE Act, the only time the 5-Year Rule applies is when both (i) the IRA owner died before the owner's Required Beginning Date, a condition that is always satisfied for a Roth IRA, regardless of the owner's age at death,[77] and (ii) the IRA beneficiary is not a Designated Beneficiary (NDB).[78]

If the 5-Year Rule applies, then an inherited IRA must be fully distributed by the end of the calendar year containing the 5th anniversary of the date of the IRA owner's death.[79] This does not mean that distributions must be made periodically over the five year period. The IRA could be distributed out in a lump sum immediately or in a lump sum at the end of the five year period. Or it could be distributed sporadically over the five years. The only requirement is that the final distribution occurs no later than December 31 of the calendar year that contains the fifth anniversary of the date of the IRA owner's death. Stated differently, there is only one Required Minimum Distribution and it is 100% of the amount remaining in the IRA at the end of the calendar year that contains the 5th anniversary of the IRA owner's

[75] Treas. Reg. § 1.401(a)(9)-4(f)(5)(ii)(B); Treas. Reg. § 1.401(a)(9)-4(f)(5)(iii)(C).

[76] See infra Section XIV, C, 2.

[77] Treas. Reg. § 1.408-8(b)(1)(ii) (no minimum distributions during the Roth IRA owner's life, and after death the rules apply "as though the Roth IRA owner died before his or her required beginning date"). Author's Note: I.R.C. § 408A(c)(4) exempts Roth IRAs only from the lifetime Required Minimum Distribution rules of I.R.C. § 401(a)(9)(A), not from the post-death rules of I.R.C. § 401(a)(9)(B).Note that Treas. Reg. § 1.408A-6, A-14(b) states the same deemed-death-before-RBD rule but has never been conformed to the SECURE Act; it still describes a five-year default, life expectancy payouts for any designated beneficiary, and an age 70½ spousal delay. Section 1.408-8(b)(1)(ii) is the current statement of the rule.

[78] Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(A); I.R.C. § 401(a)(9)(B)(ii) as altered by I.R.C. § 401(a)(9)(H)(i).

[79] Treas. Reg. § 1.401(a)(9)-3(c)(2).

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death.[80] This rule was not changed by the SECURE Act or the SECURE 2.0 Act of 2022.

b. 10-Year Rule: The 10-Year Rule applies when the Life Expectancy Rule does not apply (with one exception when the 5-Year Rule applies, which is described above). If the 10-Year Rule applies, then the inherited IRA must be fully distributed by the end of the calendar year containing the 10th anniversary of the date of the IRA owner's death.[81]

It may also be necessary to distribute annual RMDs during this 10-year period. Whether this is required depends on when the IRA owner died.

1) Death Before Required Beginning Date: If the IRA owner died before the owner's Required Beginning Date, then the only requirement is that the IRA be fully distributed no later than December 31 of the calendar year that contains the 10th anniversary of the date of the IRA owner's death;[82] there is no requirement that distributions be made during the 10-year period.[83] Or said another way, there is only one Required Minimum Distribution and it is 100% of the amount remaining in the IRA at the end of the calendar year that contains the 10th anniversary of the IRA owner's death.[84]

2) Death On or After Required Beginning Date: On the other hand, if the IRA owner died on or after the owner's Required Beginning Date, then there must be Required Minimum Distributions made annually[85] and the IRA must be fully distributed no later than December 31 of the calendar year that contains the 10th anniversary

[80] Treas. Reg. § 54.4974-1(c)(2).

[81] Treas. Reg. § 1.401(a)(9)-3(c)(3).

[82] Id.

[83] Treas. Reg. § 1.401(a)(9)-3(c)(1)-(3).

[84] Treas. Reg. § 54.4974-1(c)(2).

[85] See supra Section II, D (contains explanation).

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of the date of the IRA owner's death or, in some cases, the death of the primary beneficiary of the inherited IRA.[86]

c. Life Expectancy Rule: Since the enactment of the SECURE Act, the Life Expectancy Rule[87] only applies when the IRA beneficiary is an Eligible Designated Beneficiary (EDB). This applies whether the inherited IRA is distributable directly to the EDB or held in a see-through trust for the benefit of the EDB.

If the Life Expectancy Rule applies, then annual Required Minimum Distributions (RMDs) must be made from the inherited IRA at least annually to the EDB (or the qualified trust holding the inherited IRA for the benefit of the EDB) over a period no longer than the life expectancy of someone (usually the EDB)[88] using the Single Life Table (although the Uniform Lifetime Table may be used if the IRA owner's surviving spouse is the sole beneficiary and elects to be "treated as the employee"[89]). The annual RMDs must commence on or before December 31 of the calendar year that immediately follows the calendar year in which the IRA owner died.[90] Of course, it is also possible to draw the IRA out faster or in an immediate lump sum.

2. Two Types of IRA Distributions: Following the enactment of the SECURE Act, there are two different ways distributions are required to be made from an inherited IRA. For ease of reference these are referred to in this paper as "Annual Distributions" or "annual RMDs (Required Minimum Distributions)" (distributions made annually while the inherited IRA beneficiary is living) and the "End Date" (the date the inherited IRA must end and be fully distributed to a beneficiary).

The rules for these two types of distributions differ depending on:

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[86] Treas. Reg. § 1.401(a)(9)-5(e)(2).

[87] Treas. Reg. § 1.401(a)(9)-3(c)(4); see also Treas. Reg. § 1.401(a)(9)-5(d)(1)(i) (applying the annual life expectancy payout where the IRA owner died on or after the Required Beginning Date).

[88] Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(C).

[89] See infra Sections VI, E (for death before RBD) and VII, F (for death on or after RBD).

[90] Treas. Reg. § 1.401(a)(9)-3(c)(4); see also Treas. Reg. § 1.401(a)(9)-5(d)(1)(i) (where the IRA owner died on or after the Required Beginning Date).

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(i) when the IRA owner died (before, or on or after, the owner's Required Beginning Date) and

(ii) what type of beneficiary is receiving the IRA.

a. Annual Distributions: The amount of a distribution from an inherited IRA that is required to be made annually is calculated differently depending on the above-two factors. This is explained in more detail in Sections VI and VII, below. However, in summary, there are five options:

1) Nothing if the IRA owner died before Required Beginning Date and the 5-Year Rule or 10-Year Rule is being used;[91]

2) Based on the life expectancy of a beneficiary who is not the surviving spouse of the IRA owner;[92]

3) Based on the life expectancy of the IRA owner's surviving spouse (which is calculated differently than for a non-spouse beneficiary);[93]

4) Based on the greater of (i) the beneficiary's life expectancy or (ii) the deceased IRA owner's remaining life expectancy (often referred to as the "ghost" life expectancy, although, unfortunately, you will not find the word "ghost" in the Code or regulations);[94] and

5) Based on only the remaining ("ghost") life expectancy of the deceased IRA owner.[95]

b. End Date: Annual Distributions are required to end at different times, and when this happens the remaining assets in the IRA must be completely distributed. This is referred to in this paper as the "End Date," which is a phrase that does not appear in the Code or regulations. Exactly when the

[91] See supra Section II, D (contains explanation); Treas. Reg. § 1.401(a)(9)-3(c)(2) and (3).

[92] Treas. Reg. § 1.401(a)(9)-5(d)(2); Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

[93] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iv).

[94] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

[95] Treas. Reg. § 1.401(a)(9)-5(d)(1)(iii).

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End Date is for an inherited IRA depends on two factors: (i) whether the IRA owner died before, or on or after, the IRA owner's Required Beginning Date, and (ii) who the beneficiary is during the annual distribution period. This is more fully explained below.

Now that the definitions and basic concepts have been covered, the following sections review the rules for each type of beneficiary that may receive distributions from an inherited IRA. These are divided into two groups based on whether the IRA owner died before the owner's Required Beginning Date, or died on or after the owner's Required Beginning Date.

These rules are organized and summarized in the **Chart of IRA Distribution Rules for Individual Beneficiaries** that can be found in Appendix A of this paper.

VI. Death of IRA Owner Before Required Beginning Date

If the IRA owner dies before the IRA owner's Required Beginning Date, then it must next be determined whether the IRA distributes to a beneficiary who is not a Designated Beneficiary (NDB), to a beneficiary who is only a Designated Beneficiary and not an Eligible Designated Beneficiary (ODB), or to an Eligible Designated Beneficiary (EDB), and if so, what type of EDB. As covered later in this paper,[96] the following also applies to a Roth IRA whether the IRA owner died before, or on or after, the owner's Required Beginning Date.

A. Not a Designated Beneficiary (NDB): If the IRA owner dies before the owner's Required Beginning Date and the beneficiary is not a Designated Beneficiary (NDB) (which also includes an Eligible Designated Beneficiary (EDB)) of the IRA, then the following applies.

1. Annual Distributions: There are no Required Minimum Distributions that must be made annually because the IRA owner died before the owner's Required Beginning Date.[97]

2. End Date: The 5-Year Rule[98] applies and the IRA must be fully distributed by the end of the calendar year containing the 5th anniversary of the date of the IRA

[96] See infra Section XI.

[97] See supra Section II, D (contains an explanation).

[98] Treas. Reg. § 1.401(a)(9)-3(c)(2).

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owner's death (the End Date).[99] Essentially, there is one Required Minimum Distribution in the amount of the remaining IRA that must be made no later than December 31 of the year that is 5 years after the calendar year when the IRA owner died.

B. IRA Distributes to a Designated Beneficiary Who is Not an Eligible Designated Beneficiary (ODB): If the IRA owner dies before the owner's Required Beginning Date and the IRA distributes to a person who is only a Designated Beneficiary (ODB) (i.e., who is not an Eligible Designated Beneficiary), then the following applies:

1. Annual Distributions: There are no RMDs that must be made annually because the IRA owner died before the owner's Required Beginning Date.[100]

2. End Date: The 10-Year Rule[101] applies and the IRA must be fully distributed by the end of the calendar year containing the 10th anniversary of the date of the IRA owner's death (the End Date).[102] Essentially, there is one RMD that must be made no later than December 31 of the year that is 10 years after the calendar year when the IRA owner died.

C. IRA Distributes to an Eligible Designated Beneficiary Who is Disabled, Chronically Ill, or Not More than Ten Years Younger: If the IRA owner dies before the owner's Required Beginning Date and the IRA distributes to an Eligible Designated Beneficiary (EDB) who is Disabled, Chronically Ill, or not more than 10 years younger than the IRA owner, and the retirement plan does not adopt an optional provision (see Section VI, F, below), then the following applies:

1. Annual Distributions: Since the beneficiary is an EDB, the Life Expectancy Rule applies.[103] This means the IRA must distribute annual RMDs to the EDB over a period no longer than the life expectancy of the EDB.[104] The Single Life Table is used

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[99] Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(A); I.R.C. § 401(a)(9)(B)(ii) as altered by I.R.C. § 401(a)(9)(H)(i).

[100] See supra Section II, D (contains an explanation).

[101] Treas. Reg. § 1.401(a)(9)-3(c)(3).

[102] Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(B); I.R.C. § 401(a)(9)(B)(ii) as altered by I.R.C. § 401(a)(9)(H)(i)(I).

[103] Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(C).

[104] Treas. Reg. § 1.401(a)(9)-5(d)(2).

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to determine the EDB's life expectancy (the Applicable Denominator).[105] The age to use when determining the Applicable Denominator is the age of the EDB in the calendar year following the year when the IRA owner died.[106] This is reduced by 1 for each subsequent year.[107] The RMDs must commence on or before December 31 of the calendar year that follows the calendar year in which the IRA owner died.[108] Of course, the IRA can always be distributed faster than required by the RMD rules or in an immediate lump sum. The Single Life Table can be found in Appendix B of this paper.[109]

2. End Date: If the EDB lives past their life expectancy as contained in the Single Life Table (calculated as described above), then the End Date for the inherited IRA will be December 31 of the year the EDB's life expectancy ends. On the other hand, if the EDB dies before the EDB's life expectancy ends, the successor beneficiary of the IRA must continue the annual RMDs the EDB was taking,[110] and the remainder of the IRA must be fully distributed no later than December 31 of the year that contains the 10th anniversary of the EDB's death.[111]

3. Exceptions for Disabled and Chronically Ill EDBs When AMBT Used: As a practical matter, if an EDB who is Disabled or Chronically Ill and possibly eligible for means-tested public assistance (such as SSI or Medicaid) is the beneficiary of an IRA, it is most likely the IRA will not be distributed directly to the beneficiary since doing so will disqualify the beneficiary from means-tested public assistance. Instead, the IRA should be distributed to a see-through accumulation trust, and most likely one that qualifies as an Applicable Multi-Beneficiary Trust (AMBT). There are special rules that apply to AMBTs regarding the calculation of the annual RMDs and the determination of the End Date, and the above-described RMDs and End Date options do not apply. Instead, the life expectancy of the oldest beneficiary

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[105] Treas. Reg. § 1.401(a)(9)-5(d)(3)(i).

[106] Treas. Reg. § 1.401(a)(9)-5(a)(2)(iii); Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

[107] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

[108] Treas. Reg. § 1.401(a)(9)-3(c)(4); I.R.C. § 401(a)(9)(B)(iii)(III) as altered by I.R.C. §§ 401(a)(9)(H)(i)(I) and 401(a)(9)(H)(ii).

[109] See also Treas. Reg. § 1.401(a)(9)-9(b).

[110] Treas. Reg. §§ 1.401(a)(9)-3(c)(4), 1.401(a)(9)-5(d)(3)(iii). See also Treas. Reg. § 1.401(a)(9)-4(f)(6)(i) (Example 1).

[111] Treas. Reg. § 1.401(a)(9)-5(e)(1) and (3).

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identified in the trust as Disabled or Chronically Ill is used to calculate the annual RMDs, and the End Date is December 31 of the year containing the 10th anniversary of the death of the last of those beneficiaries.[112] AMBTs are discussed later in this paper.[113]

D. IRA Distributes to an Eligible Designated Beneficiary Who is a Minor Child of the IRA Owner: If the IRA owner dies before the owner's Required Beginning Date and the IRA distributes to an Eligible Designated Beneficiary who is a minor[114] child[115] of the IRA owner, then subsection 1 of this Section describes the applicable rules. However, if there are multiple Eligible Designated Beneficiaries who are minor children of the IRA owner, then the special rules described in subsection 2, below, apply, even if there are also other Designated Beneficiaries of the inherited IRA.

1. Rules if Only One Minor Child is an Eligible Designated Beneficiary: If there is only one minor child of the IRA owner who is an Eligible Designated Beneficiary of the inherited IRA, then the following applies:

a. Annual Distributions: The Life Expectancy Rule[116] applies[117] and RMDs must be made to or for the benefit of the minor child until the end of the calendar year that is 10 years after the calendar year in which the child reaches the age of majority (the regulations set the age of majority at twenty-one (21) years of age[118]). A minor child's status as an EDB ceases when the child turns 21 years old,[119] which means the Life Expectancy Rule is only applied when the child is younger than age 21. After that, the 10-Year

[112] Treas. Reg. § 1.401(a)(9)-5(f)(1)(ii), (f)(2)(iii). See infra Section XV, F and G.

[113] See infra Section XV.

[114] Under the age of twenty-one (21) years. Treas. Reg. § 1.401(a)(9)-4(e)(3).

[115] "Child" includes an individual who is a naturally born child, legally adopted, stepchild, or eligible foster child. Treas. Reg. § 1.401(a)(9)-4(e)(1)(ii) and I.R.C. § 152(f)(1).

[116] Treas. Reg. § 1.401(a)(9)-3(c)(4).

[117] Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(C).

[118] Treas. Reg. § 1.401(a)(9)-4(e)(3).

[119] Treas. Reg. § 1.401(a)(9)-4(e)(1)(ii); Treas. Reg. § 1.401(a)(9)-4(e)(3).

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Rule applies,[120] but annual RMDs must still be distributed to the child during the 10-year period until the child reaches age 31.[121]

The Applicable Denominator to use for the annual RMDs is based on the life expectancy of the child.[122] These are calculated using the Single Life Table[123] starting with the age of the child in the calendar year following the year when the IRA owner died,[124] and then reduced by 1 for each subsequent year.[125]

The RMDs must commence on or before December 31 of the calendar year that follows the calendar year in which the IRA owner died.[126] Of course, the IRA can always be distributed faster than required by the RMD rules or in an immediate lump sum. The Single Life Table can be found in Appendix B of this paper.

b. End Date: If the child survives until age 31, then the End Date is December 31 of the year that is 10 years after the calendar year in which the minor child reaches the age of majority[127] (which is age 21[128]), or in other words, the year when the child reaches the age of 31.

If the child dies before age 21, the IRA must be fully distributed to the next beneficiary no later than the end of the calendar year that contains the 10th anniversary of the date the child died,[129] even though it is prior to the end of the year when the child would have attained the age of 31. If the child dies after age 21 and before age 31, then the IRA must be fully distributed no

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[120] Treas. Reg. § 1.401(a)(9)-5(e)(4).

[121] Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(C).

[122] Treas. Reg. § 1.401(a)(9)-5(d)(2).

[123] Treas. Reg. § 1.401(a)(9)-5(d)(3)(i).

[124] Treas. Reg. § 1.401(a)(9)-5(a)(2)(iii); Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

[125] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

[126] Treas. Reg. § 1.401(a)(9)-3(c)(4); I.R.C. § 401(a)(9)(B)(iii)(III) as altered by I.R.C. §§ 401(a)(9)(H)(i)(I) and 401(a)(9)(H)(ii).

[127] Treas. Reg. § 1.401(a)(9)-5(e)(4).

[128] Treas. Reg. § 1.401(a)(9)-4(e)(3).

[129] Treas. Reg. § 1.401(a)(9)-5(e)(1), (3), and (4).

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later than the end of the calendar year that contains the date the child would have turned age 31 (10 years after attaining majority age).[130]

> For example, if the child's 21st birthday is May 1, 2026, then the Required Minimum Distributions continue to the child until 2036 and the IRA must be fully distributed to the child by December 31, 2036.
>
> - If the child died at age 19 in year 2024, then the IRA must be fully distributed to the next beneficiary by December 31, 2034.
>
> - If the child died at age 23 in year 2028, then the IRA must be fully distributed to the beneficiary by December 31, 2036.

2. Special Rules if Multiple Minor Children are Eligible Designated Beneficiaries: Despite the foregoing general rules, the following applies if there is more than one minor child of the deceased IRA owner who is an Eligible Designated Beneficiary of the inherited IRA. This applies even if there are also other Designated Beneficiaries of the inherited IRA.

a. Annual Distributions: The Life Expectancy Rule[131] applies[132] and RMDs must be made to or for the benefit of the IRA beneficiaries until the End Date is reached.

The Applicable Denominator to use for the annual RMDs is based on the life expectancy of the oldest Designated Beneficiary of the inherited IRA.[133] Note this is not limited to the oldest minor child who is an Eligible Designated Beneficiary. If there is a beneficiary of the inherited IRA who is Only a Designated Beneficiary (ODB) who is older than any of the minor children, then the Applicable Denominator is based on the life expectancy of the oldest DB. These are calculated using the Single Life Table[134] starting with the age of the oldest Designated Beneficiary in the calendar year following the

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[130] Id.

[131] Treas. Reg. § 1.401(a)(9)-3(c)(4).

[132] Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(C).

[133] Treas. Reg. § 1.401(a)(9)-5(f)(1)(i).

[134] Treas. Reg. § 1.401(a)(9)-5(d)(3)(i).

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year when the IRA owner died,[135] and then reduced by 1 for each subsequent year.[136]

The RMDs must commence on or before December 31 of the calendar year that follows the calendar year in which the IRA owner died.[137] Of course, the IRA can always be distributed faster than required by the RMD rules or in an immediate lump sum. The Single Life Table can be found in Appendix B of this paper.

b. End Date: If there are multiple minor children of the deceased IRA owner who are Eligible Designated Beneficiaries of the inherited IRA, then the End Date for the inherited IRA is the earlier of[138] (i) the end of the year that contains the 10th anniversary of the 21st birthday of the youngest Eligible Designated Beneficiary who is a minor child,[139] or (ii) the end of the year that contains the 10th anniversary of the death of the last surviving minor child who is an Eligible Designated Beneficiary.[140] These are major changes from the 2022 proposed regulations, which measured the 10-year period from the oldest minor child rather than the youngest, and which ended the deferral on the death of the oldest minor child rather than on the death of all of them.[141]

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[135] Treas. Reg. § 1.401(a)(9)-5(a)(2)(iii); Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

[136] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

[137] Treas. Reg. § 1.401(a)(9)-3(c)(4); I.R.C. § 401(a)(9)(B)(iii)(III) as altered by I.R.C. §§ 401(a)(9)(H)(i)(I) and 401(a)(9)(H)(ii).

[138] Treas. Reg. § 1.401(a)(9)-5(e)(1).

[139] Treas. Reg. § 1.401(a)(9)-5(f)(2)(ii)(C).

[140] Treas. Reg. § 1.401(a)(9)-5(f)(2)(ii)(B).

[141] Prop. Treas. Reg. § 1.401(a)(9)-5(f)(2)(ii)(A), 87 Fed. Reg. 10504, 10536 (Feb. 24, 2022).

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For example, if an inherited IRA is left to the IRA owner's 3 children who are ages 23, 16, and 10 when the IRA owner dies in 2026, then the following applies.

- The children who are 16 and 10 are EDBs who are minor children and the 23-year-old is an ODB.
- The Life Expectancy Rule applies because minor children of the IRA owner are EDBs.
- The Applicable Denominator for annual distributions is based on the 23-year-old's life expectancy.
- The End Date is the earlier of the end of the year that contains the 10th anniversary of:
  - the calendar year the youngest child reaches age 21 (11 years for the 10-year-old), or
  - the year the last minor child dies.
- If all children continue to live, then the End Date is December 31, 2047 (when the 10-year-old reaches age 31) and
  - the 23-year-old will be age 44 and
  - the 16-year-old will be age 37.

E. IRA Distributes to the Surviving Spouse of the IRA Owner: If the IRA owner dies before the owner's Required Beginning Date and the IRA distributes to the IRA owner's surviving spouse who was the sole beneficiary of the IRA, the surviving spouse is an EDB who has options regarding what the spouse does with the IRA. "Sole beneficiary" means either (i) the surviving spouse is named the sole beneficiary of the IRA outright, or (ii) a conduit trust[142] is the named beneficiary of the IRA and the surviving spouse is the sole current lifetime beneficiary of that trust[143] (referred to later in this paper as the sole "primary" beneficiary).[144]

[142] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A). See infra Section XIV, H, 1 (contains explanation of conduit trust).

[143] Treas. Reg. §§ 1.401(a)(9)-4(h)(2)(i), 1.401(a)(9)-5(c)(2); see also Treas. Reg. § 1.401(a)(9)-4(f)(6)(i), Example 1.

[144] See infra Section XIV, G.

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If the IRA owner named multiple beneficiaries including the surviving spouse, separate accounts may be established by December 31 of the year following the year of the IRA owner's death. If separate accounts are timely established and the surviving spouse is the sole beneficiary of one of the separate accounts, then those special spousal rules will apply to that separate account.[145]

1. Options Available to the Surviving Spouse: The surviving spouse has three options, and a fourth if the governing plan provides for it, for what the surviving spouse can do with the deceased IRA owner's retirement accounts that name the surviving spouse as the sole beneficiary. These are:

a. Roll the IRA Over to IRA Owned by the Surviving Spouse: If the surviving spouse makes this election, then the surviving spouse becomes the owner of that IRA instead of being the beneficiary of an inherited IRA.[146] This is often the option chosen. The spouse will not be required to draw any RMDs until the spouse reaches the spouse's Required Beginning Date. The Uniform Lifetime Table will be used to determine the Applicable Denominator for the surviving spouse's life expectancy.[147] The End Date will depend on who the beneficiary of the IRA is when the spouse dies.

However, if the surviving spouse is under the age of 59½ and may need to draw money out of the deceased IRA owner's IRA prior to reaching this age, then the surviving spouse may want to elect to keep the IRA as an inherited IRA under either of the two below-described options. This is because if the surviving spouse rolls the IRA over to become the surviving spouse's personal IRA, then any withdrawals prior to the surviving spouse attaining the age of 59½ will usually be subject to a 10% additional tax (often referred to as an "early withdrawal penalty," although that is not how the Code refers to it) in addition to any income tax that may be payable.[148] This additional tax is avoided if the IRA is taken as an inherited IRA.

Another time the surviving spouse may consider not rolling the IRA over to one owned by the surviving spouse is when (i) the IRA owner died before the owner's Required Beginning Date, (ii) the IRA owner's surviving spouse is the

[145] Treas. Reg. § 1.401(a)(9)-8(a). See infra Section X, D for a discussion of separate accounts.

[146] Treas. Reg. § 1.402(c)-2(j)(1).

[147] Treas. Reg. § 1.401(a)(9)-5(c)(1).

[148] I.R.C. § 72(t)(1), (2) (imposing the 10% additional tax and listing exceptions, including § 72(t)(2)(A)(i), for a distribution made on or after the date the IRA owner attains age 59½).

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sole beneficiary of the IRA owner's IRA, and (iii) the surviving spouse is older than the IRA owner. In this circumstance, if the surviving spouse elects to keep the deceased IRA owner's IRA as an inherited IRA (instead of rolling the IRA over to the surviving spouse's IRA), then the surviving spouse can delay starting Required Minimum Distributions until the end of the calendar year in which the deceased IRA owner would have reached the owner's Applicable Age.[149]

Lastly, if the inherited IRA is a Roth IRA, the surviving spouse would normally roll the IRA over to become the surviving spouse's IRA. Roth IRAs are discussed later in this paper.[150]

b. Keep the IRA as Inherited IRA and Take Life Expectancy Distributions: The surviving spouse can choose to keep the IRA as an inherited IRA. Since the surviving spouse is an EDB, the Life Expectancy Rule[151] will apply. If this is chosen, and the 10-Year Rule does not apply (see Section VI, E, 1, d, below), then what happens is described below.

1) Annual Distributions: The Life Expectancy Rule applies and annual RMDs must be made to the spouse.[152] However, the surviving spouse is not required to start receiving these RMDs until the later of (i) the end of the calendar year immediately following the year of the IRA owner's death (which is the general rule applicable to EDBs), or (ii) the end of the calendar year when the IRA owner would have attained their Applicable Age[153] (which is a special rule only available to surviving spouses).

2) Life Expectancy of Surviving Spouse: The life expectancy (Applicable Denominator) of the surviving spouse for purposes of calculating the spouse's RMDs is based on the surviving spouse's age as of the surviving spouse's birthday in the calendar year the spouse's

[149] Treas. Reg. § 1.401(a)(9)-3(d).

[150] See infra Section XI.

[151] Treas. Reg. § 1.401(a)(9)-3(c)(4).

[152] Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(C).

[153] Treas. Reg. § 1.401(a)(9)-3(d).

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RMDs start.[154] Unlike every other beneficiary, the spouse's life expectancy is recalculated every subsequent year based on the spouse's then-current age.[155]

3) Spouse is "Treated as the Employee:" Section 327 of the SECURE 2.0 Act[156] gives the surviving spouse an option to elect to be "treated as the employee" (i.e., the IRA owner) for purposes of determining required minimum distributions.[157] However, under the Proposed Regulations issued July 19, 2024, when the IRA owner dies before the Required Beginning Date, the surviving spouse is deemed to have made this election automatically.[158] In contrast, if the IRA owner had died on or after the RBD, this is an election the spouse may or may not choose.[159]

The July 19, 2024 Proposed Regulations and accompanying preamble make clear that this election only applies to the determination of RMDs and does not constitute an actual ownership election or rollover causing the IRA to no longer be treated as an inherited IRA.[160] Although the surviving spouse computes annual RMDs using the Uniform Lifetime Table as if the spouse were the IRA owner,[161] the IRA remains an inherited IRA unless and until the spouse completes an actual rollover or elects to treat the IRA as the spouse's own IRA, which the spouse can do at any time.[162] As a result, the spouse continues to be treated as the beneficiary of an inherited IRA for non-RMD purposes. This includes being eligible for the exception to the 10% additional tax on IRA distributions taken before the spouse

[154] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iv). See also Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(C), 89 Fed. Reg. 58644, 58650 (July 19, 2024). See supra Section II, F (applicability of the 2024 proposed regulations).

[155] Id.

[156] I.R.C. § 401(a)(9)(B)(iv).

[157] Treas. Reg. § 1.401(a)(9)-5(g)(3)(i).

[158] Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(A), 89 Fed. Reg. 58644, 58650 (July 19, 2024).

[159] Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(B), 89 Fed. Reg. 58644, 58650 (July 19, 2024).

[160] Prop. Treas. Reg. Preamble § F, 89 Fed. Reg. 58644, 58646–47 (July 19, 2024).

[161] Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(C), 89 Fed. Reg. 58644, 58650 (July 19, 2024).

[162] Treas. Reg. § 1.408-8(c).

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attains age 59½,[163] and the determination of when the spouse must begin taking RMDs continues to be based on when the deceased IRA owner would have reached the owner's Applicable Age rather than when the spouse attains the spouse's own Applicable Age.

The principal advantage of making this election is that annual RMDs are calculated using the Applicable Denominator under the Uniform Lifetime Table for the surviving spouse's age recalculated annually. As compared to the standard EDB payout regime, which generally requires use of the Single Life Table alone, use of the Uniform Lifetime Table will typically produce a larger Applicable Denominator and therefore a smaller annual RMD obligation for the surviving spouse.

A disadvantage of this election is that if there is a designated Roth account (DRAC) received from the deceased spouse, the value of the DRAC is included when determining RMDs.[164] However, this can be easily avoided by the surviving spouse rolling the designated Roth IRA account over to an inherited Roth IRA account owned by the surviving spouse.

4) End Date for Surviving Spouse: If the surviving spouse survives his or her full life expectancy, then the End Date is December 31 of the year when the surviving spouse's life expectancy ends. Since the surviving spouse's life expectancy is recalculated each year and the Uniform Lifetime Table is used, it is very likely this date will never be reached.

If the surviving spouse dies before reaching the surviving spouse's full life expectancy, the End Date when the IRA must be fully distributed depends on when the spouse dies: whether it occurred before or after the surviving spouse had begun, or was required to begin, drawing RMDs.

A) If the surviving spouse dies before **RMDs have commenced or are required to commence**[165] **to the surviving spouse** – then the surviving spouse's date of death

[163] I.R.C. § 72(t)(2)(A)(ii).

[164] Prop. Treas. Reg. Preamble § F, 89 Fed. Reg. 58644, 58647 (July 19, 2024).

[165] Treas. Reg. § 1.401(a)(9)-3(e)(1) and (3).

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is substituted for the IRA owner's date of death and the End Date depends on whether the next beneficiary is (i) not a Designated Beneficiary (NDB), (ii) a Designated Beneficiary who is not an EDB (or in other words, is Only a Designated Beneficiary (ODB)), or (iii) one of the Eligible Designated Beneficiaries.[166] Based on this, see the preceding subsections of this Section VI for which End Date applies to the next beneficiary.

B) If the surviving spouse dies after **RMDs have commenced (or are required to have commenced) to the surviving spouse** – then the End Date is the earlier of the end of the calendar year that contains (i) the 10th anniversary of the surviving spouse's death, or (ii) the final year of the life expectancy payout of the surviving spouse's life expectancy (which is the spouse's year of death life expectancy reduced by one for each subsequent year).[167]

c. Elect to Treat Inherited IRA as Spouse's Own IRA: The surviving spouse has a unique option (not available to other beneficiaries) to elect to treat an inherited IRA as the spouse's own IRA.[168] This election is regulatory in nature and does not appear in the Internal Revenue Code. It is available whether the IRA owner died before, or on or after, the owner's RBD.

1) Annual Distributions: If the surviving spouse makes this election, the IRA is treated as the spouse's own IRA (not an inherited IRA). The spouse becomes the owner, and future Annual Distributions are calculated based on the spouse's age using the Uniform Lifetime Table, with Annual Distributions commencing at the spouse's own Required Beginning Date.[169]

2) End Date: The End Date depends on when the surviving spouse (now treated as the IRA owner) dies:

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[166] Treas. Reg. § 1.401(a)(9)-3(e).

[167] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iv) and Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(D)(1), 89 Fed. Reg. 58644, 58651 (July 19, 2024) .

[168] Treas. Reg. § 1.408-8(c)(1).

[169] Id.

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A) If the surviving spouse dies before the spouse's RBD, then the End Date depends on whether the next beneficiary is (i) not a Designated Beneficiary (NDB), (ii) a Designated Beneficiary who is not an EDB (or in other words, is Only a Designated Beneficiary (ODB)), or (iii) one of the Eligible Designated Beneficiaries. Based on this, see the preceding subsections of this Section VI for which End Date applies to the next beneficiary.

B) If the surviving spouse dies on or after the surviving spouse's RBD, then the End Date is the earlier of the end of the calendar year that contains (i) the 10th anniversary of the surviving spouse's death, or (ii) the final year of the life expectancy payout of the surviving spouse's life expectancy (which is the spouse's year of death life expectancy reduced by one for each subsequent year).[170]

3) How this Differs from a Rollover: Unlike a rollover, which involves a transfer of funds from one account to another account, the election by the surviving spouse to treat the inherited IRA as the spouse's own IRA is a redesignation of the same IRA. The IRA is retitled in the spouse's name as owner (eliminating the "FBO" or "for benefit of" designation), but the account number and underlying investments typically remain unchanged. However, it is expected that the actual practice of IRA custodians will be to close the inherited IRA account and establish a new account in the spouse's name, making the process functionally similar to a rollover.

4) Requirements for the Spouse to Make This Election: The following are required for the surviving spouse to be able to make this election.

A) This only applies to an IRA. It is not available for inherited accounts in qualified plans, such as 401(k) plans, 403(b) plans, or governmental 457(b) plans.

[170] Treas. Reg. § 1.401(a)(9)-5(e).

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B) The surviving spouse must be the sole beneficiary of the IRA.[171] For purposes of this requirement, if the IRA owner named multiple beneficiaries but separate accounts were established by December 31 of the year following the year of death, the surviving spouse need only be the sole beneficiary of the spouse's separate account.[172]

C) The surviving spouse must have an unlimited right to withdraw amounts from the IRA.[173] The IRA must be in the spouse's name, not in a trust. The final regulations specifically say that if a trust is named as the beneficiary of the IRA, the unlimited withdrawal requirement is not satisfied, even if the trust is a conduit trust and the surviving spouse is the sole beneficiary of the trust.[174]

5) How the Election is Made: This election can be made in three different ways: (i) the surviving spouse notifies the IRA custodian and requests the IRA be redesignated in the spouse's name as owner rather than as a beneficiary; (ii) the surviving spouse fails to take the full RMD for any year after the year of the IRA owner's death; or (iii) the surviving spouse makes a contribution to the inherited IRA (other than a rollover contribution from another inherited IRA inherited from the same deceased spouse).[175] The last two of these methods are deemed to be elections and can be made inadvertently.

d. Elect to Apply the 10-Year Rule: If the retirement plan governing the IRA contains an option for a beneficiary to elect to apply the 10-Year Rule instead of the Life Expectancy Rule (this is more fully explained below), then the surviving spouse may choose the 10-Year Rule to apply to the IRA the surviving spouse receives from the IRA owner. This is only available if the IRA owner died prior to the IRA owner's Required Beginning Date and the

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[171] Treas. Reg. § 1.408-8(c)(1)(ii).

[172] Treas. Reg. § 1.408-8(a) (IRAs); Treas. Reg. § 1.401(a)(9)-8(a) (qualified plans). See infra Section X, D.

[173] Treas. Reg. § 1.408-8(c)(1)(ii).

[174] Id. See infra Sections XIV, F, 1 and XIV, H, 1 for discussion of conduit trusts.

[175] Treas. Reg. § 1.408-8(c)(2).

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retirement plan governing the IRA authorizes this election.[176] If this option is chosen, then the following applies:

1) Annual Distributions: There are no RMDs that must be made annually because the IRA owner died before the owner's Required Beginning Date.[177]

2) End Date: The IRA must be fully distributed by the end of the calendar year containing the 10th anniversary of the date of the IRA owner's death.[178]

F. Plan May Require or Allow Election To Choose 10-Year Rule: As mentioned above, the regulations allow defined contribution plans to adopt an optional plan provision that either requires the 10-Year Rule to apply, or allows the IRA owner or an Eligible Designated Beneficiary to elect between two payout options, keeping the Life Expectancy Rule payout that would normally apply or electing to have the 10-Year Rule apply.[179] Note that this only applies if the IRA owner dies before the owner's Required Beginning Date; it is not applicable if the IRA owner dies on or after the owner's Required Beginning Date.

1. Applies to Any Eligible Designated Beneficiary: Although only described above as something that applies to the IRA owner's surviving spouse, this applies to any Eligible Designated Beneficiary if the plan contains this provision.

2. Requirements if a Plan Allows This Election: A plan must comply with the following requirements if the plan requires this or allows this type of election. These requirements are (i) the plan must specify the method of distribution that applies if no election is made,[180] and (ii) the election must be made "... no later than the end of the earlier of the calendar year by which distributions must be made in order to satisfy [the requirements for the 10-Year Rule] and the calendar year in which

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[176] Treas. Reg. § 1.401(a)(9)-3(c)(5)(ii) and (iii).

[177] Author's Note: Even though the beneficiary is the IRA owner's surviving spouse who is an Eligible Designated Beneficiary, it is believed that this election to apply the 10-Year Rule instead of the Life Expectancy Rule will result in no RMDs being required because the IRA owner died before the owner's Required Beginning Date. See supra Section II, D for this explanation. The final regulations do not directly say this is the correct interpretation, but Preamble § I.C (89 Fed. Reg. 58886, 58892 (July 19, 2024)) seems to imply this.

[178] Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(B); I.R.C. § 401(a)(9)(B)(ii) as altered by I.R.C. § 401(a)(9)(H)(i)(I). See also the Author's Note in the preceding footnote.

[179] Treas. Reg. § 1.401(a)(9)-3(c)(5)(ii) and (iii).

[180] Treas. Reg. § 1.401(a)(9)-3(c)(5)(iii)(A).

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distributions would be required to begin in order to satisfy the requirements of [the life expectancy payout rule – which is the end of the calendar year following the calendar year of the IRA owner's death] (or, if applicable, paragraph (d) of this section)."[181] (emphasis added). The referenced paragraph (d) is the Section of the final regulations issued in 2024 describing the spouse's option to delay commencement of RMDs until the end of the calendar year when the IRA owner would have attained their Applicable Age and RMDs would be required to start.[182] This election must be irrevocable and is only applicable to future calendar years (i.e., cannot be retroactive and apply to years prior to the year when the election was made).[183]

VII. Death of IRA Owner On or After Required Beginning Date

If the IRA owner died on or after the IRA owner's Required Beginning Date (RBD), then two questions must be asked and answered: (1) Did the deceased IRA owner receive all the Required Minimum Distribution (RMD) for the year the owner died? and (2) Who or what is the beneficiary of the IRA?

A. IRA Owner's Undistributed Required Minimum Distribution: If the deceased IRA owner did not receive all the Required Minimum Distributions (RMD) for the year of the IRA owner's death, then the remaining unpaid RMD must be distributed to the beneficiary of the IRA no later than December 31 of the year of the IRA owner's death.[184] The regulations allow this to be delayed until the date the beneficiary of the IRA files the beneficiary's income tax return for the year of the IRA owner's death, including extensions.[185] If this undistributed RMD is not taken before the deadline, there will be an excise tax imposed on the beneficiary that is equal to 25% of the amount of the RMD that was not fully distributed.[186]

[181] Treas. Reg. § 1.401(a)(9)-3(c)(5)(iii)(B).

[182] Treas. Reg. § 1.401(a)(9)-3(d).

[183] Treas. Reg. § 1.401(a)(9)-3(c)(5)(iii)(C).

[184] Treas. Reg. § 1.401(a)(9)-5(c)(1).

[185] Treas. Reg. § 54.4974-1(g)(3)(iii). This is accomplished by waiving the excise tax if the remaining RMD is taken by the designated beneficiary before the beneficiary's tax filing deadline, including extensions, for the year the RMD should have been distributed.

[186] Treas. Reg. § 54.4974-1(a). See infra Section IX, D (contains a more complete explanation).

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B. Not a Designated Beneficiary (NDB): If the IRA owner dies on or after the owner's Required Beginning Date and the beneficiary is not a Designated Beneficiary (NDB) (which also includes not being an Eligible Designated Beneficiary (EDB)) of the IRA, then the following applies:

1. Annual Distributions: Annual RMDs must be made to the beneficiary.[187] The Single Life Table is used[188] and the age to use for the Applicable Denominator for the RMDs is the age of the IRA owner as of the owner's birthday in the calendar year of the IRA owner's death,[189] reduced by 1 for each subsequent year.[190] The RMDs must begin in the calendar year following the calendar year the IRA owner died.[191]

2. End Date: The IRA must be fully distributed by the end of the calendar year containing the final year of the deceased IRA owner's remaining ("ghost") life expectancy.[192] How this is calculated is explained later in this paper.[193]

C. IRA Distributes to a Designated Beneficiary Who is Not an Eligible Designated Beneficiary (ODB): If the IRA owner dies on or after the owner's Required Beginning Date and the IRA distributes to a beneficiary who is only a Designated Beneficiary (ODB) and not an Eligible Designated Beneficiary (EDB), then the following applies:

1. Annual Distributions: Annual RMDs must be made to the Designated Beneficiary (ODB).[194] The RMDs are based on the greater of (i) the ODB's life expectancy or (ii) the deceased IRA owner's remaining ("ghost") life expectancy.[195]

As a practical matter, the RMDs will always be based on the ODB's life expectancy. Any beneficiary who is not more than 10 years younger than the IRA owner, including a beneficiary who is older than the owner, is an Eligible Designated

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[187] See supra Section II, D (contains an explanation of why this is required).

[188] Treas. Reg. § 1.401(a)(9)-5(d)(3)(i).

[189] Treas. Reg. § 1.401(a)(9)-5(d)(3)(ii).

[190] Id.

[191] Treas. Reg. § 1.401(a)(9)-5(d)(1)(i).

[192] Treas. Reg. § 1.401(a)(9)-5(d)(1)(iii).

[193] See infra Section VIII, D.

[194] See supra Section II, D (contains explanation why this is required).

[195] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

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Beneficiary rather than an ODB.[196] An ODB is therefore always more than 10 years younger than the IRA owner, and the ODB's life expectancy will always be greater than the IRA owner's remaining "ghost" life expectancy.

The Single Life Table is used to calculate the RMDs.[197] The age of the ODB used for determination of the ODB's life expectancy (the Applicable Denominator) is the age the ODB will be in the calendar year following the calendar year of the IRA owner's death.[198] This is reduced by 1 for each subsequent year.[199] The Applicable Denominator to use for the deceased IRA owner's life expectancy is based on the age of the IRA owner as of the owner's birthday in the calendar year when the IRA owner died.[200] This also is reduced by 1 for each subsequent year.[201]

2. End Date: The IRA must be fully distributed by the end of the calendar year containing the 10th anniversary of the IRA owner's death,[202] or the end of the ODB's life expectancy, if earlier.

D. IRA Distributes to an Eligible Designated Beneficiary Who is Disabled, Chronically Ill, or Not More than Ten Years Younger: If the IRA owner dies on or after the owner's Required Beginning Date and the IRA distributes to an Eligible Designated Beneficiary (EDB) who is Disabled, Chronically Ill, or not more than 10 years younger than the IRA owner, then the following applies:

1. Annual Distributions: The Life Expectancy Rule applies[203] for two reasons: the IRA owner died after the owner's Required Beginning Date (RBD) and the beneficiary is an Eligible Designated Beneficiary. As a result, annual RMDs must be distributed to the EDB over a period of time equal to the greater of (i) the EDB's life

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[196] I.R.C. § 401(a)(9)(E)(ii)(V); Treas. Reg. § 1.401(a)(9)-4(e)(1)(v). See supra Section V, B.

[197] Treas. Reg. § 1.401(a)(9)-5(d)(3)(i).

[198] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

[199] Id.

[200] Treas. Reg. § 1.401(a)(9)-5(d)(3)(ii).

[201] Id.

[202] Treas. Reg. § 1.401(a)(9)-5(e)(2).

[203] See supra Section V, C, 1, c (contains definition of Life Expectancy Rule); Treas. Reg. § 1.401(a)(9)-5(d)(1)(i).

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expectancy, or (ii) the deceased IRA owner's remaining ("ghost") life expectancy.[204] This means if the EDB was older than the IRA owner and has a shorter life expectancy, then the EDB can use the IRA owner's life expectancy when calculating the annual RMDs during the EDB's life because the IRA owner's life expectancy is greater than the EDB's life expectancy.

The Single Life Table is used to calculate the life expectancies.[205] The age of the EDB used for determination of the EDB's life expectancy (the Applicable Denominator) is the age the EDB will be in the calendar year following the calendar year of the IRA owner's death.[206] This is reduced by 1 for each subsequent year.[207] The Applicable Denominator to use for the deceased IRA owner's life expectancy is based on the age of the IRA owner as of the owner's birthday in the calendar year when the IRA owner died.[208] This also is reduced by 1 for each subsequent year.[209] The RMDs must begin in the calendar year following the IRA owner's death.[210]

If the EDB dies before the IRA is fully distributed, the successor beneficiary of the IRA must continue the annual RMDs the EDB was taking.[211]

2. End Date: If the EDB lives past their life expectancy as contained in the Single Life Table (calculated as described above), then the End Date for the inherited IRA will be December 31 of the year the EDB's life expectancy ends. On the other hand, if the EDB dies before the IRA is fully distributed, the remainder of the IRA must be fully distributed no later than the end of the year that contains the 10th anniversary of the EDB's death.[212] If the EDB was older than the deceased IRA owner,

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[204] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

[205] Treas. Reg. § 1.401(a)(9)-5(d)(3)(i).

[206] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

[207] Id.

[208] Treas. Reg. § 1.401(a)(9)-5(d)(3)(ii).

[209] Id.

[210] Treas. Reg. § 1.401(a)(9)-5(d)(1)(i).

[211] Treas. Reg. § 1.401(a)(9)-5(d)(1)(i), (d)(3)(iii), (e)(3). See also Treas. Reg. § 1.401(a)(9)-4(f)(6)(i) (Example 1).

[212] Treas. Reg. §§ 1.401(a)(9)-5(e)(3) and 1.401(a)(9)-5(e)(1). See also Final Treas. Reg. Preamble § I.E.3.c., 89 Fed. Reg. 58886, 58897 (July 19, 2024).

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then the life expectancy of the deceased IRA owner would be used to determine the RMDs that are distributed to the EDB.[213]

3. Practical Exception for Disabled and Chronically Ill EDBs When AMBT Used: As a practical matter, if an EDB who is Disabled or Chronically Ill and possibly eligible for means-tested public assistance (such as SSI or Medicaid) is the beneficiary of an IRA, it is most likely the IRA will not be distributed directly to the beneficiary since doing so will disqualify the beneficiary from means-tested public assistance. Instead, the IRA should be distributed to a see-through accumulation trust, and most likely one that qualifies as an Applicable Multi-Beneficiary Trust (AMBT). There are special rules that apply to AMBTs regarding the calculation of the annual RMDs and the determination of the End Date, and the above-described RMDs and End Date options do not apply. Instead, the life expectancy of the oldest beneficiary identified in the trust as Disabled or Chronically Ill is used or, if greater, the IRA owner's remaining "ghost" life expectancy.[214] AMBTs are discussed later in this paper.[215]

E. IRA Distributes to an Eligible Designated Beneficiary Who is a Minor Child of the IRA Owner: If the IRA owner dies on or after the owner's Required Beginning Date and the IRA distributes to an Eligible Designated Beneficiary who is a minor[216] child[217] of the IRA owner, then subsection 1 of this Section describes the applicable rules. However, if there are multiple Eligible Designated Beneficiaries who are minor children of the IRA owner, then the special rules described in subsection 2 apply, even if there are also other Designated Beneficiaries of the inherited IRA.

1. Rules if Only One Minor Child is an Eligible Designated Beneficiary: If there is only one minor child of the IRA owner who is an Eligible Designated Beneficiary of the inherited IRA, then the following applies:

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[213] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii) (providing that the Applicable Denominator is the greater of the EDB's or the deceased owner's remaining life expectancy).

[214] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii), (f)(1)(ii), (f)(2)(iii). See infra Section XV, F and G.

[215] See infra Section XV.

[216] Under the age of twenty-one (21) years. Treas. Reg. § 1.401(a)(9)-4(e)(3).

[217] "Child" includes an individual who is a naturally born child, legally adopted, stepchild, or eligible foster child. Treas. Reg. § 1.401(a)(9)-4(e)(1)(ii) and I.R.C. § 152(f)(1).

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a. Annual Distributions: The Life Expectancy Rule[218] applies[219] and RMDs must be made to or for the benefit of the minor child until the end of the calendar year that is 10 years after the calendar year in which the child reaches the age of majority (the regulations set the age of majority at twenty-one (21) years of age[220]). A minor child's status as an EDB ceases when the child turns 21 years old,[221] which means the Life Expectancy Rule is only applied when the child is younger than age 21. After that, the 10-Year Rule applies,[222] but annual RMDs must still be distributed to the child during the 10-year period until the child reaches age 31.[223]

The Applicable Denominator to use for the annual RMDs that must be made to the child is based on the greater of (i) the minor child's life expectancy, or (ii) the deceased IRA owner's remaining ("ghost") life expectancy.[224] The Single Life Table is used to determine both life expectancies.[225]

The age of the child used for determination of the child's life expectancy (the Applicable Denominator) is the age the child will be in the calendar year following the calendar year of the IRA owner's death.[226] This is reduced by 1 for each subsequent year.[227] The Applicable Denominator to use for the deceased IRA owner's life expectancy is based on the age of the IRA owner as of the owner's birthday in the calendar year when the IRA owner died.[228]

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[218] See supra Section V, C, 1, c (contains definition of Life Expectancy Rule).

[219] Treas. Reg. § 1.401(a)(9)-5(d)(1)(i).

[220] Treas. Reg. § 1.401(a)(9)-4(e)(3).

[221] Treas. Reg. § 1.401(a)(9)-4(e)(1)(ii); Treas. Reg. § 1.401(a)(9)-4(e)(3).

[222] Treas. Reg. § 1.401(a)(9)-5(e)(4).

[223] Treas. Reg. § 1.401(a)(9)-5(d)(1)(i).

[224] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

[225] Treas. Reg. § 1.401(a)(9)-5(d)(3)(i).

[226] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

[227] Id.

[228] Treas. Reg. § 1.401(a)(9)-5(d)(3)(ii).

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This also is reduced by 1 for each subsequent year.[229] The RMDs must begin in the calendar year following the IRA owner's death.[230]

b. End Date: The IRA must be fully distributed no later than the earlier of the end of the calendar year that contains the 10th anniversary of the date the child (i) attained the age of 21, or (ii) died.[231]

2. Special Rules if Multiple Minor Children are Eligible Designated Beneficiaries: Despite the foregoing general rules, the following applies if there is more than one minor child of the deceased IRA owner who is an Eligible Designated Beneficiary of the inherited IRA. This applies even if there are also other Designated Beneficiaries of the inherited IRA.

a. Annual Distributions: The Life Expectancy Rule[232] applies[233] and RMDs must be made to or for the benefit of the IRA beneficiaries until the End Date is reached.

The Applicable Denominator to use for the annual RMDs that must be made to the Designated Beneficiaries of the IRA is based on the greater of (i) the life expectancy of the oldest Designated Beneficiary (not the oldest minor child EDB) of the inherited IRA,[234] or (ii) the deceased IRA owner's remaining ("ghost") life expectancy.[235] The Single Life Table is used to determine both life expectancies.[236]

The age used for determination of the oldest Designated Beneficiary's life expectancy (the Applicable Denominator) is the age the oldest Designated Beneficiary will be in the calendar year following the calendar year of the IRA

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[229] Id.

[230] Treas. Reg. § 1.401(a)(9)-5(d)(1)(i).

[231] Treas. Reg. § 1.401(a)(9)-5(e)(4).

[232] See supra Section V, C, 1, c (contains definition of Life Expectancy Rule).

[233] Treas. Reg. § 1.401(a)(9)-5(d)(1)(i).

[234] Treas. Reg. § 1.401(a)(9)-5(f)(1)(i).

[235] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

[236] Treas. Reg. § 1.401(a)(9)-5(d)(3)(i).

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owner's death.[237] This is reduced by 1 for each subsequent year.[238] The Applicable Denominator to use for the deceased IRA owner's life expectancy is based on the age of the IRA owner as of the owner's birthday in the calendar year when the IRA owner died.[239] This also is reduced by 1 for each subsequent year.[240] The RMDs must begin in the calendar year following the IRA owner's death.[241]

b. End Date: If there are multiple minor children of the deceased IRA owner who are Eligible Designated Beneficiaries of the inherited IRA, then the End Date for the inherited IRA is the earlier of[242] (i) the end of the year that contains the 10th anniversary of the 21st birthday of the youngest Eligible Designated Beneficiary who is a minor child,[243] or (ii) the end of the year that contains the 10th anniversary of the death of the last surviving minor child who is an Eligible Designated Beneficiary.[244] These are major changes from the 2022 proposed regulations, which measured the 10-year period from the oldest minor child rather than the youngest, and which ended the deferral on the death of the oldest minor child rather than on the death of all of them.[245]

F. IRA Distributes to the Surviving Spouse of the IRA Owner: If the IRA owner dies on or after the owner's Required Beginning Date and the IRA distributes to the IRA owner's surviving spouse who was the sole beneficiary of the IRA, the surviving spouse is an EDB who has options regarding what the spouse does with the IRA owner's IRA. "Sole beneficiary" means either (i) the surviving spouse is named the sole beneficiary of the IRA

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[237] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

[238] Id.

[239] Treas. Reg. § 1.401(a)(9)-5(d)(3)(ii).

[240] Id.

[241] Treas. Reg. § 1.401(a)(9)-5(d)(1)(i).

[242] Treas. Reg. § 1.401(a)(9)-5(e)(1).

[243] Treas. Reg. § 1.401(a)(9)-5(f)(2)(ii)(C).

[244] Treas. Reg. § 1.401(a)(9)-5(f)(2)(ii)(B).

[245] Prop. Treas. Reg. § 1.401(a)(9)-5(f)(2)(ii)(A), 87 Fed. Reg. 10504, 10536 (Feb. 24, 2022).

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outright, or (ii) a conduit trust[246] is the named beneficiary of the IRA and the surviving spouse is the sole current lifetime beneficiary of that trust[247] (referred to later in this paper as the sole "primary" beneficiary).[248]

If the IRA owner named multiple beneficiaries including the surviving spouse, separate accounts may be established by December 31 of the year following the year of the IRA owner's death. If separate accounts are timely established and the surviving spouse is the sole beneficiary of one of the separate accounts, then these special spousal rules will apply to that separate account.[249]

1. Options Available to the Surviving Spouse: The surviving spouse who is the sole beneficiary of an IRA has three options for what the surviving spouse can do with the deceased IRA owner's retirement accounts that name the surviving spouse as the sole beneficiary. The first is to take the retirement account as the surviving spouse's own. The other two are alternative methods of calculating the annual RMDs if the account is instead kept as an inherited IRA. These are:

Option 1: Roll the IRA over so the surviving spouse becomes the owner (see subsection a, below);

Option 2: Keep the IRA as an inherited IRA and calculate the annual RMDs the way they are calculated for any other Eligible Designated Beneficiary (see subsection b, 1), A), below); or

Option 3: Keep the IRA as an inherited IRA and elect under § 327 of the SECURE 2.0 Act to be treated as the IRA owner for purposes of calculating the annual RMDs (see subsection b, 1), B), below).

Options 2 and 3 differ only in which life expectancy table supplies the Applicable Denominator. Under both, the RMDs must begin in the calendar year following the calendar year of the IRA owner's death, and under both the End Date is the same (see subsection b, 2), below).

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[246] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A). See infra Sections XIV, F, 1 and XIV, H, 1 (contains explanation of conduit trust).

[247] Treas. Reg. §§ 1.401(a)(9)-4(h)(2)(i), 1.401(a)(9)-5(c)(2); see also Treas. Reg. § 1.401(a)(9)-4(f)(6)(i), Example 1.

[248] See infra Section XIV, G.

[249] Treas. Reg. § 1.401(a)(9)-8(a). See infra Section X, D for a discussion of separate accounts.

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a. Roll the IRA Over to IRA Owned by Surviving Spouse: If the surviving spouse makes this election, then the surviving spouse becomes the owner of that IRA instead of being the beneficiary of an inherited IRA.[250] This is often the option chosen. The spouse will not be required to draw any RMDs until the spouse reaches the spouse's Required Beginning Date. The Uniform Lifetime Table will be used to determine the Applicable Denominator for the surviving spouse's life expectancy.[251] The End Date will depend on who the beneficiary of the IRA is when the spouse dies.

However, if the surviving spouse is under the age of 59½ and may need to draw money out of the deceased IRA owner's IRA prior to reaching this age, then the surviving spouse may want to elect to keep the IRA as an inherited IRA under either of the two below-described options. This is because if the surviving spouse rolls the IRA over to become the surviving spouse's personal IRA, then any withdrawals prior to the surviving spouse attaining the age of 59½ will usually be subject to a 10% additional tax (often referred to as an "early withdrawal penalty," although that is not how the Code refers to it) in addition to any income tax that may be payable.[252] This additional tax is avoided if the IRA is taken as an inherited IRA.

If the inherited IRA is a Roth IRA, the surviving spouse would normally roll the IRA over to become the surviving spouse's IRA. Roth IRAs are discussed later in this paper.[253]

b. Keep the IRA as Inherited IRA and Take Life Expectancy Distributions: The surviving spouse can choose to keep the IRA as an inherited IRA. Since the surviving spouse is an EDB, the Life Expectancy Rule[254] will apply. If this is chosen, then what happens is described below.

1) Annual Distributions: Because the IRA owner died after the owner's RBD, the surviving spouse must begin taking annual RMDs

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[250] Treas. Reg. § 1.402(c)-2(j)(1).

[251] Treas. Reg. § 1.401(a)(9)-5(c)(1).

[252] I.R.C. § 72(t)(1), (2) (imposing the 10% additional tax and listing exceptions, including § 72(t)(2)(A)(i), for a distribution made on or after the date the IRA owner attains age 59½).

[253] See infra Section XI.

[254] See supra Section V, C, 1, c (contains definition of Life Expectancy Rule); Treas. Reg. § 1.401(a)(9)-5(d)(1)(i).

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the year following the year of the IRA owner's death.[255] The life expectancy of the surviving spouse for purposes of calculating the spouse's RMDs is based on the surviving spouse's age as of the spouse's birthday in that calendar year.[256] Unlike every other beneficiary, the spouse's life expectancy is recalculated every subsequent year based on the spouse's then-current age.[257]

The surviving spouse has two options concerning how the RMDs are calculated:

A) Be Treated Like Other EDBs: If the surviving spouse chooses to be treated like other EDBs, then the Single Life Table is used,[258] but the spouse's life expectancy is recalculated every year based on the spouse's then-current age.[259] The Applicable Denominator is the greater of (i) the surviving spouse's life expectancy, or (ii) the IRA owner's remaining ("ghost") life expectancy.[260] Because the surviving spouse's life expectancy is recalculated each year based on the surviving spouse's age in that year and the IRA owner's ghost life expectancy is calculated once and then reduced by 1 each year,[261] both life expectancies are compared each year, and the greater (longer) life expectancy is used as the Applicable Denominator. Using the greater life expectancy produces a smaller Annual Distribution.

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[255] Treas. Reg. §§ 1.401(a)(9)-5(d)(1)(i), 1.401(a)(9)-5(a)(2)(i) and (ii), and 1.401(a)(9)-5(d)(3)(iv). Essentially, after the IRA owner's RBD the owner must start taking RMDs. When the owner dies, the RMDs continue, which is why there are RMDs required the year after the owner's death. However, often the Applicable Denominator will change and be based on a life expectancy other than the deceased IRA owner's remaining "ghost" life expectancy.

[256] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iv).

[257] Id.

[258] Treas. Reg. § 1.401(a)(9)-5(d)(3)(i).

[259] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iv).

[260] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

[261] See infra Section VIII, D (contains explanation of how the ghost life expectancy is calculated).

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B) Elect to be Treated as the IRA Owner: Section 327 of the SECURE 2.0 Act of 2022 allows the IRA owner's surviving spouse to elect to be "treated as (the) employee" (which is how the IRA owner is referred to in the statute and regulations). Unlike when the IRA owner dies before the owner's RBD (where this election is automatic), when the IRA owner dies on or after the owner's RBD the spouse must make an election for this option to apply. However, the election may be a default election under the terms of the plan, and the preamble anticipates that most plans will provide the election as a default.[262]

The July 19, 2024 Proposed Regulations and accompanying preamble make clear that this election can only be made if the IRA owner died in 2023 or later,[263] and when this election is made it only applies to the determination of RMDs and does not constitute an actual ownership election or rollover causing the IRA to no longer be treated as an inherited IRA.[264] Although the surviving spouse computes annual RMDs using the Uniform Lifetime Table as if the spouse were the IRA owner,[265] the IRA remains an inherited IRA unless and until the spouse completes an actual rollover or elects to treat the IRA as the spouse's own IRA, which the spouse can do at any time.[266] As a result, the spouse continues to be treated as the beneficiary of an inherited IRA for non-RMD purposes. This includes being eligible for the exception to the 10% additional tax on IRA distributions taken before the spouse attains age 59½.[267]

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[262] Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(B), 89 Fed. Reg. 58644, 58650 (July 19, 2024); see also 89 Fed. Reg. at 58646, 58649 (preamble).

[263] Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(E), 89 Fed. Reg. 58644, 58651 (July 19, 2024). See supra Section II, F (applicability of the 2024 proposed regulations).

[264] Prop. Treas. Reg. Preamble § F, 89 Fed. Reg. 58644, 58646–47 (July 19, 2024).

[265] Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(C), 89 Fed. Reg. 58644, 58650 (July 19, 2024).

[266] Treas. Reg. § 1.408-8(c).

[267] I.R.C. § 72(t)(2)(A)(ii).

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The principal advantage of making this election is that the annual RMDs are calculated using the greater of (a) the Applicable Denominator under the Uniform Lifetime Table for the surviving spouse's age recalculated annually or (b) the deceased IRA owner's remaining "ghost" life expectancy determined under the Single Life Table. As compared to the standard EDB payout regime, which generally requires use of the Single Life Table alone, use of the Uniform Lifetime Table will typically produce a larger Applicable Denominator and therefore a smaller annual RMD obligation for the surviving spouse.

A disadvantage of this election is that if there is a designated Roth account (DRAC) received from the deceased spouse, the value of the DRAC is included when determining RMDs.[268] However, this can be easily avoided by the surviving spouse rolling the designated Roth IRA account over to an inherited IRA Roth account owned by the surviving spouse.

2) End Date for Surviving Spouse: If the surviving spouse dies after the IRA owner, the End Date when the IRA must be fully distributed is the earlier of the end of the calendar year that contains (i) the 10th anniversary of the surviving spouse's death[269] or (ii) the final year of the life expectancy payout of the surviving spouse's life expectancy (which is the spouse's year of death life expectancy reduced by one each subsequent year).[270]

VIII. How to Determine Life Expectancy

Life expectancy for purposes of determining how much of an IRA must be distributed in a given year (the Required Minimum Distribution (RMD)) is calculated differently depending

[268] Prop. Treas. Reg. Preamble § F, 89 Fed. Reg. 58644, 58647 (July 19, 2024).

[269] Treas. Reg. § 1.401(a)(9)-5(e)(3). In addition, if the surviving spouse chose to be treated as the employee (IRA owner), as authorized by § 327 of the SECURE 2.0 Act of 2022, then Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(D), 89 Fed. Reg. 58644, 58651 (July 19, 2024) also applies.

[270] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iv). In addition, if the surviving spouse chose to be treated as the employee (IRA owner), as authorized by § 327 of the SECURE 2.0 Act of 2022, then Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(D), 89 Fed. Reg. 58644, 58651 (July 19, 2024) also applies.

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on whose life expectancy is being determined. Two factors are involved: (i) which life expectancy table is used, and (ii) which birthday is used to determine the age of the person whose life expectancy is being calculated.

A. Life Expectancy Tables: There are three life expectancy tables in the Regulations. These tables were updated by final regulations published on November 12, 2020, and apply to retirement account distributions to be made in calendar years beginning on or after January 1, 2022. For distributions before that date, the prior life expectancy tables need to be used. In 2024, the IRS proposed extending the Uniform Lifetime Table to cover ages 10 through 71, using a version of the table first published in 2022 for another purpose.[271] That extension has not been finalized. See Section II, F, above. The current tables can be found in Treas. Reg. § 1.401(a)(9)-9 and IRS Publication 590-B. In addition, two of them are reproduced in Appendices B and C of this paper.

1. Single Life Table: This table is used to determine the life expectancy of (i) a beneficiary who is only a Designated Beneficiary (ODB) and (ii) an Eligible Designated Beneficiary (EDB). It is also used to determine the remaining ("ghost") life expectancy after the year of death for the IRA owner who died on or after the owner's Required Beginning Date. This table is reproduced in Appendix B of this paper. It is located at Treas. Reg. § 1.401(a)(9)-9(b).

2. Uniform Lifetime Table: This table is normally the one that is used to determine the IRA owner's RMDs during the IRA owner's lifetime and in the year the IRA owner dies. However, it is not used when the IRA owner's spouse is the sole beneficiary of the IRA for the entire calendar year and the spouse is more than ten years younger than the IRA owner; in that situation the Joint and Last Survivor Table is used.[272] The Uniform Lifetime Table is also used if a surviving spouse is "treated as the employee" of an IRA the surviving spouse has taken as an inherited IRA.[273] The Uniform Lifetime Table published in 2020 was updated to start at age 10 and published in Appendix A of IRS Notice 2022-6, 2022-5 IRB 460. It was also reproduced in the proposed regulations issued July 19, 2024, which would modify Treas. Reg. § 1.401(a)(9)-9(c). The proposed updated Uniform Lifetime Table is reproduced in Appendix C at the end of this paper. It is located at Treas. Reg.

[271] Prop. Treas. Reg. § 1.401(a)(9)-9(c), 89 Fed. Reg. 58644, 58651–52 (July 19, 2024); see 89 Fed. Reg. at 58647 (preamble); I.R.S. Notice 2022-6, 2022-5 I.R.B. 460.

[272] Treas. Reg. §§ 1.401(a)(9)-5(c)(2)(i)-(ii), 1.401(a)(9)-9(d), 1.401(a)(9)-5(c)(1).

[273] Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(C), 89 Fed. Reg. 58644, 58650 (July 19, 2024).

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§ 1.401(a)(9)-9(c) as modified by Prop. Treas. Reg. § 1.401(a)(9)-9(c), 89 Fed. Reg. 58644, 58651-58652 (July 19, 2024).

3. Joint and Last Survivor Table: This table is used to determine the IRA owner's RMDs during the IRA owner's lifetime and in the year the IRA owner dies when the sole beneficiary of the IRA for the entire calendar year during which the RMD is to be made is the IRA owner's spouse and the spouse is more than ten years younger than the IRA owner. This table is too large to include in this paper, but is located at Treas. Reg. § 1.401(a)(9)-9(d).

B. Beneficiary's Life Expectancy - Not Surviving Spouse: Life expectancy of a Designated Beneficiary (DB), including an Eligible Designated Beneficiary (EDB) who is not the IRA owner's surviving spouse, is determined using the Single Life Table.[274] The beneficiary's age is determined as of the beneficiary's birthday in the calendar year immediately following the calendar year of the IRA owner's death.[275] Thereafter, that life expectancy is reduced by one for each calendar year that elapses after the calendar year immediately following the calendar year of the IRA owner's death.[276]

> Example: Assume the IRA owner died on November 29, 2026, when the beneficiary is 25 years old. If the beneficiary turned age 26 on December 28, 2026, then the age to use for the beneficiary's life expectancy is age 27, the age the beneficiary will be on December 28, 2027 (the calendar year following the calendar year of the IRA owner's death).

If the beneficiary is a see-through trust, the life expectancy used is that of the oldest countable beneficiary of the trust or, if the trust is an AMBT, the oldest beneficiary identified in the trust as Disabled or Chronically Ill.[277]

C. Beneficiary's Life Expectancy - Surviving Spouse: If the Designated Beneficiary is an Eligible Designated Beneficiary (EDB) who is the IRA owner's surviving spouse and the

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[274] Treas. Reg. § 1.401(a)(9)-5(d)(3)(i).

[275] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

[276] Id.

[277] Treas. Reg. § 1.401(a)(9)-5(f)(1)(i)-(ii). See infra Sections XIV and XV.

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spouse is not rolling the IRA over to become the spouse's IRA, then how the surviving spouse's life expectancy is determined depends on which option applies to the surviving spouse.

1. Options Applicable to the Surviving Spouse:

a. Standard EDB Approach: If the surviving spouse is treated as a standard EDB, which is the case if the IRA owner died on or after the IRA owner's RBD and neither the surviving spouse nor the plan has made the election described in subsection b, below, then the Single Life Table is used,[278] with life expectancy recalculated each year based on the spouse's then-current age.[279]

b. Treated as the Employee (SECURE 2.0 § 327): If the surviving spouse is treated as the employee[280] (which is automatic if the IRA owner dies before the owner's RBD[281] and a choice the surviving spouse can make if the IRA owner dies on or after the owner's RBD[282]), then the Uniform Lifetime Table is used to calculate the spouse's life expectancy instead of the Single Life Table.[283] If the IRA owner died before the owner's RBD, the Applicable Denominator is based on the surviving spouse's age as of the surviving spouse's birthday in the distribution calendar year.[284] If the IRA owner died on or after the owner's RBD, then the Applicable Denominator for a distribution calendar year is the greater of (i) the Applicable Denominator from the Uniform Lifetime Table for the surviving spouse's age as of the surviving spouse's birthday in the distribution calendar year or (ii) the IRA

[278] Treas. Reg. § 1.401(a)(9)-5(d)(3)(i).

[279] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iv).

[280] I.R.C. § 401(a)(9)(B)(iv); Treas. Reg. § 1.401(a)(9)-5(g)(3).

[281] Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(A), 89 Fed. Reg. 58644, 58650 (July 19, 2024). See supra Section II, F (applicability of the 2024 proposed regulations).

[282] Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(B), 89 Fed. Reg. 58644, 58650 (July 19, 2024).

[283] Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(C), 89 Fed. Reg. 58644, 58650 (July 19, 2024).

[284] Id.

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owner's remaining "ghost" life expectancy[285] (which is described in Section VIII, D, below).

2. Calculating Life Expectancy After Death of Surviving Spouse: The remaining life expectancy after the surviving spouse dies is determined under the Single Life Table, using the age of the surviving spouse as of the surviving spouse's birthday in the calendar year the surviving spouse died.[286] Thereafter, that life expectancy is reduced by one for each calendar year following the surviving spouse's death.[287]

D. IRA Owner's Remaining "Ghost" Life Expectancy - Death On or After RBD: If an IRA owner died on or after the owner's Required Beginning Date, the IRA owner's remaining ("ghost") life expectancy is determined by using the Single Life Table.[288] The age to use for the deceased IRA owner is the age the owner would have attained on the owner's birthday in the calendar year of the IRA owner's death.[289] In subsequent years, this is reduced by one for each calendar year that has elapsed after the calendar year of the IRA owner's death.[290]

IX. Calculating IRA Distributions

A. Calculating the Required Minimum Distribution: The Required Minimum Distribution (RMD) for an inherited IRA is calculated by -

(i) referring to the Single Life Table[291] (see Appendix B),

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[285] Id.

[286] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iv); see also Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(D)(1), 89 Fed. Reg. 58644, 58651 (July 19, 2024).

[287] Id.

[288] Treas. Reg. § 1.401(a)(9)-5(d)(3)(i).

[289] Treas. Reg. § 1.401(a)(9)-5(d)(3)(ii).

[290] Id.

[291] For the surviving spouse who is treated as the employee, use the Uniform Lifetime Table. Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(C), 89 Fed. Reg. 58644, 58650 (July 19, 2024).

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(ii) locating the life expectancy (Applicable Denominator[292]) associated with the beneficiary who is only a Designated Beneficiary's (ODB) or Eligible Designated Beneficiary's (EDB) age on the appropriate date, and

(iii) dividing the value of the IRA on December 31 of the preceding calendar year[293] by the appropriate Applicable Denominator.[294]

If the IRA owner died on or after the owner's Required Beginning Date, the Applicable Denominator in step (ii) is the greater of the beneficiary's remaining life expectancy and the IRA owner's remaining ("ghost") life expectancy. If the IRA owner had no Designated Beneficiary, the IRA owner's remaining ("ghost") life expectancy is used.[295]

The resulting amount is the RMD for that calendar year. For all beneficiaries who are only Designated Beneficiaries (ODB) or are Eligible Designated Beneficiaries (EDB) other than the IRA owner's surviving spouse, the Applicable Denominator is reduced by one each subsequent year and a new RMD is calculated.[296] For the IRA owner's surviving spouse, the current age of the spouse each year is used to recalculate the spouse's Applicable Denominator during the spouse's lifetime up to and including the year of the spouse's death.[297] After the spouse's death, the Applicable Denominator of the surviving spouse in the year of the spouse's death is reduced by one for each calendar year following the year of the spouse's death.[298]

Example Continued

Continuing the example from above, if the IRA owner died in 2026 after the owner's Required Beginning Date, in the year the owner would have been age 75, and the age to use for the beneficiary is age 27, the Applicable Denominator using the Single Life Table is the greater of the beneficiary's life

[292] Prior to the 2022 proposed regulations this was referred to as the "Applicable Distribution Period."

[293] Treas. Reg. § 1.401(a)(9)-5(b)(1).

[294] Treas. Reg. § 1.401(a)(9)-5(a)(1).

[295] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii) and (iii). See supra Section VIII, D.

[296] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

[297] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iv).

[298] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iv); see also Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(D)(1), 89 Fed. Reg. 58644, 58650 (July 19, 2024).

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expectancy of 58.2 years and the IRA owner's remaining "ghost" life expectancy of 14.8 years.[299] Because the beneficiary's life expectancy is greater, the Applicable Denominator is 58.2. In other words, based on this IRS table the beneficiary has a life expectancy of 58.2 years. This means that in the first year (which is 2027, the year after the year the IRA owner died), the Required Minimum Distribution (RMD) that must be distributed to the beneficiary is 1/58.2 of the value of the inherited IRA as of December 31, 2026.[300] If that value is $100,000, then the RMD is $1,718.21 (100,000 / 58.2 = 1,718.21).

If the beneficiary was not the IRA owner's surviving spouse, then the next year (2028), the beneficiary must withdraw 1/57.2 out of the balance in the inherited IRA on December 31, 2027. This reduction by 1 repeats every subsequent year during the life of the beneficiary until the End Date or the death of the beneficiary, whichever occurs first.

If the beneficiary was the IRA owner's surviving spouse, then the next year the original process would repeat using the Applicable Denominator for the surviving spouse's age in 2028. Using the surviving spouse's actual age to determine the Applicable Denominator repeats every subsequent year of the surviving spouse's life. The Single Life Table would be used for determining the Applicable Denominator of the surviving spouse unless the spouse chose to be treated as the employee,[301] in which case the Uniform Lifetime Table is used.

End of Example

B. Final Required Minimum Distribution at End Date: The Code has always required that an inherited IRA be fully distributed by a certain date, and the SECURE Act changed when that date occurs for most beneficiaries.[302] For ease of reference, this paper refers to this as the "End Date," a phrase that is not found in the Code or the regulations.[303] In

[299] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

[300] Treas. Reg. § 1.401(a)(9)-5(b)(1).

[301] Treas. Reg. § 1.401(a)(9)-5(g)(3)(i).

[302] I.R.C. § 401(a)(9)(B) and (H); Treas. Reg. § 1.401(a)(9)-5(e).

[303] See supra Section V, C, 2, b.

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essence, there is a final Required Minimum Distribution equal to 100% of the amount remaining in the inherited IRA that must be distributed no later than the End Date.

When the End Date occurs depends on whether (i) the IRA owner died before, or on or after, the IRA owner's Required Beginning Date (RBD), (ii) the beneficiary of the IRA is not a Designated Beneficiary (NDB), (iii) the beneficiary is a Designated Beneficiary who is not an Eligible Designated Beneficiary (ODB), or (iv) the beneficiary is an Eligible Designated Beneficiary (EDB), and if so, which type of EDB. The various options for the End Date based on the different types of beneficiaries are explained earlier in this paper.[304]

Whichever year applies, the End Date is always December 31 of that year.[305]

Examples

To illustrate this, consider the following examples assuming the IRA owner died on December 1, 2026, the year when the owner would have been age 75, which is after the owner's Required Beginning Date. The owner's remaining ("ghost") life expectancy (Applicable Denominator) is 14.8 because the deceased IRA owner's life expectancy is calculated as of the age the owner would be on the owner's birthday in the year the owner died.[306]

1. If the IRA beneficiary is a Disabled or Chronically Ill EDB who was 26 years old in the year the IRA owner died (therefore 27 years old in the year following the year the IRA owner died)[307] and lives until July 12, 2059, the End Date is December 31, 2069, which is the earlier of:

- December 31, 2069 (10 years after death of the beneficiary), or
- December 31, 2085 (the final year of the beneficiary's 58.2 year life expectancy)

  Note: the final year of the IRA owner's remaining ("ghost") life expectancy is not an option here because the beneficiary was not older than the IRA owner and is therefore not using the IRA owner's

[304] See supra Sections VI and VII.

[305] Treas. Reg. § 1.401(a)(9)-5(e).

[306] Treas. Reg. § 1.401(a)(9)-5(d)(3)(ii).

[307] Treas. Reg. § 1.401(a)(9)-5(d)(3)(iii).

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life expectancy to determine the annual RMDs during the beneficiary's lifetime.[308]

2. If the IRA beneficiary is age 80 in the year the IRA owner died in 2026 (i.e., an EDB who is not more than 10 years younger than the IRA owner), the Applicable Denominator is the greater of:

- The beneficiary's 10.5 year life expectancy, determined for 2027, the year following the year the IRA owner died, which would run out December 31, 2037, or
- The IRA owner's remaining ("ghost") life expectancy of 13.8 years, determined for 2027 (14.8 in the year of death, reduced by one), which runs out December 31, 2040.[309]

Because the IRA owner's remaining life expectancy is greater, it is the Applicable Denominator. If the beneficiary dies on July 12, 2032, the End Date is December 31, 2040, which is the earlier of:

- December 31, 2042 (10 years after the beneficiary's death), or
- December 31, 2040 (the final year of the IRA owner's remaining ("ghost") life expectancy, which is calculated as of the year the IRA owner died).[310]

3. If the IRA beneficiary is the surviving spouse of the IRA owner who turned age 72 in the year the IRA owner died (2026) and elected to be treated as the employee,[311] and the spouse dies December 12, 2030 when the spouse is age 76, the End Date is December 31, 2040, which is the earlier of:

- December 31, 2040 (10 years after the spouse's death), or
- December 31, 2044 (the final year of the spouse's 14.1 year life expectancy).

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[308] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

[309] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

[310] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii). Note: The final year of the beneficiary's own 10.5 year life expectancy (December 31, 2037) is not an option here because the beneficiary was older than the IRA owner, and the Applicable Denominator is the IRA owner's remaining ("ghost") life expectancy.

[311] Treas. Reg. § 1.401(a)(9)-5(g)(3)(i). This allows the spouse to use the Uniform Lifetime Table to calculate RMDs. See Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(C), 89 Fed. Reg. 58644, 58650 (July 19, 2024).

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Note: After the surviving spouse's death, the Applicable Denominator is the surviving spouse's remaining life expectancy and the IRA owner's remaining ("ghost") life expectancy is no longer used.[312]

4. If the IRA beneficiary is the minor child of the IRA owner who turned 15 years old in the year when the IRA owner died, the End Date is:

- December 31, 2042 (10 years after the year the child turns age 21)

5. If the IRA beneficiary is the minor child of the IRA owner who turned 15 years old in the year when the IRA owner died in 2026, and the child dies before reaching age 21, the End Date is 10 years after the child died. If the child dies in 2030, the End Date is December 31, 2040; or if the child dies in 2028, the End Date is December 31, 2038. In each case that date is earlier than December 31, 2042, which is 10 years after the year the child would have turned age 21.

6. If the IRA beneficiary is the minor child of the IRA owner who turned 15 years old in the year when the IRA owner died in 2026, and who dies in 2035, the End Date is December 31, 2042, which is the earlier of:

- December 31, 2042 (10 years after the year the child turns age 21), or
- December 31, 2045 (10 years after the year the child died)

End of Examples

C. Withdrawals Are Not Limited To the Minimum Amount: The RMD rules only set the minimum amount that must be withdrawn; nothing prohibits larger withdrawals. The beneficiary of an inherited IRA can always withdraw more than the Required Minimum Distribution, even up to the entire amount remaining in the inherited IRA. Although whatever is withdrawn from a traditional IRA is taxable income to the beneficiary, there is generally no penalty for withdrawing more than the RMD.[313] Withdrawals from an inherited Roth IRA are normally not taxable income to the beneficiary,[314] and there is no penalty for withdrawing more than the RMD.

D. Excise Tax Imposed if RMD Not Distributed From an IRA on a Timely Basis: If the IRA owner while living, or the beneficiary of an inherited IRA, does not draw all of the Required Minimum Distribution out of the IRA during the applicable calendar year, I.R.C.

[312] Prop. Treas. Reg. § 1.401(a)(9)-5(g)(3)(ii)(D), 89 Fed. Reg. 58644, 58650-51 (July 19, 2024).

[313] The 10% additional tax on early distributions does not apply to a distribution made to a beneficiary on or after the death of the IRA owner. I.R.C. § 72(t)(2)(A)(ii).

[314] See infra Section XI.

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§ 4974 imposes a penalty that is equal to a percentage of the amount of the Required Minimum Distribution that was not withdrawn.[315] This penalty is referred to as an "excise tax" in the I.R.C. and regulations.

Section 302 of the SECURE 2.0 Act of 2022 made two amendments to I.R.C. § 4974. The first amended § 4974(a) by reducing the excise tax percentage to 25% (previously it had been 50%).[316] The second amendment added a new subsection (e) that allows a person who did not draw the entire RMD, whether the IRA owner or the beneficiary of an inherited IRA, to reduce the excise tax to 10% of the amount of the RMD that was not withdrawn if that person:

- receives, during the "correction window," a corrective distribution from the IRA that is equal to the amount of the RMD that was not withdrawn, and

- files a return during the "correction window" reflecting the 10% excise tax on the amount by which the RMD for the calendar year exceeded the amount actually distributed during that year.[317]

The "correction window" begins on the date the excise tax is imposed with respect to the undrawn RMD and ends on the earliest of (i) the date the IRS mails a notice of deficiency with respect to the undrawn RMD, (ii) the date on which the excise tax was assessed, or (iii) the last day of the second taxable year that begins after the end of the taxable year in which the excise tax is imposed.[318]

Note that this also applies to an inherited IRA. If any RMDs are not distributed from an inherited IRA on a timely basis, this excise tax will be imposed on the amount of the RMD that is not distributed.

The excise tax may also be waived. The IRS may waive the excise tax if the payee establishes that the failure to distribute the Required Minimum Distribution was due to reasonable

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[315] I.R.C. § 4974; Treas. Reg. § 54.4974-1. The current version of Treas. Reg. § 54.4974-1 applies for taxable years beginning on or after January 1, 2025. For earlier taxable years, the rules of former Treas. Reg. § 54.4974-2 apply. Treas. Reg. § 54.4974-1(h).

[316] Treas. Reg. § 54.4974-1(a)(1).

[317] Treas. Reg. § 54.4974-1(a)(2)(ii).

[318] I.R.C. § 4974(e)(2); Treas. Reg. § 54.4974-1(a)(2)(iii); SECURE 2.0 Act of 2022, Pub. L. No. 117-328, div. T, § 302, 136 Stat. 4459, 5339.

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error and that reasonable steps are being taken to remedy the failure.[319] The regulations also provide two automatic waivers. The first applies where the IRA owner died before the Required Beginning Date, the beneficiary is an Eligible Designated Beneficiary whose RMDs are determined under the Life Expectancy Rule without having made an affirmative election, the beneficiary fails to take an RMD, and the beneficiary elects the 10-Year Rule by the end of the ninth calendar year following the calendar year of the IRA owner's death.[320] The second applies to the Required Minimum Distribution for the year of death. If the person who was required to take that distribution dies during that calendar year without having taken it, the excise tax is waived automatically if that person's beneficiary takes a corrective distribution of the required amount no later than the beneficiary's tax filing deadline, including extensions, for the taxable year that begins with or within that calendar year, or if later, the last day of the following calendar year.[321]

X. Rules for Inherited IRA with Multiple Beneficiaries

Potential issues arise if an IRA pays to more than one beneficiary. The regulations provide guidance for some of these. Note: Some of the words and phrases used in this Section have not yet been defined in this paper because they apply to when a trust is a beneficiary of an IRA. Refer to Sections XIV and XV of this paper, below, for those definitions.

A. Not All Beneficiaries are DBs or EDBs: IRAs are treated differently if there are only beneficiaries who are (i) not Designated Beneficiaries (NDB), or (ii) only Designated Beneficiaries and not Eligible Designated Beneficiaries (ODB), or (iii) Eligible Designated Beneficiaries (EDB) (and if so, which type of EDB). If an IRA has a mix of different types of beneficiaries, then there are questions about how the IRA is to be distributed.

1. General Rule - All Beneficiaries Must Qualify: Generally, if not all beneficiaries of an IRA qualify as a Designated Beneficiary (which includes ODBs and EDBs), the IRA is treated as not having any Designated Beneficiaries.[322] This also

[319] Treas. Reg. § 54.4974-1(g)(1).

[320] Treas. Reg. § 54.4974-1(g)(2).

[321] Treas. Reg. § 54.4974-1(g)(3). See supra Section VII, A.

[322] Treas. Reg. § 1.401(a)(9)-4(b).

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applies for Eligible Designated Beneficiaries; if not all beneficiaries are EDBs, then the inherited IRA is treated as not having any beneficiaries who are EDBs.[323]

2. Exceptions: However, there are exceptions to this general rule. These are:

a. Minor Child of IRA Owner: If a minor child of the IRA owner is one of the Eligible Designated Beneficiaries (EDB) of the inherited IRA, then the IRA is treated as having an EDB even though there are other beneficiaries who are only Designated Beneficiaries (ODB).[324] This means the Life Expectancy Rule can be applied to all beneficiaries of the IRA.

There is not a special rule for whose life expectancy to use to determine the Applicable Denominator used to calculate the Required Minimum Distributions (RMDs) when a minor child of the IRA owner is a beneficiary of the inherited IRA. Therefore, the general rule described in Section X, B, below, applies, and the life expectancy of the oldest ODB or EDB who is a beneficiary of the inherited IRA is used to determine the Applicable Denominator and calculate the annual RMDs.

b. Applicable Multi-Beneficiary Trust: If the IRA is payable to an Applicable Multi-Beneficiary Trust (AMBT), then the beneficiaries of the trust who are identified in the trust as being Disabled or Chronically Ill are treated as Eligible Designated Beneficiaries even though one or more of the other beneficiaries of the trust are not Eligible Designated Beneficiaries.[325] This means the Life Expectancy Rule can be applied, using the life expectancy of the oldest beneficiary who is Disabled or Chronically Ill, as described in Section X, B, 2, a, below. AMBTs are further described later in this paper.[326]

c. Separate Accounts: If the IRA that has mixed types of beneficiaries is divided into separate accounts by December 31 of the calendar year following the year of the IRA owner's death, then each separate account is viewed separately to determine if the beneficiary is not a Designated

[323] Treas. Reg. § 1.401(a)(9)-4(e)(2)(i).

[324] Treas. Reg. § 1.401(a)(9)-4(e)(2)(ii).

[325] Treas. Reg. § 1.401(a)(9)-4(e)(2)(iii).

[326] See infra Section XV.

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Beneficiary (NDB), only a Designated Beneficiary (ODB), or an Eligible Designated Beneficiary (EDB).[327]

If the IRA is payable to a see-through trust, the beneficiaries of the trust rather than the trust itself are treated as the beneficiaries of the IRA, and different rules apply depending on the type of trust. This is discussed later in this paper.[328]

B. Which Life Expectancy Is Used to Calculate RMDs: The life expectancy used to determine the Applicable Denominator to calculate the Required Minimum Distributions (RMDs) that must be made annually will depend on whether (i) the IRA pays to an Applicable Multi-Beneficiary Trust (AMBT), (ii) the IRA pays to an age 31 trust, (iii) the IRA is divided into separate accounts by December 31 of the calendar year following the year of the IRA owner's death, or (iv) the IRA pays to multiple beneficiaries.

1. General Rule for Calculating RMDs - Oldest Beneficiary: If an IRA pays to more than one Designated Beneficiary (DB) (in this situation, an Eligible Designated Beneficiary is not distinguished and is included in the definition of a Designated Beneficiary), the general rule is the life expectancy of the oldest Designated Beneficiary will be used for the determination of the Applicable Denominator to calculate the Required Minimum Distributions (RMDs).[329]

If the IRA owner died on or after the owner's Required Beginning Date, the Applicable Denominator is the greater of the oldest Designated Beneficiary's remaining life expectancy and the IRA owner's remaining ("ghost") life expectancy. If the IRA owner had no Designated Beneficiary, the IRA owner's remaining ("ghost") life expectancy is used.[330]

2. Exceptions: There are exceptions to this general rule. Note that there is not an exception for a minor child of the IRA owner. This means the general rule applies in that situation. The exceptions to the general rule are:

a. Applicable Multi-Beneficiary Trust: If the IRA beneficiary is an Applicable Multi-Beneficiary Trust (AMBT), then the life expectancy of the

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[327] Treas. Reg. § 1.401(a)(9)-4(b); Treas. Reg. § 1.401(a)(9)-4(e)(2)(i); Treas. Reg. § 1.401(a)(9)-8(a).

[328] See infra Section XIV.

[329] Treas. Reg. § 1.401(a)(9)-5(f)(1)(i).

[330] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii) and (iii). See supra Section VIII, D.

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oldest beneficiary who is Disabled or Chronically Ill is used to determine the Applicable Denominator to determine the RMDs.[331] All other beneficiaries are ignored. AMBTs are further described later in this paper.[332]

b. Age 31 Trust: If the IRA beneficiary is a trust for the benefit of a primary beneficiary under age 31 and the trust must fully distribute the IRA and proceeds received from investing any RMDs received from the IRA to the beneficiary by December 31 of the year the beneficiary turns age 31, then any beneficiary who would take only if the primary beneficiary dies before full distribution is disregarded, so the primary beneficiary's life expectancy is used. This type of trust is further described later in this paper.[333]

c. Separate Accounts: If an IRA that has multiple beneficiaries is divided into separate accounts by December 31 of the calendar year following the year of the IRA owner's death, then each separate account is viewed separately to determine which beneficiary's life expectancy is used to determine the Applicable Denominator to calculate the Required Minimum Distributions that must be made annually until the applicable End Date.[334]

C. Which Life Expectancy Is Used to Calculate the End Date: If there are multiple beneficiaries, the life expectancy used to determine when the IRA must be fully distributed (referred to in this paper as the End Date) will depend on whether (i) the IRA pays to one or more minor children of the IRA owner; (ii) the IRA pays to an Applicable Multi-Beneficiary Trust; (iii) the IRA is divided into separate accounts by December 31 of the calendar year following the year of the IRA owner's death; or (iv) the IRA pays to multiple beneficiaries.

1. General Rule for Determination of End Date - Oldest Beneficiary: If an IRA pays to more than one Designated Beneficiary (DB) (in this situation, an Eligible Designated Beneficiary is not distinguished and is included in the definition of a Designated Beneficiary), the End Date is determined by applying the ten-year rules with respect to the oldest Designated Beneficiary. If any beneficiary is only a DB

[331] Treas. Reg. § 1.401(a)(9)-5(f)(1)(ii).

[332] See infra Section XV.

[333] Treas. Reg. § 1.401(a)(9)-4(f)(3)(ii)(B). See infra Section XIV, H, 2, c, 2.

[334] Treas. Reg. § 1.401(a)(9)-5(f)(1)(i); Treas. Reg. § 1.401(a)(9)-8(a).

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(ODB), that is the tenth year after the IRA owner's death; if all beneficiaries are EDBs, it is the tenth year after the oldest EDB's death.[335]

2. Exceptions: There are exceptions to this general rule.

a. Minor Children of IRA Owner: If the IRA owner is survived by children who are minors when the IRA owner died (for ease of reference, each of these children is referred to as a "minor child" throughout this Section even though they may attain the age of 21 after the IRA owner died and they will no longer be a minor), then these minor children of the IRA owner are Eligible Designated Beneficiaries of the IRA owner's IRA. Even if there are also other Designated Beneficiaries of the IRA owner's IRA who may be older than the minor children (such as, for example, other children of the IRA owner who were age 21 or older on the date of the IRA owner's death), the date by which the entire IRA must be distributed (End Date) is the earlier of: (i) December 31 of the calendar year when the youngest minor child who was an Eligible Designated Beneficiary of the IRA turns age 31 (10 years after attaining the age of majority),[336] or (ii) December 31 of the 10th calendar year following the calendar year when the last of the minor children dies (i.e., when all of the minor children are not living).[337] The other beneficiaries do not affect the End Date, but they remain countable in determining the Applicable Denominator, as described in the next paragraph.

Note that for RMD purposes, it is the oldest Designated Beneficiary's (not the oldest minor child's) life expectancy that is used to calculate the annual RMDs from the IRA. But for End Date purposes, it is the age of the IRA owner's youngest minor child at the IRA owner's death that controls, not the life expectancy of the oldest Designated Beneficiary. However, it is also possible for the IRA to be fully distributed before the End Date. If the oldest Designated Beneficiary's remaining life expectancy (the Applicable Denominator) runs out prior to the End Date, the RMD for that final year is the entire remaining balance.

b. Applicable Multi-Beneficiary Trust: If the IRA beneficiary is an Applicable Multi-Beneficiary Trust (AMBT), then the IRA must be fully

[335] Treas. Reg. § 1.401(a)(9)-5(f)(2)(i).

[336] Treas. Reg. § 1.401(a)(9)-5(f)(2)(ii)(C).

[337] Treas. Reg. § 1.401(a)(9)-5(f)(2)(ii)(B).

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distributed (i.e., the End Date) no later than December 31 of the 10th year following the year the last Eligible Designated Beneficiary who is Disabled or Chronically Ill died.[338] AMBTs are further described later in this paper.[339]

c. Separate Accounts: If an IRA that has multiple beneficiaries is divided into separate accounts by December 31 of the calendar year following the year of the IRA owner's death, then each separate account is viewed separately to determine which beneficiary is used to determine the applicable End Date.[340]

D. Separate Accounts: It is possible to divide an IRA payable to multiple beneficiaries into separate IRAs, one for each beneficiary. If this is done in a manner that satisfies the requirements of the regulations, then each separate inherited IRA receives "separate account" treatment. This means each beneficiary of each separate account (i.e., separate IRA) will be treated separately when determining the applicable Required Minimum Distributions (RMDs) and the applicable End Date.[341] In other words, each beneficiary can use their own life expectancy and status as a beneficiary (either NDB, ODB, or a type of EDB) when determining RMDs and the End Date for the beneficiary's separate IRA.

In order to qualify for "separate account" treatment, the IRA must be split into separate accounts (separate IRAs) by December 31 of the calendar year following the calendar year of the original IRA owner's death.[342]

In summary, the beneficiaries of the IRA are those named as of the IRA owner's death who remain beneficiaries on the Beneficiary Finalization Date, September 30 of the year following the year the IRA owner died.[343] That date does not require the IRA to be divided; it only fixes who the beneficiaries are. The IRA may be divided into separate IRAs at any time after the IRA owner's death, but to receive "separate account" treatment the division must be completed no later than December 31 of that same year.

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[338] Treas. Reg. § 1.401(a)(9)-5(f)(2)(iii).

[339] See infra Section XV.

[340] Treas. Reg. § 1.401(a)(9)-5(f)(2)(i); Treas. Reg. § 1.401(a)(9)-8(a).

[341] Treas. Reg. § 1.401(a)(9)-8(a).

[342] Treas. Reg. § 1.401(a)(9)-8(a)(1)(ii).

[343] Treas. Reg. § 1.401(a)(9)-4(c)(1).

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An IRA can still be divided into separate IRAs after that December 31 date. However, the separate IRAs will not receive separate account treatment. Instead, the RMD for each later year is calculated as though the IRA had not been divided and is then allocated among the separate IRAs in proportion to their balances. As a result, the RMDs and End Date of all the separate IRAs will be based on the countable beneficiary whose classification and life expectancy results in the earliest End Date or least favorable distribution method.[344]

1. IRA Payable Directly to Beneficiaries: An IRA that is payable directly to multiple beneficiaries (as opposed to a trust) can be divided into a separate IRA for each beneficiary that receives "separate account" treatment as long as it is accomplished no later than December 31 of the year following the calendar year the IRA owner died. This can be accomplished by (i) the owner of the IRA directing in the IRA beneficiary designation form that the IRA be divided into a separate IRA for each beneficiary upon the owner's death, or (ii) the IRA custodian or administrator dividing the IRA into separate IRAs after the IRA owner's death and no later than December 31 of the year following the calendar year the IRA owner dies. In practice, it is better if this is accomplished before the IRA is distributed to any beneficiary, since some custodians may balk at dividing an IRA after a distribution has been made.

If the IRA is not divided into separate IRAs on or before December 31 of the year following the year when the IRA owner died, then the separate IRAs do not receive "separate account" treatment. Instead, the RMDs and End Date for all of the separate IRAs will be governed by the countable beneficiary whose beneficiary classification and life expectancy is most disadvantageous to the IRA beneficiaries as a whole.

2. IRA Payable to a Trust - General Rule: The final regulations issued in 2024 retained the prior general rule for an IRA payable to a trust, but provided an exception if certain conditions are met. The prior rule was that an IRA payable to a see-through trust can be divided into separate IRAs for each primary beneficiary of the trust, but each IRA does not receive separate account treatment. The effect of this after the SECURE Act was enacted was that any required annual RMDs and the End Date were determined prior to dividing the IRA. This means all countable trust beneficiaries were taken into account when determining whether annual RMDs are payable, and if so, what life expectancy is used and how End Date is determined. This then applied to all the separate IRAs established when the original IRA was divided into separate IRAs.

[344] Treas. Reg. § 1.401(a)(9)-8(a)(1)(ii).

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For example, if an IRA owner dies after the owner's Required Beginning Date and the IRA pays to a conduit trust with two primary beneficiaries, both of whom are ODBs but not an EDB, and one is 25 years old and the other is 55 years old when the IRA owner dies, then the oldest beneficiary's life expectancy will be used to determine the annual RMDs for both beneficiaries, and the End Date for both is December 31 of the tenth year after the IRA owner's death. The RMD for the separate share of the IRA that is payable to the 25-year-old, or is held in a conduit trust for the benefit of the 25-year-old, will be based on the 55-year-old beneficiary's life expectancy.

3. Exception for See-Through Trust That Immediately Divides: The SECURE Act created an exception to the general rule described above for an Applicable Multi-Beneficiary Trust (AMBT) and the proposed regulations issued in 2022 applied this to what was referred to as a "type I" AMBT.[345] The 2024 final regulations, however, expanded separate account availability to any see-through trust (not just an AMBT) as long as certain conditions are met. In addition, the 2024 proposed regulations further clarified this (but keep in mind that these proposed provisions have not been finalized and may be different when the final regulations are published[346]). The below description is based on both the 2024 final and the 2024 proposed regulations.

These conditions are:

a. Divided Immediately: The trust receiving the IRA must be a see-through trust that is "divided immediately" upon the death of the IRA owner into separate see-through trusts.[347]

Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(C) contains a definition of "divided immediately." The IRS is proposing to further clarify this in the 2024 proposed regulations. Most of the below quote is from the final regulation except the italicized words were added and the "[~~are allocated~~]" phrase was removed in the 2024 proposed regulation. The <u>underlined</u> words are added as emphasis by the author. To be consistent with the terminology used in this paper, the reference to "IRA owner" is added by the author in lieu of "employee."

[345] Prop. Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii), 87 Fed. Reg. 10504, 10551 (Feb. 24, 2022).

[346] See supra Section II, F.

[347] Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(B).

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> ... a trust is immediately divided upon the death of the [IRA owner] only if, as of the date of death, the trust is terminated and there is no discretion as to the extent to which the separate trusts (or the beneficiaries described in paragraph (a)(1)(iii)(D) of this section) will be entitled to receive post-death distributions attributable to the employee's interest in the plan [~~are allocated~~].[348] A trust does not fail to be immediately divided upon the death of the employee merely because there are administrative delays between the date of the employee's death and the date on which the trust is divided and terminated, provided that any amounts received by the trust during this period are allocated as if the trust had been divided on the date of the employee's death.[349]

b. Receiving Trust Must Terminate: The above-quoted regulation requires the trust receiving the IRA to be terminated, which means the separate account rule will not apply if any of the IRA continues to be held in the receiving trust. If that happens, then the general rule will apply and the RMDs and End Date for all of the separate IRAs will be governed by the countable beneficiary whose beneficiary classification and life expectancy is most disadvantageous to the IRA beneficiaries as a whole.

c. No Discretion to Allocate IRA Among Beneficiaries: The trust receiving the IRA must direct the trustee how to divide and allocate the IRA among the multiple beneficiaries. The trustee cannot have any discretion over how the IRA is allocated. This does not mean the trustee cannot have discretion to allocate other assets held in the trust among multiple beneficiaries. But the separate account rule will not apply if the trustee has discretion over how the IRA payable to the trust will be allocated among multiple beneficiaries. Instead, the general rule will apply and the RMDs and End Date for all of the separate IRAs will be governed by the countable beneficiary whose beneficiary classification and life expectancy is most disadvantageous to the IRA beneficiaries as a whole.

Practice Point: Although the trust itself may be divided and terminated after some administrative delay, the IRA should be divided into separate inherited IRAs, one for

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[348] Prop. Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(C)(emphasis added), 89 Fed. Reg. 58644, 58651 (July 19, 2024).

[349] Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(C) (emphasis added).

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each separate see-through trust, no later than December 31 of the year following the calendar year in which the IRA owner died. Any distribution from the IRA before it is divided should be allocated to the separate share to which it belongs. If the separate IRAs are not established by that December 31, the RMD for each later year is calculated as though the IRA had not been divided and is then allocated among the separate IRAs in proportion to their balances, so each separate trust loses the benefit of having its own beneficiaries determine its RMDs and End Date.[350]

4. Proposed Relaxation of Requirement to Hold in Separate See-Through Trusts: In order to allow each beneficiary to use their own life expectancy when determining RMDs (i.e., in order for the separate account rule to be applicable) the regulation requires that the separate shares of the divided IRA must be "held in separate see-through trusts."[351] However, the 2024 proposed regulations add a new paragraph 8(a)(1)(iii)(D) that clarifies that distributing an inherited IRA from the trust directly to a beneficiary rather than to a separate see-through trust will satisfy the requirement that the separate interests be held in separate see-through trusts. This proposed regulation says:

> (D) Outright distribution to trust beneficiary. The separate interests of the beneficiaries in a see-through trust will not fail to be eligible for the exception under paragraph (a)(1)(iii)(B) of this section merely because, upon termination of the trust, a beneficiary's separate interest in the trust is to be held directly by that beneficiary rather than being held by a separate see-through trust.[352]

E. Removing Beneficiaries After Owner's Death: If an IRA has multiple beneficiaries, it may be desirable to remove one or more of them prior to the Beneficiary Finalization Date of September 30 of the year following the year the IRA owner died. For example, if an IRA names a person and a charity as equal beneficiaries of an IRA, it may be favorable to remove the charity as a beneficiary because it is not a Designated Beneficiary. If the charity is still a beneficiary on the Beneficiary Finalization Date, then the general rule is the IRA must be distributed as if it did not have any Designated Beneficiaries. Or if the

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[350] Treas. Reg. § 1.401(a)(9)-8(a)(1)(i)–(ii), (a)(2). Section 1.401(a)(9)-8(a)(1)(iii)(B) does not expressly cross-reference these provisions. It is, however, an exception to the prohibition in paragraph (a)(1)(iii)(A), and both sit within paragraph (a)(1), whose separate-account requirements appear in paragraphs (a)(1)(i) and (ii). The conservative reading is that those requirements apply.

[351] Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(B).

[352] Prop. Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(D), 89 Fed. Reg. 58644, 58651 (July 19, 2024).

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IRA named a person who is an EDB and another person who is only a "DB who is not an EDB" (i.e., an ODB), then the general rule is the IRA must be distributed as though there were only Designated Beneficiaries, not any EDBs (assuming one of the exceptions to the general rules described above does not apply).

The regulations allow four ways to disregard a beneficiary named in the beneficiary designation on the date the IRA owner died so that beneficiary is no longer a beneficiary on the Beneficiary Finalization Date. These are:

(i) The beneficiary predeceases the IRA owner;

(ii) The beneficiary is deemed to have predeceased the IRA owner by the provisions of a simultaneous death provision in the applicable State law;

(iii) The beneficiary executes a qualified disclaimer of the beneficiary's entire interest in the IRA; or

(iv) The beneficiary receives the entire benefit to which the beneficiary is entitled.[353]

The regulations contain six examples of how this applies in different situations.[354] They make the point that a disclaimer must actually be a "qualified" disclaimer[355] in order to satisfy this requirement. They also illustrate how a charity (and presumably any other beneficiary who should be removed, perhaps because they are not an EDB or a DB, or are older than other beneficiaries) can receive its share of the IRA prior to the Beneficiary Finalization Date and is successfully removed from the IRA. Lastly, one example illustrates

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[353] Treas. Reg. § 1.401(a)(9)-4(c)(2).

[354] Treas. Reg. § 1.401(a)(9)-4(c)(3).

[355] A qualified disclaimer is defined in I.R.C. § 2518(b) as "an irrevocable and unqualified refusal by a person to accept an interest in property but only if–
(1) such refusal is in writing,
(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of–
(A) the day on which the transfer creating the interest in such person is made, or
(B) the day on which such person attains age 21,
(3) such person has not accepted the interest or any of its benefits, and
(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either–
(A) to the spouse of the decedent, or
(B) to a person other than the person making the disclaimer."

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that a beneficiary who survives the IRA owner but dies before September 30 of the year following the owner's death is not removed as a beneficiary. That deceased beneficiary continues to be counted, regardless of who actually receives that beneficiary's share of the IRA.[356]

XI. Roth Inherited IRA Rules

A Roth IRA does not have Required Minimum Distributions during the lifetime of the IRA owner.[357] This means a Roth IRA owner can let a Roth IRA continue to accumulate income tax free for the lifetime of the IRA owner. However, upon the death of the Roth IRA owner, a Roth IRA must begin paying out under the RMD rules for non-Roth IRAs[358] that apply to an IRA owner who died before the owner's Required Beginning Date.[359] This means that no matter how old a Roth IRA owner is when the owner dies, a Roth IRA is always treated as if the Roth IRA owner died before the owner's Required Beginning Date.

How a Roth IRA must pay out upon the death of the Roth IRA owner depends on whether there is a Designated Beneficiary, and if so, whether the Designated Beneficiary is an Eligible Designated Beneficiary, and if so, what type of Eligible Designated Beneficiary.

A. Roth IRA Beneficiary is Not a Designated Beneficiary (NDB): If the beneficiary of the Roth IRA is not a Designated Beneficiary (i.e., the beneficiary is an NDB), then there are no RMDs required and the Roth IRA must be fully paid out by the end of the calendar year containing the 5th anniversary of the date of the IRA owner's death[360] (the "5-Year Rule").

B. Roth IRA Beneficiary is a Designated Beneficiary Who is Not an Eligible Designated Beneficiary (ODB): If a Roth IRA pays to a Designated Beneficiary who is not an Eligible Designated Beneficiary (or in other words, who is only a Designated Beneficiary (ODB)), then there are no RMDs required and the Roth IRA must be fully paid out by the

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[356] Treas. Reg. § 1.401(a)(9)-4(c)(3)(vi).

[357] I.R.C. § 408A(c)(4); Treas. Reg. § 1.408-8(b)(1)(ii).

[358] Treas. Reg. § 1.408-8(b)(1)(ii). Author's Note: I.R.C. § 408A(c)(4) only exempts Roth IRAs from the lifetime Required Minimum Distribution rules of I.R.C. § 401(a)(9)(A), not the distribution rules applicable at death as found in I.R.C. § 401(a)(9)(B).

[359] *Id*.

[360] Id. See also Treas. Reg. §§ 1.401(a)(9)-3(c)(2) and 3(c)(5)(i)(A).

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end of the calendar year containing the 10th anniversary of the date of the IRA owner's death[361] (the "10-Year Rule").

C. Roth IRA Beneficiary is an Eligible Designated Beneficiary (EDB): See Section VI earlier in this paper for a description of how a Roth IRA is required to be distributed depending on which type of Eligible Designated Beneficiary is the beneficiary of the Roth IRA.

As noted in Section VI, C, 1, above, a surviving spouse who is the sole beneficiary of a Roth IRA will normally roll it over to the spouse's own Roth IRA. The spouse then owns the Roth IRA and has no Required Minimum Distributions during the spouse's lifetime.[362] A younger spouse who may need to withdraw earnings before age 59½ may prefer to wait, however. Distributions to a beneficiary after the owner's death are qualified distributions, but distributions from the spouse's own Roth IRA are not treated as made to a beneficiary.[363]

D. Income Tax Treatment; Roth IRA Payable to a Trust: A qualified distribution from a Roth IRA is not included in gross income.[364] A distribution is a "qualified distribution" if two requirements are met. First, it must be made after the five-taxable-year period described below. Second, it must be (i) made on or after the date the IRA owner reaches age 59½, (ii) made to a beneficiary (or to the estate of the IRA owner) on or after the owner's death, (iii) attributable to the owner's disability, within the meaning of I.R.C. § 72(m)(7), or (iv) made for a first-time home purchase.[365] A distribution to a beneficiary after the owner's death therefore always satisfies the second requirement, but it is a qualified distribution only if the five-taxable-year period has also been met.

The five-taxable-year period begins with the first year the Roth IRA owner made a contribution to, or conversion into, any Roth IRA. It ends on the last day of the fifth consecutive taxable year, beginning with that first year. If the owner dies before the period ends, a distribution made before it ends is taxable only to the extent it exceeds the owner's contributions. This is because distributions are treated as coming first from contributions,

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[361] Treas. Reg. § 1.408-8(b)(1)(ii); see also Treas. Reg. §§ 1.401(a)(9)-3(c)(3) and 3(c)(5)(i)(B).

[362] I.R.C. § 408A(c)(4).

[363] I.R.C. § 408A(d)(2)(A)(ii); Treas. Reg. § 1.408A-6, A-3.

[364] I.R.C. § 408A(d)(1).

[365] I.R.C. § 408A(d)(2)(A), (B); Treas. Reg. § 1.408A-6, A-1(b); I.R.C. § 72(t)(2)(F).

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then from conversions, and only last from earnings.[366] The 10% additional tax on early distributions does not apply to distributions made after the owner's death.[367]

As a result, a trust that is the beneficiary upon the owner's death of a Roth IRA can generally take distributions and keep them in the trust without paying income tax on them. In contrast, a distribution from a traditional IRA that is kept in the trust is taxed at the compressed income tax rates that apply to trusts. This benefit is available to any trust named as the beneficiary of a Roth IRA, but it is especially valuable for a supplemental needs trust. A supplemental needs trust is almost always an accumulation trust, because Required Minimum Distributions passed directly to the beneficiary would reduce or eliminate means-tested benefits.[368] If the trust qualifies as an AMBT, the Roth IRA can also be paid out over the life expectancy of the Disabled or Chronically Ill beneficiary, allowing potentially years of tax-free growth. As a result, an IRA owner who plans to leave retirement assets to a supplemental needs trust may want to consider converting a traditional IRA to a Roth IRA during the owner's lifetime, and paying the income tax at the owner's rates.

XII. How to Title an Inherited IRA

An inherited IRA must be titled so that it is identified as an IRA held for the beneficiary of a deceased IRA owner. For an IRA that receives a direct rollover from an employer plan on behalf of a nonspouse beneficiary, the IRS requires that the title identify it as an IRA with respect to a deceased individual and identify both the deceased individual and the beneficiary.[369] IRA custodians generally follow the same approach when an inherited IRA is created from a deceased owner's IRA. Although the exact wording varies among custodians, the title should include the deceased owner's name, the beneficiary's name, and a phrase such as "inherited IRA" or "beneficiary IRA." For example, "Homer Simpson, deceased, for the benefit of Bartholomew J. Simpson, Beneficiary," or "Bartholomew J. Simpson as beneficiary of Homer Simpson."

If the above IRA is payable to a trust for Bart's benefit, the inherited IRA would be titled "Homer Simpson, deceased, for the benefit of Bartholomew J. Simpson through Morris

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[366] Treas. Reg. § 1.408A-6, A-2, A-4, A-7(a), A-8, A-11.

[367] I.R.C. § 72(t)(2)(A)(ii).

[368] See supra Section VII, D, 3.

[369] Miscellaneous Pension Prot. Act Changes, 2007-1 C.B. 395 (2007) ("A-13. The IRA must be established in a manner that identifies it as an IRA with respect to a deceased individual and also identifies the deceased individual and the beneficiary, for example, "Tom Smith as beneficiary of John Smith.").

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Szyslak, or his successor, as Trustee of the Bartholomew J. Simpson Trust Dated (the date the trust is established)."[370]

If the trust is a supplemental needs trust, the account should identify the trust as the beneficiary, rather than the disabled individual who is the beneficiary of the trust. For example: "Homer Simpson, deceased, for the benefit of Morris Szyslak, Trustee of the Bartholomew J. Simpson Supplemental Needs Trust Dated (the date the trust is established), Beneficiary."[371] An account titled in the disabled individual's name could lead a benefits caseworker to treat the inherited IRA as that individual's own resource.

XIII. Steps to Follow if a Trust is Named as IRA Beneficiary

If a trust is named as the beneficiary of an IRA, then, unless certain requirements are met, the IRA does not have a Designated Beneficiary or Eligible Designated Beneficiary because the trust is not an individual.

However, if the trust meets certain requirements, it is possible to "look through" the trust to "see" who are the countable beneficiaries of the trust.[372] A trust that meets these requirements is referred to as a "see-through trust" in the regulations.[373] In the past, some authors used the phrase "look-through trust," but the regulations have adopted and defined the term "see-through trust." This paper refers to this type of trust as a "see-through trust."

> **Step 1:** The first step if a trust is named as a beneficiary of an IRA is to determine if the trust qualifies as a "see-through trust."
>
> If the trust is not a see-through trust, then there cannot be a Designated Beneficiary because the trust itself is not an individual (i.e., human being) and it is not possible to see through the trust to see if there are Designated Beneficiaries. This stops the inquiry and the IRA must be distributed under the following rule ("Default Rule"):

[370] Id. at Q&A-16 "The IRA must be established in accordance with the rules in Q&A-13 of this notice, with the trust identified as the beneficiary."

[371] See I.R.S. Notice 2007-7, Q&A-16, 2007-1 C.B. 395.

[372] Treas. Reg. § 1.401(a)(9)-4(b); Treas. Reg. § 1.401(a)(9)-4(f)(1)(i); I.R.C. § 402(c)(11)(B).

[373] Treas. Reg. § 1.401(a)(9)-4(f)(1)(i).

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(1) if the IRA owner died before the owner's Required Beginning Date, the 5-Year Rule must be utilized,[374] or

(2) if the IRA owner died on or after the owner's Required Beginning Date, the remaining ("ghost") life expectancy of the IRA owner using the Single Life Table must be utilized.[375]

Step 2: If the trust qualifies as a see-through trust, then the second step in the analysis is to look through the trust to the beneficiaries and classify each beneficiary as:

(1) a beneficiary who does not qualify as a Designated Beneficiary (NDB),

(2) a Designated Beneficiary who is not an Eligible Designated Beneficiary (i.e., is only a Designated Beneficiary (ODB)), or

(3) an Eligible Designated Beneficiary (EDB), and if an EDB, which type of EDB.

Only those who are still beneficiaries on the Beneficiary Finalization Date are taken into account. However, this step should initially be done well before that date so that any beneficiary who would cause an unfavorable result can be identified and, if possible, removed in time. See Section V, B, 6 and 8, above.

Step 3: The third step is to classify each beneficiary as:[376]

(1) a primary beneficiary,

(2) a residual beneficiary who receives some or all of the IRA after the primary beneficiary dies, or

(3) a residual beneficiary who only receives some or all of the IRA after another residual beneficiary dies.

Step 4: The fourth step is to determine what type of see-through trust it is. The choices are:

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[374] Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(A).

[375] Treas. Reg. § 1.401(a)(9)-5(d)(1)(iii).

[376] Treas. Reg. § 1.401(a)(9)-4(f)(3)(i)(A)–(B). See infra Section XIV, G.

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(1) a "conduit trust" (a see-through trust that requires all distributions from an IRA to be distributed upon receipt by the trustee to or for the benefit of a beneficiary)[377] or

(2) an "accumulation trust" (a see-through trust that is not a conduit trust).[378]

These are defined in the regulations and are further described later in this paper.[379]

Step 5: The fifth step is to determine whether the see-through trust is an Applicable Multi-Beneficiary Trust (AMBT).

As described in Section XV, A, 1, below, an AMBT is a see-through trust (i) that has more than one beneficiary, (ii) all of whose beneficiaries are Designated Beneficiaries (which, for an AMBT, can include a qualifying charity), and (iii) at least one of whose beneficiaries is an Eligible Designated Beneficiary who is Disabled or Chronically Ill. In addition, the trust terms must identify the Disabled or Chronically Ill beneficiaries as primary beneficiaries, and must provide that no other beneficiary has any right to the IRA until the death of all of them.[380] AMBTs are further described later in this paper.[381]

Step 6: The sixth step is to determine whether each beneficiary is either "countable" or "disregarded."[382]

Which beneficiaries of the trust must be taken into account (countable) and included in this analysis depends on the beneficiary's classification in Step 3 and the type of trust determined in Steps 4 and 5 (and, if applicable, the age 31 trust rule).

If any countable beneficiary is not a Designated Beneficiary (NDB), the trust is treated as having no Designated Beneficiary, and the IRA must be distributed under

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[377] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A).

[378] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii)(B).

[379] See infra Section XIV, F and H.

[380] I.R.C. § 401(a)(9)(H)(iv)(II), (v); Treas. Reg. § 1.401(a)(9)-4(g)(1), (g)(3).

[381] See infra Section XV.

[382] See infra Section XIV, E.

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the Default Rule described in Step 1. If all countable beneficiaries are Designated Beneficiaries, the IRA is distributed based on those beneficiaries, as described in Step 7.

Two special rules apply if the trust is an AMBT. First, a qualifying charity is treated as a Designated Beneficiary.[383] Second, although the other countable beneficiaries remain countable, only the beneficiaries who are Disabled or Chronically Ill are taken into account in determining the life expectancy used for RMDs and the End Date.[384]

Step 7: The seventh step is to determine how the inherited IRA (or each separate share[385]) must be distributed, based on:

(1) whether the IRA owner died before, or on or after, the owner's Required Beginning Date, and

(2) the classification of the countable beneficiaries as NDB, ODB, or EDB (and which type), applying the rules for multiple beneficiaries in Section X (or, for an AMBT, the rules in Section XV).

Keep in mind that it is not the trust that qualifies as a Designated Beneficiary or Eligible Designated Beneficiary, but it is the beneficiaries of the trust who qualify, if they would otherwise qualify as (i) a Designated Beneficiary who is not an Eligible Designated Beneficiary (i.e., an ODB) or (ii) an Eligible Designated Beneficiary (EDB).[386]

XIV. Rules If a Trust is Named as an IRA Beneficiary

As mentioned earlier in this paper, if a trust is named as the beneficiary of an IRA, then, unless certain requirements are met, the inherited IRA does not have a Designated Beneficiary because a trust is not an individual. If this happens, then the inherited IRA cannot be drawn out over the lifetime of an EDB. Instead, the inherited IRA will be distributed pursuant to the 5-Year Rule (if the IRA owner died before their Required Beginning Date (RBD)) or owner's remaining "ghost" life expectancy (if the IRA owner died on or after their RBD).

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[383] Treas. Reg. § 1.401(a)(9)-4(g)(3). See infra Section XV, C, 2.

[384] Treas. Reg. § 1.401(a)(9)-5(f)(1)(ii), (f)(2)(iii).

[385] See infra, Section X, D.

[386] Treas. Reg. § 1.401(a)(9)-4(f)(1)(i).

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On the other hand, if the trust meets certain requirements, it is possible to look through the trust to see who or what are the beneficiaries of the trust. A trust that meets these requirements is referred to as a "see-through trust" in the regulations.[387]

If the trust beneficiaries of a see-through trust qualify as an NDB, ODB, or EDB, then those beneficiaries are used to determine whether RMDs are required to be made from the inherited IRA each year and the date by which the inherited IRA must be fully distributed (referred to as the "End Date" in this paper).

A. Requirements of a See-Through Trust: The following four requirements must be satisfied in order for a trust to qualify as a "see-through trust,"[388] although as described in requirement 4 below, the fourth is satisfied automatically for an IRA.

1. The trust must be a valid trust under state law, or would be, but for the fact there is no corpus;

2. The trust must be irrevocable or will, by its terms, become irrevocable upon the death of the IRA owner;

3. The trust beneficiaries who are receiving any portion of an IRA must be identifiable from the terms of the trust; and

4. **This requirement does not apply to an IRA**. The documentation described below need not be provided to the IRA trustee, custodian or issuer, so this requirement is satisfied for an inherited IRA without any action by the trustee of the trust.[389] It continues to apply to other types of retirement plans, for which, by October 31 of the calendar year following the calendar year in which the participant dies,[390] the plan administrator must be provided with either of the below-listed items. The plan administrator can direct which option the trustee must satisfy.[391]

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[387] Treas. Reg. § 1.401(a)(9)-4(f)(1)(i) and (ii).

[388] Treas. Reg. § 1.401(a)(9)-4(f)(2).

[389] Treas. Reg. § 1.408-8(b)(4)(ii). See supra Section III, E.

[390] Treas. Reg. § 1.401(a)(9)-4(h)(1)(ii) and (h)(3)(i).

[391] Treas. Reg. § 1.401(a)(9)-4(h)(3)(i).

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a. A copy of the actual trust document for the trust that is named as a beneficiary,[392] or

b. A final list of all beneficiaries of the trust, including contingent (residual) beneficiaries, as of September 30 of the calendar year following the calendar year of the participant's death.[393] There must be a description of the conditions on the beneficiaries' entitlement sufficient to establish who are the beneficiaries. This list must be certified that, to the best of the trustee's knowledge, the list is correct and complete, and the above three requirements for the trust to qualify as a see-through trust are satisfied. In addition, the trustee must agree to provide a copy of the trust instrument to the plan administrator upon request.

Even though nothing must be provided to an IRA custodian, the first three requirements above must still be satisfied, and the trustee should still prepare and keep the certified list of beneficiaries described in subsection b, above. If the distribution treatment of the inherited IRA is later questioned, the trustee will have to prove that the trust qualified as a see-through trust. An IRA custodian also remains free to ask for the trust document as a matter of its own account administration, and many still do.

B. Multiple See-Through Trusts: It is common in estate planning for a person to have one trust that divides into separate subtrusts or distributes to other existing trusts. For example, an IRA can be payable to the IRA owner's revocable living trust that either (i) establishes a trust for a beneficiary of the living trust, or (ii) distributes a beneficiary's share of the assets of the living trust to a different, previously established trust for the beneficiary's benefit.

The proposed regulations expressly permitted this, and the final regulations continue the rule. As long as both trusts qualify as see-through trusts, then the beneficiaries of the second trust will be treated as beneficiaries of the first trust and, ultimately, beneficiaries of the IRA that is distributed to the first trust.[394]

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[392] Treas. Reg. § 1.401(a)(9)-4(h)(3)(iii).

[393] Treas. Reg. § 1.401(a)(9)-4(h)(3)(ii).

[394] Treas. Reg. § 1.401(a)(9)-4(f)(4).

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C. Identifiable Beneficiaries of a See-Through Trust: The regulations provide a description of what is required for beneficiaries of a trust to be "identifiable" for the purpose of qualifying a trust as a see-through trust.

1. Generally: In the past it appeared that a trust did not qualify as a see-through trust unless only Designated Beneficiaries were named as beneficiaries. However, in reality the "identifiability" requirement for a see-through trust is satisfied if it is possible to determine who or what may receive a portion of the IRA that is distributable to the trust. Based on the qualifications of these beneficiaries, the trust will then be treated as either (i) not having Designated Beneficiaries (NDB), (ii) having Designated Beneficiaries who are not Eligible Designated Beneficiaries (i.e., only Designated Beneficiaries (ODB)), or (iii) having Eligible Designated Beneficiaries (EDB).

Obviously, specifically naming a person or entity as a beneficiary of the trust makes them identifiable. In addition, a beneficiary is identifiable if the beneficiary is a member of a class, such as the children of the IRA owner.[395]

2. Powers of Appointment, Decanting, and Reformation: In addition, the regulations clarify that a trust will not fail the "beneficiaries must be identifiable" requirement to qualify as a see-through trust merely because someone holds a power of appointment to appoint a portion of the IRA to beneficiaries who are currently not identifiable. Instead, the power of appointment is ignored unless it is actually exercised.[396] In addition, even though state law allows a trust to be decanted or modified through court reformation, this is not sufficient to disqualify a trust from being a see-through trust based on the beneficiaries not being identifiable.[397]

The regulations state that if the trust is not decanted or reformed, or if a power of appointment is not exercised or restricted to certain identifiable beneficiaries, by September 30 of the calendar year following the calendar year of the IRA owner's death (the Beneficiary Finalization Date), then the beneficiaries named in the trust document to receive the IRA if the power of appointment was not exercised are the beneficiaries who are looked at to determine if the beneficiaries are identifiable and, if so, whether they are (i) Not Designated Beneficiaries (NDB), (ii) only Designated

[395] Treas. Reg. § 1.401(a)(9)-4(a)(3).

[396] Treas. Reg. § 1.401(a)(9)-4(f)(5)(ii).

[397] Treas. Reg. § 1.401(a)(9)-4(f)(5)(iii).

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Beneficiaries who are not Eligible Designated Beneficiaries (ODB), or (iii) Eligible Designated Beneficiaries (EDB), and if EDBs, whose life expectancy is used to determine the Required Minimum Distributions and the End Date.[398]

On the other hand, if the trust is decanted or reformed, or the power of appointment is exercised or restricted to certain identifiable beneficiaries, prior to September 30 of the calendar year following the calendar year of the IRA owner's death (the Beneficiary Finalization Date), then the removed beneficiaries are ignored ("disregarded") and the new beneficiaries are looked at to determine if they are identifiable. In other words, the new beneficiaries become the beneficiaries who must be identifiable and, if so, whether they are (i) Not Designated Beneficiaries (NDB), (ii) only Designated Beneficiaries who are not Eligible Designated Beneficiaries (ODB), or (iii) Eligible Designated Beneficiaries (EDB), and if EDBs, whose life expectancy is used to determine the Required Minimum Distributions and the End Date.[399]

Exercise of a power of appointment, decanting, or modifying a trust after September 30 of the calendar year following the calendar year of the IRA owner's death (the Beneficiary Finalization Date) will not cause a trust to fail the identifiable beneficiary requirement or alter the Required Minimum Distributions or End Date that applied for the prior years. However, beginning the calendar year after the calendar year when a new beneficiary is added, the identifiable requirements apply and the trust will be retested to determine if all beneficiaries are identifiable for future years and, if so, whether they are (i) Not Designated Beneficiaries (NDB), (ii) only Designated Beneficiaries who are not Eligible Designated Beneficiaries (ODB), or (iii) Eligible Designated Beneficiaries (EDB), and if EDBs, whose life expectancy is used to determine the Required Minimum Distributions and the End Date.[400] If the retest produces an End Date that has already passed, or that falls in the year of the addition, the IRA need not be fully distributed until December 31 of the year after the year the beneficiary is added or after the year of the exercise or modification.[401]

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[398] Treas. Reg. § 1.401(a)(9)-4(f)(5)(ii)(A); Treas. Reg. § 1.401(a)(9)-4(f)(5)(iii)(B) and (C). See also Treas. Reg. § 1.401(a)(9)-4(f)(6)(iv) and (v) (Examples 4 and 5 illustrate this).

[399] Id.

[400] Treas. Reg. § 1.401(a)(9)-4(f)(5)(iv).

[401] Treas. Reg. § 1.401(a)(9)-4(f)(5)(v).

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D. Levels of Beneficiaries of a Trust: Most trusts have multiple levels of beneficiaries. These are often referred to as "primary" and "successor," "contingent," "secondary," "remainder," or "residual" beneficiaries.

Primary beneficiaries are those who are entitled to receive trust distributions upon the establishment of a trust for their benefit. Their ability to receive trust distributions is not contingent upon the happening of an event, such as the death or disqualification of another beneficiary.

Successor (or secondary, contingent, remainder, or residual) beneficiaries are those who are entitled to receive a distribution from a trust that is contingent upon the happening of some event, and it is possible that event may not happen.

For example, a successor beneficiary may receive trust distributions upon the death of a primary beneficiary, or if a primary beneficiary is disqualified from receiving trust distributions and, as a result, the successor beneficiary now becomes the primary beneficiary and is eligible to receive trust distributions.

There are often different levels of successor beneficiaries in a trust. For example, a trust may direct the trustee to distribute to the settlor's spouse for life, then upon the spouse's death to the settlor's child, and if the child is not living, then to the settlor's grandchild, and if none of them are living, to a charity. In this situation, the spouse is the primary beneficiary, the settlor's child is the first successor beneficiary, the settlor's grandchild is the next or successor beneficiary, and the charity is the final successor beneficiary.

E. Countable and Disregarded Beneficiaries for Inherited IRA Purposes: For inherited IRA purposes, the regulations describe similar levels of beneficiaries of a see-through trust. These are described in the following Sections of this paper.

The primary purpose for this is to determine which beneficiaries of the see-through trust need to be taken into account (referred to as "countable" in this paper) when determining exactly which beneficiaries will be receiving some of the inherited IRA held in the see-through trust. How fast the inherited IRA will be required to distribute depends on who are the countable beneficiaries of the trust.

For inherited IRA purposes, all beneficiaries of a see-through trust can be divided into two types. These are referred to in this paper as beneficiaries that are "countable" and beneficiaries that are "disregarded." The word "countable" is not used in the regulations.

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1. Countable Beneficiaries: These are beneficiaries of a see-through trust who are required to be "treated as having been designated as beneficiaries of the"[402] IRA owner. In other words, they are "taken into account"[403] ("countable") when determining who are the trust beneficiaries who possibly may receive some of the inherited IRA that is distributed to the trustee.

This is important because the calculations of the RMDs and End Date of the inherited IRA held in the trust are different depending on what type of beneficiaries are countable. For example, countable beneficiaries who are not a Designated Beneficiary (NDB) or only Designated Beneficiaries (ODB) may cause the inherited IRA held in the trust to have different RMDs and End Date than countable beneficiaries who are Eligible Designated Beneficiaries (EDB).

2. Disregarded Beneficiaries: These are beneficiaries of the trust who are not countable. They can be ignored when making a determination of how fast the IRA must be distributed.

F. Two Types of See-Through Trusts: There are two types of see-through trusts for purposes of IRA analysis. These are referred to in the regulations as a "conduit trust" and an "accumulation trust."[404]

1. Conduit Trust: A conduit trust is a trust that requires that "all distributions" received by a trustee from an inherited IRA held by the trust (including, but not limited to, annual RMDs) must be paid out "upon receipt by the trustee . . . directly to, or for the benefit of, specified trust beneficiaries."[405] Or, in other words, no IRA distributions can be accumulated in the trust. Instead, they must quickly be paid out to or for the benefit of the primary beneficiaries of the trust.

2. Accumulation Trust: An accumulation trust is a trust that is not a conduit trust (or in other words, does not mandate that all distributions received by the trustee from an inherited IRA held by the trust must be distributed upon receipt by

[402] Treas. Reg. § 1.401(a)(9)-4(f)(3)(i).

[403] Treas. Reg. Preamble § I.D.2.a.1, 89 Fed. Reg. 58886, 58894 (July 19, 2024).

[404] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii).

[405] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A).

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the trustee to, or for the benefit of, a primary trust beneficiary).[406] It does not matter whether the trustee is directed to accumulate the IRA distributions or given discretion to accumulate or distribute; it is an accumulation trust if the trustee is not required to distribute all IRA distributions to a beneficiary "upon receipt" by the trustee of each such distribution.

G. Levels of Trust Beneficiaries for Inherited IRA Purposes: As stated above, the SECURE Act regulations describe two levels of potential beneficiaries of the inherited IRA held in a see-through trust. First are those who will receive the inherited IRA if living and not disqualified (referred to as "primary" beneficiaries in the preamble to the final regulations),[407] and next are those who will receive the inherited IRA if the first beneficiary is not able to receive the IRA (referred to as "residual" beneficiaries in the preamble to the final regulations[408]). In addition, the regulations describe instances when residual beneficiaries can be ignored ("disregarded") for purposes of determining how the inherited IRA held in a trust is treated.

For ease of reference throughout this paper, and to be consistent with the preamble of the final regulations, these beneficiaries will be referred to in this paper as "primary," "residual," and "disregarded" beneficiaries.

1. Primary Beneficiary: A primary beneficiary is a beneficiary of a see-through trust whose ability to receive amounts from the inherited IRA held in the trust is "neither contingent upon, nor delayed until, the death of another trust beneficiary" who did not die before the IRA owner, and is not treated as dying before the IRA owner[409] (such as by disclaiming the IRA or pursuant to a simultaneous death provision of state law or the trust document).[410]

2. Residual Beneficiary: A residual beneficiary is a beneficiary of the trust who has a possibility of receiving amounts from the IRA that could be retained in the trust and not distributed to one or more primary beneficiaries, whether or not such

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[406] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii)(B).

[407] Treas. Reg. Preamble § I.D.2.a, 89 Fed. Reg. 58886, 58894 (July 19, 2024).

[408] Id.

[409] Treas. Reg. § 1.401(a)(9)-4(f)(3)(i)(A).

[410] Treas. Reg. § 1.401(a)(9)-4(c)(2)(ii).

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amounts are actually accumulated or distributed.[411] This typically arises in a trust that permits the trustee to retain IRA distributions for future use rather than requiring immediate distribution to the primary beneficiary (i.e., an accumulation trust). This beneficiary can be more formally referred to as a "residual beneficiary who is not disregarded."

3. Disregarded Residual Beneficiary: A disregarded residual beneficiary is a residual beneficiary who is not also a primary beneficiary, and who could receive amounts from the IRA solely because of the death of another residual beneficiary; provided that the deceased other residual beneficiary was not also a primary beneficiary, did not die before the IRA owner, and is not being treated as having died before the IRA owner.[412] Or in other words, the disregarded residual beneficiary is a beneficiary who would otherwise be a residual beneficiary, but is ignored (disregarded) because they only receive IRA amounts if another residual beneficiary dies first, and that deceased residual beneficiary is not also a primary beneficiary.

H. The Type of See-Through Trust Determines Which Beneficiaries Are Countable: Which trust beneficiaries of a see-through trust must be taken into account (countable) or can be ignored (disregarded) varies depending on which type of trust is holding the inherited IRA. As described above, there are two types of see-through trusts for purposes of IRA analysis: "conduit trust" and "accumulation trust."[413]

1. Conduit Trust:

a. Description: A conduit trust is a trust that requires that "all distributions" received by a trustee from an inherited IRA held by the trust (including, but not limited to, annual RMDs) must be paid out "upon receipt by the trustee . . . directly to, or for the benefit of, specified trust beneficiaries."[414]

b. Distributing Only Trust Income Is Not Sufficient: It is not unusual for a trust to allow a beneficiary to withdraw, or to require the trustee to distribute to the beneficiary, all the "income" of the trust each year.

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[411] Treas. Reg. § 1.401(a)(9)-4(f)(3)(i)(B).

[412] Treas. Reg. § 1.401(a)(9)-4(f)(3)(ii)(A).

[413] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii).

[414] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A).

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However, this is not enough to make a trust a conduit trust. This is because "income" in a trust instrument means trust accounting income (see I.R.C. § 643(b)), which generally does not include the principal portion of an IRA distribution, even though the entire distribution is taxable income.[415] There is a difference between "taxable income" or "federal gross income" and "trust accounting income."[416] Therefore, even if all of the trust's income is distributed, this would not include any of the IRA principal distributed to the trust, such as happens with a Required Minimum Distribution. Instead, in order to qualify as a conduit trust, it is necessary for the trust to require that all distributions from an inherited IRA, whether or not they are classified as income for trust accounting purposes, must be distributed to the primary beneficiary upon receipt by the trustee.[417]

c. Which Trust Beneficiaries are Countable: Because any distributions made from an inherited IRA to the trustee of a see-through trust that is a conduit trust must be distributed to a primary beneficiary "upon receipt by the trustee," it is not possible for any of the IRA that was distributed to end up with a residual beneficiary of the trust. As a result, only the primary beneficiaries are taken into account (countable) when determining exactly who are the beneficiaries of the inherited IRA for purposes of calculating the RMDs and End Date for the IRA.

d. Which Trust Beneficiaries are Not Countable: All beneficiaries of the trust other than the primary beneficiaries can be ignored (disregarded) when the trust holding the inherited IRA is a conduit trust.

e. Multiple Beneficiaries - Conduit Trust General Rules: There are three general rules that apply if there is more than one primary beneficiary of a conduit trust:

1) All primary beneficiaries must qualify as a Designated Beneficiary (DB). If they do not, then the trust is treated as though it does not

[415] See Rev. Rul. 2006-26, 2006-1 C.B. 939 for one example of this.

[416] The details of this are beyond the scope of this paper.

[417] See Treas. Reg. § 1.401(a)(9)-4(f)(6)(ii)(C).

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have a DB (or in other words, only has beneficiaries who are not Designated Beneficiaries (NDB));[418]

2) If all primary beneficiaries are DBs, but one or more of them is not an Eligible Designated Beneficiary (EDB), then the trust is treated as though it does not have an EDB;[419] and

3) The life expectancy of the oldest primary beneficiary must be used to determine how the IRA must be distributed.[420]

f. Exceptions to Conduit Trust General Rules: There are three exceptions to these general rules for conduit trusts, which are:

1) Minor Child of IRA Owner: If a minor child (under age 21[421]) of the IRA owner is one of the primary beneficiaries of a conduit trust, then the IRA is treated as having Eligible Designated Beneficiaries (EDBs) even though not all primary beneficiaries are EDBs.[422] This means the Life Expectancy Rule can be applied to the trust beneficiaries.

There is not a special rule for whose life expectancy to use to determine the Applicable Denominator to calculate the Required Minimum Distributions (RMDs) when a minor child of the IRA owner is a primary beneficiary of a conduit trust. Therefore, the general rule described above applies, and the life expectancy of the oldest DB or EDB who is a primary beneficiary of the conduit trust is used to determine the Applicable Denominator and calculate the annual RMDs.

The End Date for distribution of the remainder of the inherited IRA to the beneficiaries is the earlier of: (i) December 31 of the 10th calendar year following the calendar year when the youngest minor child who

[418] Treas. Reg. § 1.401(a)(9)-4(b).

[419] Treas. Reg. § 1.401(a)(9)-4(e)(2)(i).

[420] Treas. Reg. §§ 1.401(a)(9)-5(f)(1)(i) and 5(f)(2).

[421] Treas. Reg. § 1.401(a)(9)-4(e)(3).

[422] Treas. Reg. § 1.401(a)(9)-4(e)(2)(ii).

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was a primary beneficiary of the IRA turns age 21 (the age of majority) or, in other words, when that child turns age 31, or (ii) December 31 of the 10th calendar year following the calendar year in which the last child who qualified as a minor child dies.[423] The other beneficiaries do not affect the End Date, but they remain countable in determining the Applicable Denominator, as described in the preceding paragraph. These are major changes from the 2022 proposed regulations, which measured the 10-year period from the oldest minor child rather than the youngest, and which ended the deferral on the death of the oldest minor child rather than on the death of all of them.[424]

2) AMBT: If the trust is an Applicable Multi-Beneficiary Trust (AMBT), then the trust is treated as having Eligible Designated Beneficiaries even if there are other beneficiaries who are not Eligible Designated Beneficiaries.[425]

Despite this exception, as a practical matter an AMBT for a beneficiary who is receiving means-tested public assistance will probably never be designed as a conduit trust. This is because a conduit trust requires that all IRA "distributions will, upon receipt by the trustee, be paid directly to, or for the benefit of,"[426] the primary beneficiary of the trust. If that beneficiary is receiving means-tested public assistance, such as SSI or Medicaid, the IRA distribution may be deemed to be "income" to the beneficiary and negatively impact the beneficiary's eligibility for the public assistance. Instead, an AMBT for a beneficiary receiving means-tested public assistance should be designed to be an accumulation trust.

3) Separate Accounts: This exception applies if the IRA is split into separate accounts[427] for each beneficiary by December 31 of the year following the year the IRA owner died. In order to accomplish this, the trust receiving the IRA must direct that the IRA be "divided

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[423] Treas. Reg. § 1.401(a)(9)-5(f)(2)(ii).

[424] Prop. Treas. Reg. § 1.401(a)(9)-5(f)(2)(ii)(A), 87 Fed. Reg. 10504, 10536 (Feb. 24, 2022).

[425] Treas. Reg. § 1.401(a)(9)-4(e)(2)(iii).

[426] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A).

[427] Treas. Reg. § 1.401(a)(9)-4(b); Treas. Reg. § 1.401(a)(9)-4(e)(2), and Treas. Reg. § 1.401(a)(9)-8(a).

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immediately" into separate see-through trusts upon the death of the IRA owner (which means the trust receiving the IRA terminates and directs the allocation of the IRA to different trusts, whether subtrusts or irrevocable standalone trusts), then each beneficiary of each separate trust receives separate account treatment (which means the RMDs and End Date for each separate trust are determined by that trust's own countable beneficiaries). This is more fully explained earlier in this paper.[428] If this does not happen, then the general rules described above apply and the RMDs and End Date of all the separate IRAs will be based on the countable beneficiary whose classification and life expectancy results in the earliest End Date or least favorable distribution method.[429]

Example

g. Conduit Trust Example: Assume a 75-year-old IRA owner dies in 2026 after her Required Beginning Date and leaves an IRA to a trust for the benefit of the IRA owner's adult Child for life. Upon Child's death, the remainder is to be distributed to IRA owner's Sister, or to Charity if the Sister does not survive Child. Both Child and Sister survive the IRA owner, and both are adults who are not Disabled, Chronically Ill, or less than 10 years younger than the IRA owner (or in other words, they are each a Designated Beneficiary but not an Eligible Designated Beneficiary (i.e., an ODB)).

Child's trust requires all current income be distributed to Child annually. In addition, everything received from an inherited IRA must be distributed to Child upon the trustee receiving the IRA distribution. [This last provision makes Child's trust a conduit trust.] When the IRA owner dies, Child is age 48 and Sister is age 60.

Using the terminology described earlier in this paper, Child is the only primary beneficiary. Sister is the residual beneficiary who will receive the IRA upon Child's death, but because this trust is a conduit trust, it is not possible for any of the IRA proceeds distributed while Child is living to be distributed to Sister. In addition, Charity is not entitled to

[428] See supra Section X, D.

[429] Id.

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any of the IRA proceeds until both Child and Sister are no longer living. As a result, both Sister and Charity are disregarded.

Because Child's trust is a conduit trust, the only beneficiary who must be identifiable is the primary beneficiary (Child). Since Child is a human being, she is a Designated Beneficiary. Since Child is not an Eligible Designated Beneficiary, she is only a Designated Beneficiary (ODB) and the IRA must be fully distributed no later than December 31, 2036, which is the year containing the 10th anniversary of the IRA owner's death (the End Date).[430]

In addition, since the IRA owner died after her Required Beginning Date, Required Minimum Distributions (RMDs) must be made from the IRA to the trust starting in 2027 (the year following the year when the IRA owner died).[431] The Applicable Denominator is Child's life expectancy using the Single Life Table since Child has a life expectancy that exceeds the deceased IRA owner's remaining "ghost" life expectancy.[432]

End of Example

h. Explanation of Why Only Primary Beneficiary is Counted: The reason the beneficiaries of a conduit trust who receive the inherited IRA after the death of the primary beneficiary are ignored for purposes of determining whether all beneficiaries of a see-through conduit trust are (i) Eligible Designated Beneficiaries (EDB) or (ii) Designated Beneficiaries who are not Eligible Designated Beneficiaries (ODB), and whose life expectancy is used to determine the Applicable Denominator to calculate the amount of the RMD, is because it is not possible for the beneficiaries who receive distributions from the trust upon the death of the primary beneficiary to receive any distributions from an inherited IRA that were distributed to the trust during the lifetime of the primary beneficiary. This is because a conduit trust requires that all such distributions be fully distributed to the primary beneficiary.

[430] Treas. Reg. § 1.401(a)(9)-5(e)(2).

[431] See supra Section II, D (contains explanation).

[432] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

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Since the next ("residual") beneficiaries of the conduit trust will only receive the inherited IRA distributions that are made to the trust after the death of the primary beneficiary, the residual beneficiaries are not treated as a beneficiary of a conduit trust for purposes of determining whether they are identifiable, and it does not matter what their age is or whether they are an NDB, ODB, or EDB.[433] As a result, they are not taken into account (they are "disregarded") when determining whether all the trust beneficiaries are (i) not Designated Beneficiaries (NDB), (ii) Eligible Designated Beneficiaries (EDB) or (iii) Designated Beneficiaries who are not Eligible Designated Beneficiaries (i.e., ODBs), and whose life expectancy must be used when calculating the Required Minimum Distributions that must be made from an inherited IRA to a conduit trust.

2. Accumulation Trust:

a. Description: An accumulation trust is a trust that is not a conduit trust (or in other words, does not mandate that all distributions received by the trustee from an inherited IRA held by the trust must be distributed upon receipt by the trustee to, or for the benefit of, a primary beneficiary).[434] It does not matter whether the trustee is directed to accumulate the IRA distributions or given discretion to accumulate or distribute; it is an accumulation trust if the trustee is not required to distribute all IRA distributions to the primary beneficiary "upon receipt" of each such distribution.

b. Accumulation Trust General Rules: There are three general rules that apply to accumulation trusts.

1) Some Residual Beneficiaries Must Be Taken Into Account: With an accumulation trust, it is possible that some of the inherited IRA that is distributed to the trust during the lifetime of the primary beneficiary (plus the earnings from investing the IRA distribution outside of the IRA but still held inside the trust, referred to as the "proceeds" of the IRA) is accumulated in the trust and not totally distributed to the primary beneficiary of the trust during that beneficiary's lifetime. Therefore, there might be some of what came

[433] Treas. Reg. § 1.401(a)(9)-4(f)(3)(i).

[434] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii)(B).

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from the IRA or its proceeds still in the trust upon the death of the primary beneficiary and, as a result, these accumulated IRA distributions and proceeds could be distributed to a residual beneficiary. Since a residual beneficiary might receive some of the inherited IRA that was distributed to the trust during the primary beneficiary's lifetime, or the proceeds from investing those distributions, the residual beneficiary must also be included when the original determination is made concerning whether all the trust beneficiaries are identifiable and qualify as not a Designated Beneficiary (NDB), Eligible Designated Beneficiary (EDB), or Designated Beneficiary who is not an Eligible Designated Beneficiary (ODB), and, if so, whose life expectancy is used when determining what the annual RMDs and the End Date distributions must be.

In other words, the general rule is if the trust is an accumulation trust, both the primary beneficiaries and the residual beneficiaries who are not disregarded are taken into account (countable) when determining which beneficiaries qualify as (i) not a Designated Beneficiary (NDB), (ii) a Designated Beneficiary who is not an Eligible Designated Beneficiary (i.e., an ODB) or (iii) an Eligible Designated Beneficiary (EDB). The residual beneficiaries who are countable are those who might receive a distribution from the trust upon the death of a primary beneficiary. The remaining residual beneficiaries who are only entitled to receive a distribution from the trust if another residual beneficiary dies are ignored ("disregarded") because they can only receive a portion of the IRA if another residual beneficiary is not living.[435] This does not apply, however, if the residual beneficiary whose death would trigger the later beneficiary's entitlement (i) predeceased (or is treated as having predeceased) the IRA owner, or (ii) is also a primary beneficiary.[436]

2) All Beneficiaries Must Be DBs or EDBs: The general rules described earlier in this paper[437] concerning what happens if any one of the beneficiaries of an IRA is not a Designated Beneficiary (the IRA

[435] Treas. Reg. § 1.401(a)(9)-4(f)(3)(ii)(A).

[436] Id.

[437] See supra Section X.

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is treated as though it does not have any Designated Beneficiaries)[438] or an Eligible Designated Beneficiary (the IRA is treated as though it does not have any Eligible Designated Beneficiaries)[439] also apply to beneficiaries of see-through trusts, whether conduit or accumulation. However, there are exceptions to this general rule that are described later in this paper.[440]

3) Oldest Countable Beneficiary's Life Expectancy Used: As with a conduit trust, the general rule for an accumulation trust is that the life expectancy of the oldest countable beneficiary is used to determine the Applicable Denominator that is used to calculate the Required Minimum Distributions (RMDs) that establish how much of the IRA must be distributed annually. However, unlike a conduit trust, with an accumulation trust the general rule is that all primary beneficiaries and countable residual beneficiaries (i.e., the residual beneficiaries who are not disregarded) are taken into account in determining the oldest beneficiary.[441] There are exceptions to this general rule discussed later in this paper.[442]

For example, this general rule means if the primary beneficiary of an accumulation trust is a 30-year-old ODB, and the countable residual beneficiary is an ODB who is 65 years old, then the 65-year-old's life expectancy must be used to determine the Applicable Denominator to calculate the Required Minimum Distributions (RMDs) to be distributed from the IRA to the trustee during the younger primary beneficiary's lifetime.

In a similar vein, this general rule means if the residual beneficiary is a charity that is not disregarded (i.e., the charity is a countable beneficiary), the trust does not have a Designated Beneficiary (unless

[438] Treas. Reg. § 1.401(a)(9)-4(b).

[439] Treas. Reg. § 1.401(a)(9)-4(e)(2)(i).

[440] See infra Section XIV, H, 2, c; Section XV, C.

[441] Treas. Reg. § 1.401(a)(9)-4(f)(3)(i)(B). See also Treas. Reg. § 1.401(a)(9)-4(f)(6)(ii) (contains example of IRS analysis of an accumulation trust).

[442] See infra Section XIV, H, 2, c; Section XV, F.

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the charity is a qualifying charity[443] and the trust is an AMBT[444]). As a result, because the trust does not have a Designated Beneficiary, the IRA must distribute to the trustee based on the rules that apply if there is no Designated Beneficiary (NDB). This means the IRA must distribute as follows:

(i) If the IRA owner died before the owner's Required Beginning Date, the 5-Year Rule must be utilized,[445] and

(ii) If the IRA owner died on or after the owner's Required Beginning Date, the remaining ("ghost") life expectancy of the IRA owner using the Single Life Table must be utilized.[446]

However, similar to when an IRA pays directly to a beneficiary who is not a Designated Beneficiary (NDB), the more favorable Designated Beneficiary distribution rules can be used if the charity disclaims its interest in the trust, or receives its full distribution from the trust, by September 30 of the calendar year following the calendar year of the IRA owner's death (the date the final beneficiaries of the IRA are determined, i.e., the Beneficiary Finalization Date). If this happens, then the charity is no longer a residual beneficiary and any other residual beneficiary who was a disregarded beneficiary because they did not receive anything from the trust while the charity was a beneficiary becomes the new countable residual beneficiary. If this beneficiary is a Designated Beneficiary, then the Designated Beneficiary distribution rules can be used. This is discussed earlier in this paper.[447]

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[443] A qualifying charity is an organization described in I.R.C. § 170(b)(1)(A), other than a supporting organization described in § 509(a)(3) or a donor advised fund described in § 4966(d)(2). Treas. Reg. § 1.401(a)(9)-4(g)(3); I.R.C. § 408(d)(8)(B)(i). See infra Section XV, C, 2. See also Appendix F.

[444] Treas. Reg. § 1.401(a)(9)-4(g)(3).

[445] Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(A).

[446] Treas. Reg. § 1.401(a)(9)-5(d)(1)(iii).

[447] See supra Section V, B, 8.

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Example

Accumulation Trust Example: Assume the same facts as were used in the previous conduit trust example - that a 75-year-old IRA owner dies in 2026 after the owner's Required Beginning Date and leaves an IRA to a trust for the benefit of the IRA owner's adult Child for life. Upon Child's death, the remainder is to be distributed to IRA owner's Sister, or to Charity if the Sister does not survive Child. When the IRA owner dies, Child is age 48 and Sister is age 60, and both are adults who are not Disabled, Chronically Ill, or less than 10 years younger than the IRA owner (or in other words, they are each a Designated Beneficiary but not an Eligible Designated Beneficiary (i.e., an ODB)).

If instead of a conduit trust (as was illustrated in the prior example), the IRA was left to an accumulation trust (a trust that did not require the trustee to distribute to the primary beneficiary any distributions from the inherited IRA upon receipt), then the following would apply.

Since both the IRA owner's adult Child and Sister are people, they are Designated Beneficiaries. Since this is an accumulation trust, both adult Child (a primary beneficiary) and Sister (a countable residual beneficiary) are considered beneficiaries of the trust for IRA purposes.[448]

Because Charity (the residual beneficiary that receives the IRA only if Sister is not living) does not receive any of the trust assets unless Sister dies, Charity is ignored for analysis of the countable beneficiaries of the IRA (i.e., Charity is a disregarded residual beneficiary).[449]

Since neither the adult Child nor Sister is an Eligible Designated Beneficiary, all beneficiaries of the IRA that must be taken into account are only Designated Beneficiaries (ODBs).

[448] Treas. Reg. § 1.401(a)(9)-4(f)(3)(i)(A) and (B).

[449] Treas. Reg. § 1.401(a)(9)-4(f)(3)(ii).

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Because the IRA owner died after the owner's RBD and all countable beneficiaries of the trust are ODBs, the IRA must be fully distributed no later than December 31, 2036 (the End Date - the last day of the calendar year that contains the 10th anniversary of the IRA owner's death in 2026).[450]

In addition, Required Minimum Distributions (RMDs) must be made from the IRA to the trust starting in 2027 (the year following the year when the IRA owner died).[451]

The age for the Applicable Denominator used to determine the life expectancy for calculation of the RMD is Sister's age, since -

(i) Sister is older than Child,[452] and

(ii) Sister has a life expectancy that exceeds the deceased IRA owner's remaining "ghost" life expectancy.[453]

End of Example

c. Exceptions to Accumulation Trust General Rules: There are exceptions to the accumulation trust general rules described above. These are:

1) Minor Child of IRA Owner: If a minor child (under age 21[454]) of the IRA owner is one of the primary beneficiaries of the accumulation trust, then the IRA is treated as having Eligible Designated Beneficiaries (EDBs) even though not all primary

[450] Treas. Reg. § 1.401(a)(9)-5(e)(1) and (2).

[451] Treas. Reg. § 1.401(a)(9)-5(d)(1)(i).

[452] Treas. Reg. § 1.401(a)(9)-5(f)(1)(i).

[453] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

[454] Treas. Reg. § 1.401(a)(9)-4(e)(3).

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beneficiaries or residual beneficiaries are EDBs.[455] This means the Life Expectancy Rule can be applied to the trust.

There is not a special rule for whose life expectancy to use to determine the Applicable Denominator when calculating the Required Minimum Distributions (RMDs) when a minor child of the IRA owner is the EDB who is a primary beneficiary of an accumulation trust. Therefore, the general rule described above applies, and the life expectancy of the oldest ODB or EDB of the accumulation trust, whether a primary beneficiary or a residual beneficiary who is not disregarded, is used to determine the Applicable Denominator and calculate the annual RMDs. However, this does not apply if the accumulation trust is designed as described in Section XIV, H, 2, c, 2) of this paper, which follows the next paragraph.

The End Date for distribution of the remainder of the inherited IRA is the earlier of: (i) December 31 of the 10th calendar year following the calendar year in which the youngest minor child who was a primary beneficiary of the IRA turns age 21 (the age of majority)[456] or, in other words, when that child turns age 31, or (ii) December 31 of the 10th calendar year following the calendar year when all minor children who were primary beneficiaries of the IRA are not living.[457] The other beneficiaries do not affect the End Date, but they remain countable in determining the Applicable Denominator, including any residual beneficiary who is not disregarded, as described in the preceding paragraph.

2) Trust Requires IRA be Fully Distributed by Age 31: If a trust requires the full inherited IRA, plus any proceeds received from investing RMDs received from the IRA, to be distributed to the primary beneficiary by (i) the end of the 10th year following the calendar year when that beneficiary attains age 21 (or, in other words, the end of the calendar year when the beneficiary attains age 31), or (ii) the end of the calendar year following the calendar year of the IRA owner's death, if later, then all other beneficiaries of the trust who could

[455] Treas. Reg. § 1.401(a)(9)-4(e)(2)(ii).

[456] Treas. Reg. § 1.401(a)(9)-5(f)(2)(ii)(C).

[457] Treas. Reg. § 1.401(a)(9)-5(f)(2)(ii)(B).

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receive a portion of the IRA upon the death of the beneficiary (i.e., the residual beneficiaries) are not taken into account (i.e., they are "disregarded") when determining who are the Designated Beneficiaries or Eligible Designated Beneficiaries of the trust.[458]

This means when determining the amount of the annual RMDs, it is the life expectancy of the oldest primary beneficiary that is used to determine the Applicable Denominator.

This applies to any Designated Beneficiary, not just a child of the IRA owner. Where, as in the example below, every countable beneficiary is an ODB, disregarding the residual beneficiaries affects only the calculation of the annual RMDs and does not change the End Date. But where a disregarded residual beneficiary would have been a charity or other NDB, or would have been an ODB when the primary beneficiary is an EDB, disregarding that beneficiary changes the classification of the IRA's beneficiaries and therefore can change the End Date as well.

To illustrate this, consider the prior example with Two Changes: If everything in the previous accumulation trust example was the same except (i) Child, the primary beneficiary, is younger than age 31 and (ii) the trust for Child directed the trustee to distribute all of the inherited IRA and accumulated proceeds from investing the RMDs received from the IRA outright to Child prior to the end of the calendar year when Child attains age 31, then Sister is ignored for RMD calculation purposes because the entire IRA and any accumulated proceeds derived from the IRA are fully distributed to Child prior to the end of the calendar year when Child attains age 31.

3) AMBT: If the trust is an Applicable Multi-Beneficiary Trust (AMBT), then the trust is treated as having Eligible Designated Beneficiaries even if there are other beneficiaries who are not Eligible

[458] Treas. Reg. § 1.401(a)(9)-4(f)(3)(ii)(B).

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Designated Beneficiaries.[459] This means the Life Expectancy Rule applies. AMBTs are discussed later in this paper.[460]

4) Separate Accounts: This exception applies if the IRA is split into separate accounts[461] for each beneficiary by December 31 of the year following the year the IRA owner died. In order to accomplish this, the trust receiving the IRA must direct that the IRA be "divided immediately" into separate see-through trusts upon the death of the IRA owner (which means the trust receiving the IRA terminates and directs the allocation of the IRA to different trusts, whether standalone or subtrusts), then each beneficiary of each separate trust receives separate account treatment (which means the RMDs and End Date for each separate trust are determined by that trust's own countable beneficiaries). This is more fully explained earlier in this paper.[462] If this does not happen, then the general rule applies and the Applicable Denominator used to determine the RMDs for all beneficiaries in their respective trust is based on the oldest countable beneficiary in the receiving trust.[463]

I. Distinguish Between Beneficiaries Receiving IRA Distributions and Other Beneficiaries: Keep in mind that it is possible to have two different types of beneficiaries of a see-through trust: (i) those who are entitled to receive distributions from an inherited IRA and its proceeds,[464] and (ii) other beneficiaries who are not entitled to receive any inherited IRA-related distributions but are eligible to receive distributions from other, non-inherited IRA-related assets held in the trust.

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[459] Treas. Reg. § 1.401(a)(9)-4(e)(2)(iii).

[460] See infra Section XV.

[461] Treas. Reg. § 1.401(a)(9)-4(b); Treas. Reg. § 1.401(a)(9)-4(e)(2), and Treas. Reg. § 1.401(a)(9)-8(a).

[462] See supra Section X, D.

[463] Id.

[464] Treas. Reg. § 1.401(a)(9)-4(f)(2)(iii) ("beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the employee's interest in the plan"); Treas. Reg. § 1.401(a)(9)-4(f)(3)(i)(A) ("beneficiary that could receive amounts in the trust representing the employee's interest in the plan") and (B) ("beneficiary of an accumulation trust that could receive amounts in the trust representing the employee's interest in the plan").

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The rules described in this paper only apply to the beneficiaries of a see-through trust who are entitled to receive distributions from an inherited IRA or the proceeds from investing the IRA distributions. They do not apply to other beneficiaries who are entitled to receive distributions from other assets held in the trust, but not from an inherited IRA or its proceeds.

To illustrate this, consider the following example.

Example

Jane dies and leaves her assets to a trust that benefits both her adult children, Jack, who is severely disabled and receiving SSI and Medicaid benefits, and Jill, who is not disabled or chronically ill. There are two assets in this trust, Jane's IRA and Jane's investment account that only holds non-qualified assets (i.e., only assets that are not tax qualified retirement assets, such as an inherited IRA).

If the inherited IRA is held in a subtrust of the trust, or if the distributions from the inherited IRA are held in a separate investment account in the trust so it is possible to trace all distributions from the IRA and the income earned from investing those distributions (the IRA "proceeds"), then it is possible for the trustee to be directed to distribute as follows:

1. Both children can receive distributions from the trust that came from the non-qualified investment account.
2. As long as Jack is living, only he can receive distributions from the trust that came from the inherited IRA (including the proceeds of the IRA). None of these can be distributed to or for the benefit of Jill as long as Jack is living.
3. However, after Jack is no longer living, Jill can then receive distributions that came from the inherited IRA and its proceeds.

In this example, for all distributions and proceeds from the inherited IRA, Jack is the primary beneficiary and Jill is the residual beneficiary. However, for all distributions from the investment account and its proceeds, both Jack and Jill are primary beneficiaries of the trust. Both can receive distributions from the trust while both are living, but Jill cannot receive anything from the inherited IRA or its proceeds while Jack is living.

The point of this is to illustrate that the phrases "primary beneficiary" and "residual beneficiary" only apply to a beneficiary of the trust who is eligible to receive a portion of the inherited IRA or its proceeds being held in the trust. There can be other beneficiaries of the trust who are entitled to receive non-IRA assets at the same time. These other

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beneficiaries are not countable when determining who the beneficiaries are for inherited IRA distribution purposes.

However, in this situation the trust document must be carefully drafted to clearly distinguish who is and is not entitled to proceeds from the inherited IRA, and the trustee must be careful to not intermingle the IRA proceeds with the non-IRA assets held in the trust.

Note also that this arrangement, in which only Jack can benefit from the inherited IRA during his lifetime and Jill can receive it only after his death, has the structure of an Applicable Multi-Beneficiary Trust (AMBT). If the trust qualifies as an AMBT, Jack's life expectancy governs the inherited IRA even though Jill is not an Eligible Designated Beneficiary. AMBTs are discussed in Section XV, which returns to this example.

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End of Example

XV. Applicable Multi-Beneficiary Trusts (AMBT)

The SECURE Act established a unique trust for Eligible Designated Beneficiaries (EDBs) who are Disabled or Chronically Ill. This trust is referred to as an "applicable multi-beneficiary trust."[465] Throughout this paper this is referred to as an "AMBT."

It is important to keep in mind that the laws and rules that apply to trusts holding inherited IRAs are greatly relaxed and altered in a manner favorable to the beneficiary if the trust is an AMBT. The reader is cautioned to not confuse the AMBT rules with the normal rules when drafting to hold an inherited IRA in any type of trust that is not an AMBT.

The following subsection A defines the AMBT and then explains who qualifies as Disabled or Chronically Ill. Those definitions also determine whether an individual named directly as an IRA beneficiary is an Eligible Designated Beneficiary (see Section V, B, 5, above). The rules that apply specifically to AMBTs are in Subsections B through H, below.

A. Definitions:

1. Applicable Multi-Beneficiary Trust (AMBT): The Code defines an AMBT as a trust –

[465] I.R.C. § 401(a)(9)(H)(iv) and (v); Treas. Reg. § 1.401(a)(9)-4(g).

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"**(I)** which has more than one beneficiary,"

"**(II)** all of the beneficiaries of which are treated as designated beneficiaries for purposes of determining the distribution period pursuant to this paragraph, and" [Author's Note: beginning January 1, 2023, for purposes of an AMBT, this includes a qualifying charity in addition to an individual]

"**(III)** at least one of the beneficiaries of which is an eligible designated beneficiary [who is Disabled or Chronically Ill]."[466] (last phrase inserted by the Author rather than leaving in the cross references to the applicable Code sections)

An additional requirement of an AMBT is added by the preceding Code section and is as follows (with bracketed inserts by the Author to insert names used throughout this paper rather than the cross references included in the original text):

(iv) "**(II)** no beneficiary (other than an eligible designated beneficiary [who is Disabled or Chronically Ill]) has any right to the [IRA owner's] interest in the plan until the death of all such eligible designated beneficiaries with respect to the trust."[467]

The final regulations add two further requirements: (i) the trust must be a see-through trust, and (ii) the trust terms must identify one or more individuals who are Disabled or Chronically Ill and who are primary beneficiaries of the trust.[468]

Note that no Eligible Designated Beneficiary is listed other than a Disabled or Chronically Ill individual.

2. Clarification of "Disabled" for SECURE Act Purposes: The SECURE Act says in order to qualify as an EDB who is Disabled, a Designated Beneficiary must be "disabled (within the meaning of section 72(m)(7))."[469]

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[466] I.R.C. § 401(a)(9)(H)(v).

[467] I.R.C. § 401(a)(9)(H)(iv)(II).

[468] Treas. Reg. § 1.401(a)(9)-4(g)(1), (g)(1)(ii). See infra Section XV, D.

[469] I.R.C. § 401(a)(9)(E)(ii)(III).

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Practice Point: In most cases the simplest way to establish that a beneficiary is Disabled is a determination by the Social Security Administration that the beneficiary was disabled as of the date of the IRA owner's death. That determination is deemed to satisfy the regulation's definition.[470] Without one, the beneficiary must meet the regulation's own test. For a beneficiary age 18 or older, that means being unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration. For a beneficiary under 18, it means marked and severe functional limitations.[471] For an IRA, the documentation need not be delivered to the custodian, but it should be assembled and kept.[472] The § 72(m)(7) case law discussed below remains useful where the facts are close.

a. I.R.C. § 72(m)(7)- Definition of Disabled: I.R.C. § 72(m)(7) says,

> Meaning of disabled – For purposes of this section, an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be disabled unless he furnishes proof of the existence thereof in such form and manner as the Secretary may require.[473]

b. Applicable Regulation for I.R.C. § 72(m)(7): 26 C.F.R. § 1.72-17A(f) contains further explanation of what "disabled" means for purposes of I.R.C. § 72(m)(7). A copy of this regulation is included in Appendix D of this paper.

Paragraph (f)(1) says,

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[470] Treas. Reg. § 1.401(a)(9)-4(e)(4)(iv).

[471] Treas. Reg. § 1.401(a)(9)-4(e)(4)(ii)–(iii).

[472] Treas. Reg. § 1.408-8(b)(4)(i). See supra Section III, E.

[473] I.R.C. § 72(m)(7).

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> In determining whether an individual's impairment makes him unable to engage in any substantial gainful activity, primary consideration shall be given to the nature and severity of his impairment. Consideration shall also be given to other factors such as the individual's education, training, and work experience. The substantial gainful activity to which section 72(m)(7) refers is the activity, or a comparable activity, in which the individual customarily engaged prior to the arising of the disability or prior to retirement if the individual was retired at the time the disability arose.[474]

Note that while similar to the definition used to determine disability for purposes of qualifying for Social Security Disability or SSI, the definition used in I.R.C. § 72(m)(7) is slightly different. For example, it focuses on what a person's employment was prior to the onset of the disability, or a job that is similar. This was expressed by the Tax Court in a 2006 summary opinion as follows,

> Therefore, the impairment must be evaluated in terms of whether it does, in fact, prevent the individual from engaging in her customary, or any comparable, substantial gainful activity considering the individual's education, training, and work experience.[475]

Paragraph (f)(2) of this regulation says the determination of a disability is to be "determined with reference to all the facts in the case." It then goes on to list examples of "impairments which would ordinarily be considered as preventing substantial gainful activity."[476]

Paragraph (f)(3) of this regulation says that "an impairment must be expected either to continue for a long and indefinite period or to result in death." The term "indefinite" is clarified to mean "that it cannot reasonably be anticipated that the impairment will, in the foreseeable future, be so diminished as no longer to prevent substantial gainful activity. For example, an individual who suffers a bone fracture which prevents him from working for an extended

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[474] Treas. Reg. § 1.72-17A(f)(1).

[475] Johnson v. Comm'r, No. 5609-05S, 2006 WL 1028379, at *2 (T.C. Summ. Op. Apr. 19, 2006).

[476] See Appendix D.

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period of time will not be considered disabled, if his recovery can be expected in the foreseeable future; if the fracture persistently fails to knit, the individual would ordinarily be considered disabled."

Lastly, Paragraph (f)(4) of this regulation states that an impairment that is "remediable" does not constitute a disability. This means that "if, with reasonable effort and safety to himself, the impairment can be diminished to the extent that the individual will not be prevented by the impairment from engaging in his customary or any comparable substantial gainful activity," then the individual is not disabled within the meaning of this Code section.

c. Case Law Interpreting I.R.C. § 72(m)(7): There are some court decisions that shed some light on I.R.C. § 72(m)(7) and the regulation. A 1992 Tax Court case summed this up nicely by saying,

> Section 72(m)(7) is explicit as to the applicable meaning of the term "disabled". Under section 72(m)(7) an individual is considered disabled if: (1) He is unable to engage in any substantial gainful activity due to a medically determinable physical or medical impairment; (2) the disability can be expected to result in death or be of a long-continued and indefinite duration; (3) the individual furnishes proof of the disability in the form and manner required by the Secretary. The regulations set forth the general considerations upon which a disability determination is made. See sec. 1.72-17A(f)(2), Income Tax Regs. The regulations provide that the determination is to be made on the basis of all the facts. They state that in determining whether an individual's infirmity makes him unable to engage in any substantial gainful activity, primary consideration is to be given to the nature and severity of the impairment. Sec. 1.72-17A(f)(1), Income Tax Regs. Other factors to be considered include the individual's education, training and work experience. Finally, the regulation emphasizes that any impairment, whether of lesser or greater severity, must be evaluated in terms of whether it does in fact prevent the individual from engaging in his customary or any comparable substantial activity. Sec. 1.72-17A(f)(2), Income Tax Regs.[477]

[477] Kane v. Comm'r, 63 T.C.M. (CCH) 2753 (T.C. 1992).

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Other cases[478] clarify that the burden is on the person alleging to be disabled to prove the disability, documentation must be provided, and the requirements are similar to what is required to prove disability under the Social Security system.[479] This generally means that corroborating medical evidence from physicians is required and uncorroborated testimony is insufficient.

Interestingly, the Tax Court has held in Kopty v. Commissioner,[480] and restated the holding later in Stipe v. Commissioner,[481] that a person who is disabled for Social Security or employment purposes is not automatically considered to be disabled for purposes of Section 72(m)(7). The Stipe court said,

> A taxpayer who is disabled for Social Security or employment purposes is not necessarily disabled within the meaning of section 72(m)(7). See Kopty v. Commissioner, T.C. Memo.2007-343 (taxpayer who received long-term disability benefits from the U.S. Social Security Administration not disabled within the meaning of section 72(m)(7)), affd. 313 Fed. Appx. 333 (D.C.Cir.2009); see also Hemrick v. Commissioner, T.C. Memo.2009-272 (taxpayer discharged from military duty upon certification of medical disqualification not disabled for purposes of section 72(m)(7)). In determining whether a taxpayer is disabled within the meaning of section 72(m)(7), primary consideration is given to the nature and severity of the taxpayer's ailment. Sec. 1.72-17A(f)(1), Income Tax Regs. The

[478] See Dwyer v. Comm'r, 106 T.C. 337, 341 (1996); Kaldi v. Comm'r, No. 5591-06S, 2007 WL 845920, at *2 (T.C. Mar. 21, 2007) (summary opinion); Trainito v. Comm'r, No. 7223-14S, 2015 WL 3861916, at *3 (T.C. June 23, 2015) (summary opinion); and Kowsh v. Comm'r, 96 T.C.M. (CCH) 123 (T.C. 2008).

[479] This is supported also by legislative history. The Senate Report accompanying the Employee Retirement Income Security Act of 1974 (ERISA) (Pub. L. 93-406, 88 Stat. 829, 29 U.S.C.A. § 1001 (Sept. 2, 1974)) says, "The penalty tax is not to apply in the event of death or disability. However, the committee expects that the Internal Revenue Service will require that the custodian must receive proof of disability before making distributions under the disability provision. Generally it is intended that the proof be the same as where the individual applies for disability payments under social security." (emphasis added) S. Rep. No. 93-383, 93d Cong., 1st Sess. (1973), reprinted in 1974 U.S.C.C.A.N. 4890.

[480] Kopty v. Comm'r, T.C. Memo. 2007-343, aff'd, 313 Fed. Appx. 333 (D.C. Cir. 2009).

[481] Stipe v. Comm'r, 101 T.C.M. (CCH) 1427 (T.C. 2011).

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> regulation further provides that in order for an individual to meet the requirements of section 72(m)(7), "an impairment must be expected either to continue for a long and indefinite period or to result in death." Sec. 1.72–17A(f)(3), Income Tax Regs. An impairment that is remediable is not a disability within the meaning of section 72(m)(7). Sec. 1.72–17A(f)(4), Income Tax Regs.[482]

d. SECURE Act Regulations: Fortunately, the final regulations for the SECURE Act provide some additional guidance when determining if a Designated Beneficiary is sufficiently disabled to qualify for EDB status as a Disabled individual. These regulations draw a distinction between whether a person had been determined disabled by the Social Security Administration, and whether a person is over or under the age of eighteen years.

1) SSA Disability Determination: If the Social Security Administration has determined that, as of the date of the IRA owner's death, the beneficiary is disabled within the meaning of 42 U.S.C. § 1382c(a)(3), the final SECURE Act regulations state the person is deemed to be sufficiently disabled to be an EDB who is Disabled.[483] Although the regulation only refers to the definition of disability that is used to determine eligibility for Supplemental Security Income (SSI),[484] since the definition used for Social Security Disability (SSD) eligibility is essentially the same,[485] it is assumed a person determined disabled by the Social Security Administration (including for SSD) will qualify as an Eligible Designated Beneficiary who is Disabled.

This is significant because, as pointed out in the previously cited case, merely being disabled for Social Security purposes does not necessarily mean the individual meets the definition of disability for purposes of I.R.C. § 72(m)(7).

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[482] Id.

[483] Treas. Reg. § 1.401(a)(9)-4(e)(4)(iv).

[484] Id. This regulation only cites 42 U.S.C. § 1382c(a)(3), which is the definition of "disabled" for SSI purposes.

[485] 42 U.S.C. § 423(d)(1)(A); § 223(d)(1)(A) of the Social Security Act.

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2) No SSA Disability Determination: The final regulations say if the Social Security Administration has not determined that, as of the date of the IRA owner's death, the beneficiary is disabled within the meaning of 42 U.S.C. § 1382c(a)(3), then the following standards must be met in order for the individual to be sufficiently disabled to qualify as an EDB who is Disabled.

A) If Age 18 or Older: If a Designated Beneficiary is at least eighteen (18) years of age and has not been determined to be disabled by the Social Security Administration when the IRA owner dies, then in order to qualify as an EDB who is Disabled, the individual must be "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration."[486] This is the same standard found in I.R.C. § 72(m)(7).

B) If Under Age 18: If a Designated Beneficiary is under the age of eighteen (18) years when the IRA owner dies, then in order to qualify as an EDB who is Disabled, the individual must have a "medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or to be of long-continued and indefinite duration."[487]

It should be noted that commenters asked the IRS to treat two other determinations as proof of disability: a state-court finding of incapacity or appointment of a guardian, and eligibility for an ABLE account under I.R.C. § 529A(e)(1). The IRS declined both, explaining that those standards could be broader than the definition of disability in § 72(m)(7).[488] A guardianship order or ABLE account therefore does not by itself establish that a beneficiary is Disabled.

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[486] Treas. Reg. § 1.401(a)(9)-4(e)(4)(ii) (emphasis added).

[487] Treas. Reg. § 1.401(a)(9)-4(e)(4)(iii) (emphasis added).

[488] Treas. Reg. Preamble, 89 Fed. Reg. 58886, 58892–93 (July 19, 2024).

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3) Documentation Does Not Need to Be Provided to an IRA Trustee, Custodian, or Issuer: While the regulations for the SECURE Act require that the documentation that the Designated Beneficiary is sufficiently disabled to qualify as an EDB who is Disabled be provided to the plan administrator no later than October 31 of the calendar year following the year of the IRA owner's death,[489] **that requirement does not apply to an IRA**.[490] It continues to apply to other types of retirement plans.

The beneficiary must still actually have been Disabled as of the date of the IRA owner's death. The documentation should therefore still be obtained and kept, because the trustee or the beneficiary will have to prove that fact if the distribution treatment of the inherited IRA is later questioned.

3. Clarification of "Chronically Ill" for SECURE Act Purposes: The SECURE Act says in order to qualify as a Chronically Ill EDB, a Designated Beneficiary must be chronically ill "within the meaning of section § 7702B(c)(2), except that the requirements of subparagraph (A)(i) thereof shall only be treated as met if there is a certification that, as of such date, the period of inability described in such subparagraph with respect to the individual is an indefinite one which is reasonably expected to be lengthy in nature."[491] A copy of I.R.C. § 7702B(a) through (c) is included in Appendix E of this paper.

a. I.R.C. § 7702B(c)(2) - Definition of Chronically Ill: I.R.C. § 7702B sets forth the requirements for a "qualified long-term care insurance contract." Among other requirements, a qualified long-term care insurance contract must provide "qualified long-term care services" which are defined as "necessary diagnostic, preventive, therapeutic, curing, treating, mitigating, and rehabilitative services, and maintenance or personal care services" that are required by a "chronically ill" individual and "provided pursuant to a plan of care prescribed by a licensed health care practitioner."[492]

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[489] Treas. Reg. § 1.401(a)(9)-4(e)(7) and Treas. Reg. § 1.401(a)(9)-4(e)(9) (contains examples illustrating this).

[490] Treas. Reg. § 1.408-8(b)(4)(i). See supra Section III, E.

[491] I.R.C. § 401(a)(9)(E)(ii)(IV).

[492] I.R.C. § 7702B(c)(1)(A) and (B).

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Paragraph (c)(2) defines a chronically ill individual as,

> (A) In general
>
> The term "chronically ill individual" means any individual who has been certified by a licensed health care practitioner as–
>
> > (i) being unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for a period of at least 90 days due to a loss of functional capacity,
> >
> > (ii) having a level of disability similar (as determined under regulations prescribed by the Secretary in consultation with the Secretary of Health and Human Services) to the level of disability described in clause (i), or
> >
> > (iii) requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment.
>
> Such term shall not include any individual otherwise meeting the requirements of the preceding sentence unless within the preceding 12-month period a licensed health care practitioner has certified that such individual meets such requirements.[493]

Note that an individual can be certified as "chronically ill" if the individual satisfies any one of these three definitions. Only the first definition has a requirement of "being unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for a period of at least 90 days due to a loss of functional capacity."[494]

Paragraph (c)(2) continues on to define "activities of daily living" as,

> (B) Activities of daily living

[493] I.R.C. § 7702B(c)(2)(A).

[494] I.R.C. § 7702B(c)(2)(A)(i).

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> For purposes of subparagraph (A), each of the following is an activity of daily living:
>
> (i) Eating.
> (ii) Toileting.
> (iii) Transferring.
> (iv) Bathing.
> (v) Dressing.
> (vi) Continence.[495]

A "licensed health care practitioner" is defined in paragraph (c)(4) as "any physician (as defined in section 1861(r)(1) of the Social Security Act) and any registered professional nurse, licensed social worker, or other individual who meets such requirements as may be prescribed by the Secretary."[496]

b. IRS Notice 97-31: IRS Notice 97-31, which was issued in 1997, contains some "safe-harbor definitions" that long-term care insurance companies could rely on regarding the meanings of "substantial assistance," "hands-on assistance," and "standby assistance" for Activities of Daily Living (ADL) trigger purposes and "severe cognitive impairment" and "substantial supervision" for Cognitive Impairment trigger purposes.[497]

c. Case Law Interpreting I.R.C. § 7702B(c)(2): There are few court decisions that help clarify I.R.C. § 7702B(c)(2). One case that may not have much precedential value but considered an important question was an Oregon Tax Court Magistrate Division decision that addressed what is required in order for an opinion to be "certified" by a "licensed health care practitioner." The court said,

> The first question is whether Morison was "certified" as chronically ill by a licensed health care practitioner. The term "certified" is not defined in the applicable code section. Webster's Dictionary defines "certify" as "to attest esp. authoritatively or formally." Webster's Third New Int'l Dictionary 367 (unabridged ed 2002.) The evidence presented

[495] I.R.C. § 7702B(c)(2)(B).

[496] I.R.C. § 7702B(c)(4).

[497] Notice 97-31, 1997-1 C.B. 417.

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was comprised of a letter signed by Morison's nurse and several medical records prepared by nurses. The court finds that the nurse's letter and the medical records provided by Plaintiffs are authoritative and each was prepared by a licensed health care practitioner.

The court is persuaded that those documents satisfy the certification requirement under I.R.C. section 7702B(c)(2).[498]

d. SECURE Act and Final Regulations: The SECURE Act and the final regulations for the SECURE Act provide guidance when determining what is required for a Designated Beneficiary to qualify as an EDB who is Chronically Ill. The applicable Code and final regulation sections require:

1) Certification of Chronic Illness: The Designated Beneficiary must be "chronically ill within the definition of section 7702B(c)(2)...".[499]

I.R.C. § 7702B(c)(2) requires that the individual "has been certified by a licensed health care practitioner" within the preceding 12-month period that the individual satisfies one of the three definitions found in Section 7702B(c)(2)(A).

2) SECURE Act Changes Length of Time Required for Certification Due to Inability to Perform ADLs: In addition, if the individual is determined to be chronically ill because of an inability to perform ADLs (which is the first of the three definitions that can be used to be classified as chronically ill), then the SECURE Act changes the time period of functional inability required.

I.R.C. § 7702B(c)(2)(A)(i) requires that the individual be certified as "being unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for a period of at least 90 days due to a loss of functional capacity,"

The SECURE Act at I.R.C. § 401(a)(9)(E)(ii)(IV) requires that "the requirements of subparagraph (A)(i) thereof shall only be treated as

[498] Donohoe v. Dep't of Revenue, No. TC-MD 150521N, 2016 WL 4446635, at *4 (Or. T.C. Aug. 23, 2016).

[499] Treas. Reg. § 1.401(a)(9)-4(e)(5).

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met if there is a certification that, as of such date, the period of inability described in such subparagraph with respect to the individual is an indefinite one which is reasonably expected to be lengthy in nature".

As a result, in order to satisfy the SECURE Act requirements, in order to be classified as an Eligible Designated Beneficiary who is Chronically Ill under the first definition of a chronically ill individual, the individual must be certified to be unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for a period of time that is an indefinite one which is reasonably expected to be lengthy in nature.

The other two definitions that can be used to qualify as "chronically ill" (I.R.C. §§ 7702B(c)(2)(A)(ii) and (iii)) are unchanged by the SECURE Act. All three of these require a certification by a licensed health care practitioner (as that term is defined in section 7702B(c)(4)), but an individual attempting to qualify as chronically ill under I.R.C. § 7702B(c)(2)(A)(i) must satisfy this additional requirement.

For a beneficiary with an intellectual or developmental disability, the third definition may be the most practical route. It depends on the beneficiary's need for substantial supervision to protect the beneficiary from threats to health and safety due to severe cognitive impairment, not on activities of daily living, and it does not require a Social Security disability determination.[500]

3) Certification Does Not Need to Be Provided to an IRA Trustee, Custodian, or Issuer: While the regulations require that this certification that the Designated Beneficiary is Chronically Ill be provided to the plan administrator of the inherited IRA no later than October 31 of the calendar year following the year of the IRA owner's death,[501] **this does not apply to an IRA**.[502] It continues to apply to other types of retirement plans.

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[500] I.R.C. § 7702B(c)(2)(A)(iii).

[501] Treas. Reg. § 1.401(a)(9)-4(e)(7) and Treas. Reg. § 1.401(a)(9)-4(e)(9) (contains examples illustrating this).

[502] Treas. Reg. § 1.408-8(b)(4)(i). See supra Section III, E.

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However, the certification itself remains part of the definition. As stated in the immediately preceding paragraph, a beneficiary is Chronically Ill only if there is a certification from a licensed health care practitioner.[503] The certification must therefore still be obtained, and it should be kept, because the trustee or the beneficiary will have to prove that the beneficiary was Chronically Ill as of the date of the IRA owner's death if the distribution treatment of the inherited IRA is later questioned.

e. Must a Chronically Ill Individual Be Recertified Every 12 Months?

In order to qualify as "chronically ill" for I.R.C. § 7702B(c)(2) purposes, the last sentence of subparagraph (A) says,

> Such term [i.e., chronically ill individual] shall not include any individual otherwise meeting the requirements of the preceding sentence unless within the preceding 12-month period a licensed health care practitioner has certified that such individual meets such requirements.[504]

It has been questioned whether this means for SECURE Act purposes that a Designated Beneficiary who has been certified as an EDB who is Chronically Ill as of the date of the IRA owner's death must continue to be recertified every twelve months to be able to retain EDB status. Unfortunately, the regulations did not directly address this.

However, an argument can be made that the SECURE Act does not require annual recertification of chronic illness status for an individual to continue to be treated as an EDB who is Chronically Ill. This is based on the following:

> **1)** The SECURE Act and the regulations require that the Designated Beneficiary is eligible to be treated as an Eligible Designated Beneficiary only if the individual meets the requirements to be classified as one of the EDBs on the date the IRA owner died.[505]

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[503] Treas. Reg. § 1.401(a)(9)-4(e)(5).

[504] I.R.C. § 7702B(c)(2)(A).

[505] I.R.C. § 401(a)(9)(E)(ii) ("The determination of whether a designated beneficiary is an eligible designated beneficiary shall be made as of the date of death of the employee."); Treas. Reg. § 1.401(a)(9)-4(e)(1) ("at the time of the employee's death").

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2) The regulations clearly state that the Designated Beneficiary qualifies as an EDB who is Chronically Ill "as of the date of certification from a licensed health care practitioner."[506]

3) The SECURE Act[507] and final regulations[508] eliminate EDB status for a minor child of the IRA owner when the child reaches the age of 21. If Congress wanted EDB status for a Chronically Ill individual to be terminated if the individual did not receive an annual certification of the individual's chronically ill status, that could have easily been stated in the SECURE Act. Also, if the IRS believed this should happen, it could have stated this in the final regulations.

B. Final AMBT Regulations Differ From 2022 Proposed Regulations: The proposed regulations published in 2022 described two types of AMBTs, and referred to them as "type I" and "type II." A type I AMBT was an AMBT where "the terms of the trust provide that it is to be divided immediately upon the death of the [IRA owner] into separate trusts for each beneficiary."[509] This allowed separate account treatment for all beneficiaries of the trust, but in order to qualify for this at least one of the beneficiaries had to qualify as "disabled or chronically ill." Without that, the general rule applied and all beneficiaries of the divided trust would have to use the same Applicable Denominator of the oldest beneficiary of the original trust.

The final regulations published in 2024 no longer use the type I and type II labels. The rules that applied to a type I AMBT now apply to any trust that meets certain conditions, even if there are not any disabled or chronically ill beneficiaries.[510] See Section X, D, 3, above, for an explanation of this.

Generally, what was a type II AMBT in the 2022 proposed regulations is now referred to as an AMBT in the final regulations published in 2024.

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[506] Treas. Reg. § 1.401(a)(9)-4(e)(5).

[507] I.R.C. § 401(a)(9)(E)(iii).

[508] Treas. Reg. § 1.401(a)(9)-4(e)(9) (contains examples).

[509] Prop. Treas. Reg. § 1.401(a)(9)-4(g)(2), 87 Fed. Reg. 10504, 10533 (Feb. 24, 2022); I.R.C. § 401(a)(9)(H)(iv)(I).

[510] Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(B).

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C. Two Exceptions From General Rules for an AMBT:

1. Trust Treated as Having EDB Even if Not All Beneficiaries Are EDBs: The general rules for trusts described above require that all beneficiaries of a trust be one type in order for any beneficiary to be treated the same. For example, if two beneficiaries are Designated Beneficiaries (DB) and one is not a DB, then none of the beneficiaries can be treated as a DB.[511] The same is true if all beneficiaries are not Eligible Designated Beneficiaries (EDB). If this happens, then any of the other EDBs are not treated as an EDB.[512] There are some exceptions to this general rule described above,[513] but one additional exception applies only to an AMBT.

Unlike the general rule, if the IRA distributes to an Applicable Multi-Beneficiary Trust (AMBT), then the trust is treated as having Eligible Designated Beneficiaries even if there are other primary or residual beneficiaries who are not Eligible Designated Beneficiaries.[514]

2. Charitable Organization Can Be a Residual Beneficiary: Effective January 1, 2023, the SECURE 2.0 Act of 2022 allows a qualifying charitable organization to be treated as a Designated Beneficiary of an AMBT.[515] This change is accomplished by two amendments to Code Section 401(a)(9)(H), which was a new provision that was added to the Code by the SECURE Act.

These amendments, which are located in § 337 of Division T of the Consolidated Appropriations Act, 2023, are:

> (a) IN GENERAL.—Section 401(a)(9)(H)(iv)(II) is amended by striking "no individual" and inserting "no beneficiary".
>
> (b) CONFORMING AMENDMENT.—Section 401(a)(9)(H)(v) is amended by adding at the end the following flush sentence:

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[511] Treas. Reg. § 1.401(a)(9)-4(b).

[512] Treas. Reg. § 1.401(a)(9)-4(e)(2)(i).

[513] See supra Sections X and XIV.

[514] Treas. Reg. § 1.401(a)(9)-4(e)(2)(iii).

[515] SECURE 2.0 Act of 2022, Pub. L. No. 117-328, div. T, § 337, 136 Stat. 4459, 5373. Treas. Reg. § 1.401(a)(9)-4(g)(3).

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> "For purposes of the preceding sentence, in the case of a trust the terms of which are described in clause (iv)(II) [author note: this refers to an AMBT], 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)." (Quotation marks in original text).[516]

a. The Organization Described in I.R.C. § 408(d)(8)(B)(i): The organization that is described in Code § 408(d)(8)(B)(i) is:

> an organization described in section 170(b)(1)(A) (other than any organization described in section 509(a)(3) or any fund or account described in section 4966(d)(2)),[517]

I.R.C. § 170(b)(1)(A) contains a list of most charitable organizations, I.R.C. § 509(a)(3) describes supporting organizations, and I.R.C. § 4966(d)(2) describes donor advised funds. See Appendix F at the end of this paper for a copy of these Code Sections.

b. Practical Effects of This Provision:

1) Since only Disabled or Chronically Ill EDBs can receive distributions from an inherited IRA held in an AMBT while any of them are living,[518] a charity can only be a residual beneficiary. Of course, an individual or multiple people can also be residual beneficiaries.

2) Any charitable organization described in § 170(b)(1)(A), other than supporting organizations and donor advised funds, can be a qualifying residual Designated Beneficiary of an AMBT.

D. Who Can Be a Designated Beneficiary of an AMBT: While it is necessary that an individual who qualifies as an Eligible Designated Beneficiary (EDB) who is Disabled or

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[516] Id.

[517] I.R.C. § 408(d)(8)(B)(i).

[518] Treas. Reg. § 1.401(a)(9)-4(g)(1)(iii).

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Chronically Ill be a beneficiary of an AMBT, that does not mean there cannot be other Designated Beneficiaries of the trust who do not qualify for this status.

However, these other Designated Beneficiaries cannot receive any of the distributions from the inherited IRA, or any proceeds from investing those distributions after they are made from the IRA to the trust, while a beneficiary who is an EDB who is Disabled or Chronically Ill is living. Those can only be received by the EDBs who are Disabled or Chronically Ill.

Instead, these other Designated Beneficiaries, including a charitable organization that qualifies as a Designated Beneficiary, can receive income or principal from any assets being held in the trust that are NOT an inherited IRA or the proceeds received from investing IRA distributions retained in the trust. However, if this is attempted, the trustee must be extremely careful to fully document that none of the IRA or its proceeds are distributed to the other Designated Beneficiaries. If any distributions are made from the trust to a beneficiary who is not an EDB who is Disabled or Chronically Ill, there is a risk that if challenged, the burden will be on the trustee to prove the source of these distributions were not from the IRA or proceeds received from investing distributions out of the IRA to the trust. Failure to accomplish this could result in the trust not qualifying as an AMBT.

In addition, these other Designated Beneficiaries can be residual beneficiaries of the inherited IRA and its proceeds.

E. Early Termination Provisions: Third-party supplemental needs trusts often contain one or both of two provisions that are typically referred to as "savings clauses." The first directs the trustee not to make distributions that would reduce or eliminate the beneficiary's means-tested benefits unless doing so is in the beneficiary's best interest. That is a limit on distributions, not a termination provision, and it does not affect whether a trust is an AMBT. The second is an early termination provision, which allows the trustee to end the trust, or the beneficiary's interest in it, before the beneficiary's death. For example, such a provision might apply if the trust assets would otherwise be counted as a resource of the beneficiary's, or if the beneficiary no longer needs means-tested benefits.

The final regulations permit an early termination provision in an AMBT, but only if the requirement that no other beneficiary has any right to the inherited IRA until the death of all of the Disabled or Chronically Ill beneficiaries continues to apply.[519] As a result, if the trust is terminated during the lifetime of a Disabled or Chronically Ill beneficiary, the inherited IRA and any proceeds from it may go only to, or be held only for, a Disabled or Chronically Ill beneficiary identified in the trust. **A provision that would distribute the**

[519] Treas. Reg. § 1.401(a)(9)-4(g)(2).

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inherited IRA or its proceeds to the remainder beneficiaries upon early termination prevents the trust from qualifying as an AMBT.

An AMBT will almost always be a third-party trust.[520] For SSI purposes, a third-party trust is evaluated under POMS SI 01120.200. Under that section, trust principal is a countable resource of the beneficiary if the beneficiary (or the beneficiary's spouse) has the legal authority to revoke or terminate the trust and use the trust assets to meet the beneficiary's shelter needs, or can direct the use of the trust funds for those needs.[521] The POMS also recognizes that a trustee may hold the power to terminate a trust,[522] and the trustee's actions are not treated as the beneficiary's actions.[523] Thus, for SSI eligibility purposes, in a third-party trust, the question is whether the beneficiary can terminate the trust and obtain the trust assets.[524] A termination power held by the trustee does not by itself make a third-party trust a countable resource. But if the trust assets are actually distributed to the beneficiary, the ordinary SSI income and resource rules apply to them.[525]

A regional counsel opinion illustrates the point. The trust at issue was a third-party supplemental needs trust that allowed the trustee, if the trust rendered the beneficiary ineligible for public benefits, to terminate the trust and distribute the trust property as if the beneficiary had died, which means to the remainder beneficiaries, not to the beneficiary. The opinion concluded that the trust was not a countable resource, noting that although the trustee had discretion to terminate the trust, nothing in the trust instrument gave the beneficiary the power to revoke or terminate it.[526] **That same termination**

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[520] It is possible for an AMBT to be a first-party trust if the IRA owner was the beneficiary's spouse and the trust was established by the deceased spouse but not established under the deceased spouse's will. However, this is uncommon. See 42 U.S.C. § 1396p(d)(2)(A), (h)(1).

[521] Soc. Sec. Admin., Program Operations Manual System (POMS) SI 01120.200D.1.a (rev. May 6, 2024); see 20 C.F.R. § 416.1201(a) (resources are assets that could be converted to cash "to be used for his or her support and maintenance"). The POMS still refers to "food or shelter" needs, but SSA removed food from in-kind support and maintenance effective September 30, 2024. Omitting Food From In-Kind Support and Maintenance Calculations, 89 Fed. Reg. 21199 (Mar. 27, 2024).

[522] POMS SI 01120.200D.1.b.3.

[523] POMS SI 01120.200D.1.b.2.

[524] POMS SI 01120.200B.11.

[525] POMS SI 01120.200E.1.a.

[526] Soc. Sec. Admin., POMS PS 01825.006.EE, PS 19-005, Opinion: Evaluation of a Trust as a Countable Resource – NH Abramson (Sept. 18, 2018).

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provision, however, would prevent a trust holding an inherited IRA from qualifying as an AMBT, because it would allow the inherited IRA and its proceeds to pass to the remainder beneficiaries during the Disabled or Chronically Ill beneficiary's lifetime.

Medicaid follows the same approach. The federal Medicaid trust statute applies only to a trust established with the beneficiary's own assets, including the assets of the beneficiary's spouse (unless established by the spouse's will). Such trusts include first-party special needs trusts and pooled trusts under 42 U.S.C. § 1396p(d)(4)(A) and (C).[527] The POMS restrictions on early termination provisions likewise apply only to first-party trusts. They permit early termination only if the State is reimbursed first, no one other than the beneficiary benefits, and someone other than the beneficiary holds the power to terminate.[528] Neither the statute nor these POMS restrictions applies to a third-party trust.[529] Instead, in most states, for aged, blind, and disabled individuals, the state Medicaid agency must generally apply the SSI methodologies, meaning a third-party trust is evaluated for Medicaid under the same SSI rules described above.[530] Because some states use more restrictive criteria, the treatment of a third-party trust should be confirmed under the law of the state where the beneficiary receives benefits.[531]

For a third-party supplemental needs trust, the limit on an early termination provision comes from the AMBT rules, not from the SSI or Medicaid rules. A common third-party provision allowing the trustee to terminate the trust and distribute to the remainder beneficiaries does not create an SSI problem, as the regional counsel opinion described above illustrates.[532] Applied to the portion of the trust holding an inherited IRA, however, that provision prevents the trust from qualifying as an AMBT. For that portion, the termination provision should provide that, during the lifetime of the Disabled or Chronically Ill beneficiary, the inherited IRA and its proceeds may be distributed only to, or held only for, that beneficiary. Because a distribution to the beneficiary will generally count for SSI purposes, a termination provision of this kind is most useful where the reason for terminating is that the beneficiary no longer needs means-tested benefits.

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[527] 42 U.S.C. § 1396p(d)(2)(A), (d)(4)(A), (d)(4)(C), (h)(1).

[528] POMS SI 01120.199.F.1.

[529] POMS SI 01120.201A.2 (rev. May 23, 2022); POMS SI 01120.200J.1.b.

[530]42 C.F.R. § 435.601(a), (b)(2), (d); 42 C.F.R. § 435.121.

[531] POMS SI 01120.200M.1.a.

[532] See POMS PS 01825.006.EE (PS 19-005).

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F. Annual Required Minimum Distributions for an AMBT: If the trust qualifies as an AMBT, then the Life Expectancy Rule[533] applies.[534] If the trust identifies only one Disabled or Chronically Ill beneficiary, that beneficiary's life expectancy is used to calculate the RMDs.[535] In an AMBT, only an individual who is Disabled or Chronically Ill can receive the benefit of distributions from the inherited IRA, and any proceeds derived from investing those distributions, while there are any beneficiaries of the trust who are EDBs who are Disabled or Chronically Ill.[536]

If the AMBT is an accumulation trust with more than one primary beneficiary who is Disabled or Chronically Ill, the annual RMDs from the inherited IRA to the trustee of the AMBT are based on the life expectancy of the oldest of those beneficiaries.[537] This applies even if there are older ODBs or EDBs who are not Disabled or Chronically Ill who are beneficiaries of the trust's non-IRA assets, or residual beneficiaries of the IRA share. The preamble to the final regulations describes this as follows,

> [I]f the employee's beneficiary is an applicable multi-beneficiary trust, then only the disabled and chronically ill beneficiaries of the trust are taken into account in determining the oldest designated beneficiary.[538]

Whether the AMBT has one Disabled or Chronically Ill beneficiary or more than one, if the IRA owner died on or after the owner's Required Beginning Date, the Applicable Denominator is the greater of that beneficiary's (or the oldest such beneficiary's) life expectancy and the IRA owner's remaining "ghost" life expectancy.[539]

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[533] Treas. Reg. § 1.401(a)(9)-3(c)(4).

[534] Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(C).

[535] Treas. Reg. § 1.401(a)(9)-4(e)(2)(iii).

[536] Treas. Reg. § 1.401(a)(9)-4(g)(1)(iii).

[537] Treas. Reg. § 1.401(a)(9)-5(f)(1)(ii).

[538] Treas. Reg. Preamble § I.E.3.d, 89 Fed. Reg. 58886, 58898 (July 19, 2024).

[539] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii), (f)(1)(ii).

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G. End Date of an AMBT: The death of the last Disabled or Chronically Ill beneficiary of an AMBT triggers a ten-year payout of the IRA.[540] Annual RMDs continue during that ten-year period, calculated using the deceased beneficiary's remaining life expectancy (the same Applicable Denominator, reduced by one each year).[541]

To illustrate this, return to the Jane, Jack and Jill example in Section XIV, I, above. Assume the trust terms identify Jack as a beneficiary who is Disabled, and that Jack was Disabled as of Jane's death. The trust's interest in the inherited IRA is an AMBT: it has more than one beneficiary, all of its beneficiaries are Designated Beneficiaries, and Jill has no right to the IRA or its proceeds until Jack dies.[542] Jack is treated as an Eligible Designated Beneficiary even though Jill is not,[543] and only Jack's life expectancy is used to calculate the annual RMDs (or, if Jane died on or after her Required Beginning Date, the greater of Jack's life expectancy and Jane's remaining "ghost" life expectancy).[544]

After Jack's death, annual RMDs must continue to be distributed from the inherited IRA to the trust, calculated using the same Applicable Denominator that applied to Jack, reduced by one for each year after his death, and the inherited IRA must be fully distributed by December 31 of the year containing the 10th anniversary of Jack's death.[545] Jill then receives those distributions, and whatever remains, under the terms of the trust.

H. Chart of AMBT Distribution Rules: The following chart summarizes the RMD and End Date rules for an AMBT.[546]

[540] Treas. Reg. § 1.401(a)(9)-5(e)(3), (f)(2)(iii).

[541] Treas. Reg. § 1.401(a)(9)-5(f)(2)(iii), (e)(3); Treas. Reg. § 1.401(a)(9)-4(f)(6)(i) (Example 1).

[542] Treas. Reg. § 1.401(a)(9)-4(g)(1).

[543] Treas. Reg. § 1.401(a)(9)-4(e)(2)(iii).

[544] Treas. Reg. § 1.401(a)(9)-5(f)(1)(ii), (d)(1)(ii).

[545] Treas. Reg. § 1.401(a)(9)-5(f)(2)(iii), (e)(3); Treas. Reg. § 1.401(a)(9)-4(f)(6)(i) (Example 1).

[546] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii), (f)(1)(ii), (f)(2)(iii).

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	IRA Owner Died Before RBD	IRA Owner Died On or After RBD
Annual RMDs	Life expectancy of the oldest Disabled or Chronically Ill beneficiary identified in the trust	Greater of: (i) life expectancy of the oldest Disabled or Chronically Ill beneficiary, or (ii) IRA owner's "ghost" life expectancy
End Date	Earlier of: (i) end of 10th year after death of the last Disabled or Chronically Ill beneficiary, or (ii) final year of that life expectancy	Earlier of: (i) end of 10th year after death of the last Disabled or Chronically Ill beneficiary, or (ii) final year of the Applicable Denominator

XVI. Example Illustrating Some of These Rules

To illustrate the effect of some of these trust rules applying to inherited IRAs based on the final 2024 regulations and the proposed 2024 regulations, if applicable, consider the following example.

1. Facts: An IRA owner died on May 1, 2026, the year in which he would have attained age 75, after his Required Beginning Date, and named his revocable living trust as the beneficiary of an IRA. That trust instructs the trustee to divide the trust assets, including the IRA, into three equal separate shares: one for the benefit of his stepchild (Child 2) and each of his two children (Child 1 and Child 3). Each child's share is distributed to a trust established for the child's benefit.

If Child 1 or Child 2 does not survive IRA owner, or dies while the IRA is held in trust for their benefit, the deceased child's share is distributed to IRA owner's Sister, if she survives the IRA owner and deceased child; and if she does not, then the deceased child's share is divided equally among the other two children's shares.

If Child 3 does not survive IRA owner or dies while there are assets in trust for Child 3, then Child 3's share divides 50% to IRA owner's Sister, if she survives Child 3, and the remainder, or all if Sister does not survive, to a local § 501(c)(3) public charity serving individuals with Down syndrome.

On the date of the IRA owner's death, Child 1 is 45 years old and not Disabled or Chronically Ill, Child 2 (IRA owner's stepchild) is 15 years old and not Disabled or Chronically Ill, and Child 3 is 48 years old, severely disabled, and receiving assistance from SSI and Medicaid. IRA owner's Sister is age 66 and not Disabled or Chronically

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Ill. The charitable organization named as a beneficiary of Child 3's trust is a charitable organization described in I.R.C. § 408(d)(8)(B)(i).[547]

For inherited IRA purposes, Child 1 is a "Designated Beneficiary who is not an Eligible Designated Beneficiary (an ODB)," Child 2 is an "Eligible Designated Beneficiary who is a minor child of the IRA owner" (despite being a stepchild of the IRA owner[548]), and Child 3 is an "Eligible Designated Beneficiary who is Disabled." Sister is an "Eligible Designated Beneficiary who is not more than 10 years younger" than IRA owner. The charitable organization is deemed to be a Designated Beneficiary of Child 3's trust because it meets the requirements of Treas. Reg. § 1.401(a)(9)-4(g)(3). See the description of Child 3's trust, below, for an explanation.

Although not required for an IRA, the trustee gave the custodian a copy of the living trust. Through the authority granted in the living trust, the trustee establishes the three separate trusts, one for each child. As directed by the terms of the living trust, the trustee instructs the IRA administrator to divide the IRA into three equal inherited IRAs and, via a trustee-to-trustee transfer, these inherited IRAs are transferred into each child's respective trust by December 31, 2027 (the year following the year when the IRA owner died).

a. Analysis of IRA Owner's Living Trust:

1) The IRA owner died after his Required Beginning Date,[549] so the rules applying to IRAs for owners who die after their Required Beginning Date are applied.

2) The IRA owner's trust and each subtrust established for the IRA owner's children qualify as see-through trusts.[550] The beneficiaries of

[547] See infra Section XVI, 2,c for the analysis of Child 3's trust to understand the significance of this.

[548] "Child" includes an individual who is a naturally born child, legally adopted, stepchild, or eligible foster child. Treas. Reg. § 1.401(a)(9)-4(e)(1)(ii) and I.R.C. § 152(f)(1).

[549] Treas. Reg. § 1.401(a)(9)-2(b).

[550] This is because the living trust satisfies the requirements of Treas. Reg. § 1.401(a)(9)-4(f)(2): (1) the trust is valid under state law, (2) the trust is irrevocable because the IRA owner died, and (3) the trust beneficiaries are identifiable. The subtrusts also qualify as see-through trusts and, therefore, the beneficiaries of those trusts can be identified (Treas. Reg. § 1.401(a)(9)-4(f)(4)). Note that the documentation requirement of Treas. Reg. § 1.401(a)(9)-4(f)(2)(iv) and (h) does not apply to an IRA (Treas. Reg. § 1.408-8(b)(4)(ii)).

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each subtrust are identified in the further description of each subtrust, below.

3) Because the living trust instructs the trustee to divide the trust assets into separate trusts for each beneficiary, each separate inherited IRA that is established for the benefit of each of the children is treated separately.[551] This means that each child's trust is analyzed using only its own beneficiaries when determining its RMDs and End Date.

4) Because each separate inherited IRA is treated separately, whether each beneficiary is a Designated Beneficiary is determined separately for each child's trust, not for the living trust as a whole.[552]

5) For IRA purposes, the primary beneficiaries of the IRA owner's living trust are the IRA owner's three children (one of whom is a stepchild). The residual beneficiaries are Sister, all three children, and the charitable organization.

2. Description and Analysis of Each Child's Trust:

a. Child 1's Trust: Child 1 is 45 years old and not Disabled or Chronically Ill. The Trustee is instructed to hold the trust assets in trust until Child 1 attains age 60, then distribute remaining assets outright to Child 1. If Child 1 dies before age 60, the trust terminates and distributes to IRA owner's Sister, if she survives Child 1. If Sister does not survive Child 1, the remaining trust assets are divided equally and added to the shares established for Child 2 and Child 3. While in trust the income and assets can be used for the health, education, maintenance, and support of Child 1. In

[551] Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(B). See supra Section X, D, 3 (contains description of requirements for the trusts to qualify for separate account treatment).

[552] Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(B) (the rules of §§ 1.401(a)(9)-4(f) and 1.401(a)(9)-5 "will apply separately to each separate trust"). Some of the facts relied upon for this statement are not revealed until the upcoming analysis of each child's trust. After that analysis, all countable beneficiaries are Designated Beneficiaries. The analysis of each child's trust follows. The IRA owner's three children and Sister are living individuals, thus satisfying Treas. Reg. § 1.401(a)(9)-4(a)(1). The charitable organization is a Designated Beneficiary only of Child 3's trust, which is an AMBT, because Treas. Reg. § 1.401(a)(9)-4(g)(3) applies only for purposes of determining whether a trust is an AMBT. Treas. Reg. § 1.401(a)(9)-4(g)(1)(i).

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addition, all distributions received from an inherited IRA must be distributed to Child 1 upon receipt by the Trustee.

1) Analysis of Child 1's Trust:

A) All beneficiaries of Child 1's trust other than the charitable organization are Designated Beneficiaries. The charitable organization's status does not matter, because it is a residual beneficiary and is disregarded (see D) below).[553]

B) Child 1 is the only primary beneficiary.

C) Residual beneficiaries are Sister, Child 2, Child 3, and the charitable organization.

D) Child 1's trust is a conduit trust because all distributions received from an inherited IRA must be distributed to Child 1 upon receipt by the Trustee.[554] This means only Child 1, the sole primary beneficiary, is taken into account when determining RMDs and the End Date.[555] All residual beneficiaries are disregarded (ignored).

2) Annual Distributions: Annual RMDs must be made to Child 1.[556] The RMDs are based on the greater of (i) Child 1's life expectancy[557] or (ii) the deceased IRA owner's remaining ("ghost") life

[553] All three of IRA owner's children and the owner's Sister are living individuals, thus satisfying Treas. Reg. § 1.401(a)(9)-4(a)(1). The charitable organization is not a Designated Beneficiary of Child 1's trust, because Treas. Reg. § 1.401(a)(9)-4(g)(3) applies only for purposes of determining whether a trust is an AMBT (Treas. Reg. § 1.401(a)(9)-4(g)(1)(i)), and Child 1's trust is not an AMBT. Because Child 1's trust is a conduit trust, however, the residual beneficiaries, including the charitable organization, are disregarded. Treas. Reg. § 1.401(a)(9)-4(f)(6)(i). This is more fully explained in the analysis of Child 3's trust.

[554] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii)(A).

[555] Treas. Reg. § 1.401(a)(9)-4(f)(6)(i) (contains an example of a conduit trust).

[556] See supra Section II, D (contains explanation why this is required).

[557] Child 1's life expectancy is used rather than the life expectancy of the oldest beneficiary of the IRA owner's living trust because the IRA owner's living trust did not give the trustee discretion regarding how to divide the IRA and the living trust terminated and distributed Child 1's portion of the IRA to Child 1's trust, thus satisfying the requirements of Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(B).

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expectancy.[558] Since Child 1 is younger than the IRA owner, Child 1's life expectancy is used to determine the annual RMDs.

3) End Date: The End Date of Child 1's inherited IRA is December 31, 2036, which is the end of the year containing the 10th anniversary of the IRA owner's death.[559] Since this is a conduit trust, the total remaining value of the inherited IRA on this date will be distributed to Child 1. Other assets in Child 1's trust will continue to be held in the trust until Child 1 reaches age 60.

b. Child 2's Trust: Child 2, the IRA owner's stepchild, is 15 years old and not Disabled or Chronically Ill. The Trustee is instructed to hold all but the inherited IRA in trust until Child 2 attains age 60, then distribute remaining assets outright to Child 2. While in trust the income and assets can be used for the health, education, maintenance, and support of Child 2. Annual RMDs from the inherited IRA can be accumulated in the trust, and the remainder of the IRA, plus IRA distributions that have been accumulated and the investment proceeds derived from them, must be fully distributed to Child 2 by December 31 of the year (i) when Child 2 attains age 31, or (ii) the year following the year when the IRA owner died, if later. If Child 2 dies while assets remain in the trust, all trust assets distribute to IRA owner's Sister, if she survives Child 2. If Sister does not survive Child 2, the remaining trust assets are divided equally and added to the shares established for Child 1 and Child 3.

1) Analysis of Child 2's Trust:

A) All beneficiaries of Child 2's trust other than the charitable organization are Designated Beneficiaries. The charitable organization's status does not matter, because all residual beneficiaries are disregarded (see C) below).[560] Child 2

[558] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

[559] Treas. Reg. § 1.401(a)(9)-5(e)(2).

[560] All three of IRA owner's children and the owner's Sister are living individuals, thus satisfying Treas. Reg. § 1.401(a)(9)-4(a)(1). The charitable organization is not a Designated Beneficiary of Child 2's trust, because Treas. Reg. § 1.401(a)(9)-4(g)(3) applies only for purposes of determining whether a trust is an AMBT (Treas. Reg. § 1.401(a)(9)-4(g)(1)(i)), and Child 2's trust is not an AMBT. It does not matter, however, because the charitable organization, like the other residual beneficiaries, can take only if Child 2 dies before full distribution

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is an Eligible Designated Beneficiary because Child 2 is a minor child of IRA owner.[561]

B) Child 2 is the only primary beneficiary.[562] Residual beneficiaries are Sister, Child 1, Child 3, and the charitable organization.[563]

C) This is an accumulation trust.[564] Normally the residual beneficiaries who are not disregarded would have to be taken into account when determining who are the Designated Beneficiaries or Eligible Designated Beneficiaries of the trust. However, because the trust directs the trustee to distribute the full remaining and accumulated IRA and the investment proceeds derived from them, to Child 2 by the later of (i) the end of the calendar year following the calendar year of the IRA owner's death, and (ii) the end of the 10th year following the calendar year when Child 2 attains age 21, all residual beneficiaries are disregarded (ignored) for purposes of determining who is a beneficiary of the trust.[565]

2) Annual Distributions: Annual RMDs must be distributed from the inherited IRA to Child 2's trust because the IRA owner died after his Required Beginning Date.[566] Because Child 2 is an Eligible Designated Beneficiary,[567] the End Date is determined as described in paragraph 3) below rather than being ten years after the IRA owner's

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and is therefore disregarded. Treas. Reg. § 1.401(a)(9)-4(f)(3)(ii)(B). This is more fully explained in the analysis of Child 3's trust.

[561] I.R.C. § 152(f)(1)(A)(i) and Treas. Reg. § 1.401(a)(9)-4(e)(1)(ii).

[562] Treas. Reg. § 1.401(a)(9)-4(f)(3)(i)(A).

[563] Treas. Reg. § 1.401(a)(9)-4(f)(3)(i)(B).

[564] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii)(B).

[565] Treas. Reg. § 1.401(a)(9)-4(f)(3)(ii)(B).

[566] Treas. Reg. § 1.401(a)(9)-5(d)(1)(i). See supra Section II, D (contains an explanation why this is required).

[567] Treas. Reg. § 1.401(a)(9)-4(e)(1)(ii); Treas. Reg. § 1.401(a)(9)-5(d)(1)(i) (last two sentences), (e)(3), (e)(4).

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death. The RMDs are based on Child 2's life expectancy. There are two reasons for this:

A) Child 2's trust requires the trustee to distribute the inherited IRA to Child 2 by the later of (i) the end of the calendar year following the calendar year of the IRA owner's death, and (ii) the end of the 10th year following the calendar year when Child 2 attains age 21. Therefore, the residual beneficiaries are disregarded (ignored),[568] and

B) The IRA was first paid to the IRA owner's living trust and that trust (i) did not give the trustee discretion regarding how to divide the IRA, (ii) terminated, and (iii) distributed Child 2's portion of the IRA to Child 2's separate trust by December 31, 2027. As a result, Child 2's trust receives separate account treatment,[569] meaning Child 2's life expectancy is used to determine the Applicable Denominator to calculate the annual RMDs for Child 2's trust. Because the IRA owner died after his Required Beginning Date, the Applicable Denominator is the greater of Child 2's remaining life expectancy and the IRA owner's remaining ("ghost") life expectancy.[570] Since Child 2 is younger than the IRA owner, Child 2's life expectancy is used.

3) End Date: The End Date of Child 2's inherited IRA is the earlier of the end of the calendar year that contains the 10th anniversary of the date Child 2 (i) attains the age of 21, or (ii) dies.[571] By this date the inherited IRA in Child 2's trust must be distributed to or for the benefit of Child 2 (if living; or the residual beneficiary if Child 2 is not living).[572] The remaining assets in Child 2's trust will remain in trust for Child 2 until Child 2 turns 60 years of age.

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[568] Treas. Reg. § 1.401(a)(9)-4(f)(3)(ii)(B).

[569] Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(B).

[570] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

[571] Treas. Reg. § 1.401(a)(9)-5(e)(1), (3), (4).

[572] Treas. Reg. § 1.401(a)(9)-4(f)(3)(ii)(B).

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c. Child 3's Trust: Child 3 is 48 years old, severely disabled, and receiving assistance from SSI and Medicaid. The Trustee is directed to accumulate income and distribute income and principal as needed for Child 3's special needs. Upon Child 3's death, any remaining trust assets are to be divided into two equal shares. One share is to be distributed to the IRA owner's Sister, who was age 66 when the IRA owner died. The second share, or both shares if the IRA owner's Sister does not survive Child 3, is to be distributed to a local § 501(c)(3) public charity serving individuals with Down syndrome.

1) Analysis of Child 3's Trust: This is a discretionary third-party supplemental needs trust. As such, the assets in this trust will not count as available resources for Child 3's eligibility for SSI and Medicaid benefits. The trust is an accumulation trust rather than a conduit trust for the same reason. A conduit trust would have to pass every RMD through to Child 3, which could reduce or eliminate Child 3's SSI and Medicaid benefits.[573]

A) Child 3 qualifies as an Eligible Designated Beneficiary who is Disabled.[574] This is because the Social Security Administration has determined that Child 3 is disabled (Child 3 receives SSI), and that determination was in effect on the date of the IRA owner's death.[575] Although evidence of this need not be given to the IRA custodian, it should be kept in the trust's file.[576]

B) Child 3's trust is an Applicable Multi-Beneficiary Trust (AMBT) because:

1) There is more than one beneficiary (Child 3, Sister, and the charitable organization);

2) All beneficiaries are Designated Beneficiaries:

[573] See supra Section VII, D, 3.

[574] Treas. Reg. § 1.401(a)(9)-4(e)(1)(iii).

[575] Treas. Reg. § 1.401(a)(9)-4(e)(4)(iv).

[576] See supra Section XV, A, 2, d, 3.

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i) Child 3 and the IRA owner's Sister are individuals who are living on the day the IRA owner died,[577] and

ii) The local § 501(c)(3) public charity serving individuals with Down syndrome is a charitable organization described in I.R.C. § 408(d)(8)(B)(i).[578]

While the general rule is that a charitable organization does not qualify as a Designated Beneficiary because it is not human and does not have a life expectancy,[579] the rules are different for an AMBT. This is because of Section 337 of the SECURE 2.0 Act of 2022.[580] This Section modifies the general rule for an AMBT by declaring that as of January 1, 2023, a qualifying charitable organization "shall be treated as a designated beneficiary" of an AMBT.

3) The trust provisions identify one or more primary beneficiaries of the trust who qualify as Disabled or Chronically Ill (i.e., Child 3), and

4) No beneficiary other than an Eligible Designated Beneficiary (EDB) who is Disabled or Chronically Ill (i.e., Child 3) will be able to receive any of the inherited IRA until all EDBs who are Disabled or Chronically Ill (i.e., Child 3) are no longer living.[581]

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[577] Treas. Reg. § 1.401(a)(9)-4(a)(1).

[578] Treas. Reg. § 1.401(a)(9)-4(g)(3).

[579] I.R.C. § 401(a)(9)(E)(i); Treas. Reg. § 1.401(a)(9)-4(b).

[580] SECURE 2.0 Act of 2022, Pub. L. No. 117-328, div. T, § 337, 136 Stat. 4459, 5373. The SECURE 2.0 Act of 2022 was signed into law on December 29, 2022, as Division T of the Consolidated Appropriations Act, 2023.

[581] I.R.C. § 401(a)(9)(H)(iv)(II); Treas. Reg. § 1.401(a)(9)-4(g)(1)(ii) and (iii).

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C) Child 3 is the only primary beneficiary.[582] Residual beneficiaries are Sister and the local § 501(c)(3) public charity serving individuals with Down syndrome.[583]

D) This is an accumulation trust.[584] The residual beneficiaries (Sister and the charitable organization) therefore are taken into account in determining whether the trust qualifies as an AMBT, and each of them must be a Designated Beneficiary, as described in B) above.[585] However, because Child 3's trust is an AMBT, and Child 3 is the only beneficiary of this trust who qualifies as an EDB who is Disabled, only Child 3 is taken into account when determining the Applicable Denominator and the End Date. Sister and the charitable organization are not.[586]

2) Annual Distributions: Annual RMDs are required because the IRA owner died after his Required Beginning Date.[587] Because Child 3 is an Eligible Designated Beneficiary (EDB),[588] those RMDs are not limited to the ten years following the IRA owner's death, as they are for Child 1's trust; instead, the End Date is determined as described in paragraph 3) below. The RMDs are calculated using the Applicable Denominator based on Child 3's life expectancy. This is because:

A) The IRA was first paid to the IRA owner's living trust and that trust (i) did not give the trustee discretion regarding how

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[582] Treas. Reg. § 1.401(a)(9)-4(f)(3)(i)(A).

[583] Treas. Reg. § 1.401(a)(9)-4(f)(3)(i)(B).

[584] Treas. Reg. § 1.401(a)(9)-4(f)(1)(ii)(B).

[585] Treas. Reg. § 1.401(a)(9)-4(f)(3)(i)(B); Treas. Reg. § 1.401(a)(9)-4(g)(1)(i).

[586] Treas. Reg. § 1.401(a)(9)-4(g)(1)(ii); Treas. Reg. § 1.401(a)(9)-5(f)(1)(ii) (Applicable Denominator), (f)(2)(iii) (End Date).

[587] Treas. Reg. § 1.401(a)(9)-5(d)(1)(i). See supra Section II, D (contains an explanation why this is required).

[588] Treas. Reg. § 1.401(a)(9)-4(e)(1)(iii), (e)(2)(iii); Treas. Reg. § 1.401(a)(9)-5(d)(1)(i) (last two sentences), (e)(3), (f)(2)(iii).

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to divide the IRA, (ii) terminated, and (iii) distributed Child 3's portion of the IRA to Child 3's separate trust by December 31, 2027. As a result, Child 3's trust receives separate account treatment,[589] and the life expectancy of the beneficiaries of this trust (as opposed to the beneficiaries of the IRA owner's living trust) is used to determine the Applicable Denominator.

B) Even though not all beneficiaries are EDBs (only Child 3 and Sister are EDBs, the charitable organization is only treated as a DB) and the general rule says the trust should be treated as though there were no EDBs,[590] because this is an AMBT the beneficiary who is an EDB who is Disabled (i.e., Child 3) is treated as an EDB,[591] and therefore the Life Expectancy Rule is used.

C) Because Child 3's trust is an AMBT, only the primary beneficiaries identified in the trust as Disabled or Chronically Ill (here, only Child 3) are taken into account in determining the oldest beneficiary for purposes of the Applicable Denominator. Sister and the charitable organization are not.[592] Because the IRA owner died after his Required Beginning Date, the Applicable Denominator is the greater of Child 3's remaining life expectancy and the IRA owner's remaining ("ghost") life expectancy.[593] Since Child 3 is younger than the IRA owner, Child 3's life expectancy is used.

For example, assuming both the IRA owner's and Child 3's birthdays fall on or before May 1, Child 3 will be age 49 in 2027, the year following the IRA owner's death. The Single Life Table factor for age 49 is 37.1, which is greater than the IRA owner's remaining "ghost" life expectancy of 13.8 (14.8 in the

[589] Treas. Reg. § 1.401(a)(9)-8(a)(1)(iii)(B).

[590] Treas. Reg. § 1.401(a)(9)-4(e)(2)(i).

[591] Treas. Reg. § 1.401(a)(9)-4(e)(2)(iii).

[592] Treas. Reg. § 1.401(a)(9)-5(f)(1)(ii); Treas. Reg. § 1.401(a)(9)-4(g)(1)(ii).

[593] Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii).

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year of death, reduced by one). If Child 3's inherited IRA is worth $400,000 on December 31, 2026, the 2027 RMD is $10,781.67 ($400,000 ÷ 37.1).

3) End Date: The End Date of Child 3's inherited IRA is the earlier of (i) December 31 of the final year of Child 3's life expectancy, or (ii) December 31 of the year that contains the 10th anniversary of the death of Child 3.[594]

This applies even if the IRA owner's Sister survived Child 3. Sister is an EDB because she was not more than 10 years younger than the IRA owner. Normally, this would mean Sister can draw the IRA out over her Life Expectancy. However, that only applies if Sister had been a primary beneficiary of the inherited IRA. Because Sister is a residual beneficiary of this IRA, the general rule does not apply. Instead, Treas. Reg. § 1.401(a)(9)-5(f)(2)(iii) requires the remaining IRA to be fully distributed by December 31 of the year containing the 10th anniversary of Child 3's death, with annual RMDs continuing in the meantime. There is no exception if the residual beneficiary happens to be an EDB.[595]

XVII. Random Final Thoughts

A. After an estate plan is designed, then consider how to treat any IRAs. Is there a beneficiary who would be a better recipient of the IRA than other beneficiaries? Or a beneficiary who should not receive any of the IRA (because, perhaps, the beneficiary is much older than other beneficiaries)?

B. If the estate plan includes distributing an IRA to a trust with multiple beneficiaries, and if it would be better to allow each beneficiary to be able to use their own life expectancy to calculate any RMDs that the IRA may have to distribute (i.e., if separate account treatment is desired), then the trust must direct how the IRA is to be divided among the beneficiaries. If the trustee has discretion to allocate some or all of the IRA to one or more beneficiaries, or trusts for beneficiaries, the life expectancy of the oldest Designated Beneficiary of the trust receiving the IRA will be used to determine RMDs for all beneficiaries, even after the IRA is divided and distributed to the beneficiaries.

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[594] Treas. Reg. § 1.401(a)(9)-5(f)(2)(iii).

[595] I.R.C. § 401(a)(9)(H)(iii).

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C. If an IRA is distributing to a trust for the benefit of an individual, then consider putting language in the trust document that requires the establishment of (or allows the trustee discretion to establish) a subtrust in the beneficiary's trust to hold the IRA. Doing this allows control of how the IRA will be treated no matter what the distribution provisions are in the trust. It also isolates all IRA distributions, plus the proceeds received when accumulated IRA distributions are invested, so they can be traced and documented that they were distributed appropriately.

D. If an IRA distributes to an accumulation trust, the residual beneficiaries will be taken into account when determining how the IRA must be distributed unless (i) the trust requires the IRA to be fully distributed to a young primary beneficiary by the later of the end of the year following the year of the IRA owner's death or the end of the year containing the 10th anniversary of the date that beneficiary turns age 21, or (ii) the trust is an AMBT, in which case the residual beneficiaries still must be Designated Beneficiaries but are disregarded when determining the Applicable Denominator and End Date. Carefully think through who those residual beneficiaries should be and design the estate plan accordingly. (See Section XIV, H, 2, c).

E. On the other hand, if an IRA distributes to a conduit trust, then only the primary beneficiaries are considered when determining how the IRA must be distributed.

F. Keep in mind that upon the death of the last Disabled or Chronically Ill beneficiary of an AMBT, any remaining IRA must be distributed by the end of the 10th year following the beneficiary's death and RMDs must be paid using the life expectancy of the deceased Disabled or Chronically Ill beneficiary. This applies even if the residual beneficiary is also an EDB, even one who is Disabled or Chronically Ill.

G. If there are multiple Disabled or Chronically Ill beneficiaries, it is possible to establish one AMBT for all of them. This will allow each of them to continue to receive annual RMDs until the last one dies. The life expectancy of the oldest Disabled or Chronically Ill beneficiary will be used to calculate the annual RMDs.

H. If there are multiple Disabled or Chronically Ill beneficiaries and separate AMBTs are established for each of them, upon the death of a Disabled or Chronically Ill beneficiary (the "deceased beneficiary") any remaining inherited IRA payable to the AMBT of another Disabled or Chronically Ill beneficiary must be fully distributed by December 31 of the year that contains the 10th anniversary of the deceased beneficiary's death and RMDs during the 10-year period will be based on the life expectancy of the deceased beneficiary.

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I. If a minor child of the IRA owner also qualifies as a Disabled EDB, then be sure to gather verification of the disability in case there is ever a need to prove the child was sufficiently disabled when the IRA owner died to qualify for EDB status and be able to stretch RMDs and End Date for the child's life expectancy. If ever questioned and this information cannot be produced it may result in the inherited IRA being required to be fully distributed no later than December 31 of the year when the child reaches age 31. On the other hand, if verification of the disability is provided when required, then the inherited IRA can be distributed over the entire life expectancy of the child.

J. Keep in mind that the IRA owner's surviving spouse must be the sole beneficiary of the IRA or of a separate account in order for the surviving spouse to be able to qualify for certain exceptions that only apply to the surviving spouse, or in order for the IRA owner to be able to use the Joint and Last Survivor Table to calculate annual RMDs during the IRA owner's life if the owner's spouse is more than 10 years younger than the IRA owner.

K. If the IRA owner has died and an IRA is payable to a trust established by the owner, be sure to review the trust provisions to determine the impact of the IRA. Keep in mind that it is possible to alter the beneficiaries of the trust until September 30 of the year following the year when the IRA owner died (the Beneficiary Finalization Date). If necessary, consider distributing an amount equal to the entire benefit early to beneficiaries who are older or do not qualify as a Designated Beneficiary (or if applicable, an Eligible Designated Beneficiary), or having that beneficiary execute a qualified disclaimer. In addition, there may be a power of appointment power in the trust that can be exercised, or it may be appropriate to decant or modify the trust.

L. If the IRA owner has died and an IRA is payable directly to multiple beneficiaries, a beneficiary can be removed by executing a qualified disclaimer or by receiving a full distribution of that beneficiary's share no later than the Beneficiary Finalization Date (September 30 of the year after the IRA owner died). Alternatively, the IRA can be divided into separate accounts (separate IRAs), one for each beneficiary, so that each beneficiary's share is treated separately, but this must be done no later than December 31 of the year after the IRA owner died. (See Section X, D and E).

M. If a trust is intended to be an AMBT, the trust terms must identify the Disabled or Chronically Ill beneficiary as a primary beneficiary of the trust. (See Section XVI, 2, c, 1).

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N. While any Disabled or Chronically Ill beneficiary of an AMBT is living, no other beneficiary may have any right to the inherited IRA. A charitable organization may be a residual beneficiary, but only if it is described in I.R.C. § 170(b)(1)(A) and is not a supporting organization or a donor advised fund. A charity that does not meet this definition will prevent the trust from qualifying as an AMBT. (See Sections XV, A, 1 and XV, C, 2).

O. A provision allowing the trustee to terminate the Disabled or Chronically Ill beneficiary's interest in order to protect eligibility for public benefits does not disqualify the AMBT, but only if no one else can receive any of the inherited IRA until that beneficiary dies. (See Treas. Reg. § 1.401(a)(9)-4(g)(2) and Section XV, E).

P. Although documentation of a beneficiary's disability or chronic illness no longer needs to be provided to the IRA custodian, keep the Social Security Administration's determination or the health care practitioner's certification in the file. If the beneficiary's status is ever questioned, the trustee must be able to prove it. (See Sections III, E, 4; XV, A, 2, d, 3); and XV, A, 3, d, 3)).

Q. If the Disabled or Chronically Ill beneficiary receives SSI or Medicaid, use an accumulation trust, not a conduit trust. A conduit trust must pass every IRA distribution through to the beneficiary, which can reduce or eliminate those benefits. (See Sections VII, D, 3 and XIV, H, 1, f, 2)).

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Appendix A – Chart of IRA Distribution Rules for Individual Beneficiaries

Beneficiary	IRA Owner Death Before RBD		IRA Owner Death On or After RBD	
	Annual Distributions	**End Date**	**Annual Distributions**	**End Date**
Not DB	None	End of 5th year after IRA owner's death	RMDs based on deceased IRA owner's "ghost" life expectancy	End of last year of deceased IRA owner's "ghost" life expectancy
DB but not EDB	None	End of 10th year after IRA owner's death	RMDs based on greater of: (i) DB's life expectancy, or (ii) IRA owner's "ghost" life expectancy	Earlier of: (i) end of 10th year after IRA owner's death, or (ii) final year of DB's life expectancy
EDB - Not > 10 years younger than IRA owner, Disabled or Chronically Ill	Life Expectancy of EDB	Earlier of: (i) end of 10th year after EDB's death, or (ii) final year of EDB's life expectancy	Life Expectancy Rule. RMDs based on greater of (i) EDB's life expectancy, or (ii) IRA owner's "ghost" life expectancy	Earlier of: (i) end of 10th year after EDB's death, or (ii) final year of greater of EDB's life expectancy or IRA owner's "ghost" life expectancy
EDB - Minor Child of IRA owner	Life Expectancy of child until age 21; then 10-Year Rule with annual RMDs	Earlier of end of year containing 10th anniversary of: Death of child, or child turning age 21	Life Expectancy of child until age 21; then 10-Year Rule with annual RMDs	Earlier of end of year containing 10th anniversary of: (i) Death of child, or (ii) child turning age 21
EDB - Surviving Spouse as sole beneficiary **(if does not roll over to spouse's IRA)**	Life expectancy of spouse, recalculated annually, RMDs beginning on later of: (i) year following IRA owner's death, or (ii) year IRA owner would have reached the Applicable Age	<u>If spouse dies before RMDs begin</u>: spouse is substituted for IRA owner and spouse's date of death used. <u>If spouse dies on or after RMDs start:</u> Earlier of: (i) 10th anniversary of spouse's death, or (ii) final year of spouse's life expectancy (as of calendar year of death, reduced by 1 each year)	Greater of (i) spouse's life expectancy, recalculated annually, or (ii) IRA owner's "ghost" life expectancy	Earlier of: (i) 10th anniversary of spouse's death, or (ii) final year of greater of spouse's life expectancy (as of calendar year of death, reduced by 1 each year) or IRA owner's "ghost" life expectancy

These rules may be different if the IRA is payable to a trust.

See Sections XIV and XV; the rules for an AMBT are summarized in the chart in Section XV, H.

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Appendix A Continued – Authorities for Chart

Beneficiary	IRA Owner Death Before RBD		IRA Owner Death On or After RBD	
	Annual Distributions	**End Date**	**Annual Distributions**	**End Date**
Not DB	Treas. Reg. § 1.401(a)(9)-3(c)(5)(i)(A), (c)(2)	Treas. Reg. § 1.401(a)(9)-3(c)(2)	Treas. Reg. § 1.401(a)(9)-5(d)(1)(iii), (d)(3)(ii)	Treas. Reg. § 1.401(a)(9)-5(a)(1), (d)(3)(ii)
DB but not EDB	Treas. Reg. § 1.401 (a)(9)-3(c)(5)(i)(B), (c)(3)	Treas. Reg. § 1.401(a)(9)-3(c)(3); -5(e)(2)	Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii), (d)(3)(ii)–(iii)	(i) Treas. Reg. § 1.401(a)(9)-5(e)(2); (ii) -5(a)(1), (d)(3)(iii)
EDB - Not > 10 years younger than IRA owner, Disabled or Chronically Ill	Treas. Reg. §§ 1.401(a)(9)-3(c)(4), (c)(5)(i)(C); 1.401(a)(9)-5(d)(2), (d)(3)(iii)	(i) Treas. Reg. § 1.401(a)(9)-5(e)(3); (ii) -5(a)(1), (d)(3)(iii)	Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii), (d)(3)(ii)–(iii)	(i) Treas. Reg. § 1.401(a)(9)-5(e)(3); (ii) -5(a)(1), (d)(1)(ii), (d)(3)
EDB - Minor Child of IRA owner	Treas. Reg. §§ 1.401(a)(9)-3(c)(4); 1.401(a)(9)-5(d)(2), (d)(3)(iii)	Treas. Reg. § 1.401(a)(9)-5(e)(3), (e)(4); -4(e)(3) (age of majority is 21)	Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii), (d)(3)(iii)	Treas. Reg. § 1.401(a)(9)-5(e)(3), (e)(4); -4(e)(3)
EDB - Surviving Spouse as sole beneficiary **(if does not roll over to spouse's IRA)**	Treas. Reg. §§ 1.401(a)(9)-3(c)(4); 1.401(a)(9)-5(d)(2), (d)(3)(iv). Delayed start: I.R.C. § 401(a)(9)(B)(iv)(I); Treas. Reg. § 1.401(a)(9)-3(d)	Spouse dies before RMDs begin: I.R.C. § 401(a)(9)(B)(iv)(II); Treas. Reg. § 1.401(a)(9)-3(e)(1). Spouse dies after RMDs begin: (i) -5(e)(3); (ii) -5(a)(1), (d)(3)(iv)	Treas. Reg. § 1.401(a)(9)-5(d)(1)(ii), (d)(3)(ii), (d)(3)(iv)	(i) Treas. Reg. § 1.401(a)(9)-5(e)(3); (ii) -5(a)(1), (d)(1)(ii), (d)(3)(ii), (d)(3)(iv)

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Appendix B – Single Life Table

Age	AD	Age	AD	Age	AD	Age	AD	Age	AD
0	84.6	25	60.2	50	36.2	75	14.8	100	2.8
1	83.7	26	59.2	51	35.3	76	14.1	101	2.6
2	82.8	27	58.2	52	34.3	77	13.3	102	2.5
3	81.8	28	57.3	53	33.4	78	12.6	103	2.3
4	80.8	29	56.3	54	32.5	79	11.9	104	2.2
5	79.8	30	55.3	55	31.6	80	11.2	105	2.1
6	78.8	31	54.4	56	30.6	81	10.5	106	2.1
7	77.9	32	53.4	57	29.8	82	9.9	107	2.1
8	76.9	33	52.5	58	28.9	83	9.3	108	2.0
9	75.9	34	51.5	59	28.0	84	8.7	109	2.0
10	74.9	35	50.5	60	27.1	85	8.1	110	2.0
11	73.9	36	49.6	61	26.2	86	7.6	111	2.0
12	72.9	37	48.6	62	25.4	87	7.1	112	2.0
13	71.9	38	47.7	63	24.5	88	6.6	113	1.9
14	70.9	39	46.7	64	23.7	89	6.1	114	1.9
15	69.9	40	45.7	65	22.9	90	5.7	115	1.8
16	69.0	41	44.8	66	22.0	91	5.3	116	1.8
17	68.0	42	43.8	67	21.2	92	4.9	117	1.6
18	67.0	43	42.9	68	20.4	93	4.6	118	1.4
19	66.0	44	41.9	69	19.6	94	4.3	119	1.1
20	65.0	45	41.0	70	18.8	95	4.0	120+	1.0
21	64.1	46	40.0	71	18.0	96	3.7		
22	63.1	47	39.0	72	17.2	97	3.4		
23	62.1	48	38.1	73	16.4	98	3.2		
24	61.1	49	37.1	74	15.6	99	3.0		

AD = Applicable Denominator (Life Expectancy at that age)

Treas. Reg. § 1.401(a)(9)-9(b).

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Appendix C – Uniform Lifetime Table

(Ages 10–71 are proposed;
ages 72 and older are the final table in Treas. Reg. § 1.401(a)(9)-9(c).)

Age	AD	Age	AD	Age	AD	Age	AD	Age	AD
10	88.2	33	65.3	56	42.6	79	21.1	102	5.6
11	87.2	34	64.3	57	41.6	80	20.2	103	5.2
12	86.2	35	63.3	58	40.7	81	19.4	104	4.9
13	85.2	36	62.3	59	39.7	82	18.5	105	4.6
14	84.2	37	61.3	60	38.7	83	17.7	106	4.3
15	83.2	38	60.3	61	37.7	84	16.8	107	4.1
16	82.2	39	59.4	62	36.8	85	16.0	108	3.9
17	81.2	40	58.4	63	35.8	86	15.2	109	3.7
18	80.2	41	57.4	64	34.9	87	14.4	110	3.5
19	79.2	42	56.4	65	33.9	88	13.7	111	3.4
20	78.2	43	55.4	66	33.0	89	12.9	112	3.3
21	77.2	44	54.4	67	32.0	90	12.2	113	3.1
22	76.2	45	53.4	68	31.1	91	11.5	114	3.0
23	75.2	46	52.4	69	30.1	92	10.8	115	2.9
24	74.2	47	51.5	70	29.2	93	10.1	116	2.8
25	73.3	48	50.5	71	28.3	94	9.5	117	2.7
26	72.3	49	49.5	72	27.4	95	8.9	118	2.5
27	71.3	50	48.5	73	26.5	96	8.4	119	2.3
28	70.3	51	47.5	74	25.5	97	7.8	120+	2.0
29	69.3	52	46.5	75	24.6	98	7.3		
30	68.3	53	45.6	76	23.7	99	6.8		
31	67.3	54	44.6	77	22.9	100	6.4		
32	66.3	55	43.6	78	22.0	101	6.0		

Sources: Treas. Reg. § 1.401(a)(9)-9(c) (ages 72 and older); Prop. Treas. Reg. § 1.401(a)(9)-9(c), 89 Fed. Reg. 58644, 58651–52 (July 19, 2024) (ages 10–71; not yet final, see Section II, F). The table for all ages was first published in I.R.S. Notice 2022-6, 2022-5 I.R.B. 460 (Jan. 31, 2022), for use in calculating substantially equal periodic payments.

AD = Applicable Denominator (the distribution period for an individual of that age)

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Appendix D – 26 C.F.R. § 1.72-17A(f) – Meaning of Disabled

(1) Section 72(m)(7) provides that an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. In determining whether an individual's impairment makes him unable to engage in any substantial gainful activity, primary consideration shall be given to the nature and severity of his impairment. Consideration shall also be given to other factors such as the individual's education, training, and work experience. The substantial gainful activity to which section 72(m)(7) refers is the activity, or a comparable activity, in which the individual customarily engaged prior to the arising of the disability or prior to retirement if the individual was retired at the time the disability arose.

(2) Whether or not the impairment in a particular case constitutes a disability is to be determined with reference to all the facts in the case. The following are examples of impairments which would ordinarily be considered as preventing substantial gainful activity:

(i) Loss of use of two limbs;

(ii) Certain progressive diseases which have resulted in the physical loss or atrophy of a limb, such as diabetes, multiple sclerosis, or Buerger's disease;

(iii) Diseases of the heart, lungs, or blood vessels which have resulted in major loss of heart or lung reserve as evidenced by X-ray, electrocardiogram, or other objective findings, so that despite medical treatment breathlessness, pain, or fatigue is produced on slight exertion, such as walking several blocks, using public transportation, or doing small chores;

(iv) Cancer which is inoperable and progressive;

(v) Damage to the brain or brain abnormality which has resulted in severe loss of judgment, intellect, orientation, or memory;

(vi) Mental diseases (e.g. psychosis or severe psychoneurosis) requiring continued institutionalization or constant supervision of the individual;

(vii) Loss or diminution of vision to the extent that the affected individual has a central visual acuity of no better than 20/200 in the better eye after best correction, or has a limitation in the fields of vision such that the widest diameter of the visual fields subtends an angle no greater than 20 degrees;

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(viii) Permanent and total loss of speech;

(ix) Total deafness uncorrectable by a hearing aid.

The existence of one or more of the impairments described in this subparagraph (or of an impairment of greater severity) will not, however, in and of itself always permit a finding that an individual is disabled as defined in section 72(m)(7). Any impairment, whether of lesser or greater severity, must be evaluated in terms of whether it does in fact prevent the individual from engaging in his customary or any comparable substantial gainful activity.

(3) In order to meet the requirements of section 72(m)(7), an impairment must be expected either to continue for a long and indefinite period or to result in death. Ordinarily, a terminal illness because of disease or injury would result in disability. The term "indefinite" is used in the sense that it cannot reasonably be anticipated that the impairment will, in the foreseeable future, be so diminished as no longer to prevent substantial gainful activity. For example, an individual who suffers a bone fracture which prevents him from working for an extended period of time will not be considered disabled, if his recovery can be expected in the foreseeable future; if the fracture persistently fails to knit, the individual would ordinarily be considered disabled.

(4) An impairment which is remediable does not constitute a disability within the meaning of section 72(m)(7). An individual will not be deemed disabled if, with reasonable effort and safety to himself, the impairment can be diminished to the extent that the individual will not be prevented by the impairment from engaging in his customary or any comparable substantial gainful activity.

[T.D. 7636, 44 FR 47049, Aug. 10, 1979, as amended by T.D. 8894, 65 FR 46591, July 31, 2000; T.D. 9849, 84 FR 9233, Mar. 14, 2019]

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Appendix E – I.R.C. § 7702B(a) through (c)

(a) In general

For purposes of this title–

(1) a qualified long-term care insurance contract shall be treated as an accident and health insurance contract,

(2) amounts (other than policyholder dividends, as defined in section 808, or premium refunds) received under a qualified long-term care insurance contract shall be treated as amounts received for personal injuries and sickness and shall be treated as reimbursement for expenses actually incurred for medical care (as defined in section 213(d)),

(3) any plan of an employer providing coverage under a qualified long-term care insurance contract shall be treated as an accident and health plan with respect to such coverage,

(4) except as provided in subsection (e)(3), amounts paid for a qualified long-term care insurance contract providing the benefits described in subsection (b)(2)(A) shall be treated as payments made for insurance for purposes of section 213(d)(1)(D), and

(5) a qualified long-term care insurance contract shall be treated as a guaranteed renewable contract subject to the rules of section 816(e).

(b) Qualified long-term care insurance contract

For purposes of this title–

(1) In general

The term "qualified long-term care insurance contract" means any insurance contract if–

(A) the only insurance protection provided under such contract is coverage of qualified long-term care services,

(B) such contract does not pay or reimburse expenses incurred for services or items to the extent that such expenses are reimbursable under title XVIII of the Social Security Act or would be so reimbursable but for the application of a deductible or coinsurance amount,

(C) such contract is guaranteed renewable,

(D) such contract does not provide for a cash surrender value or other money that can be–

(i) paid, assigned, or pledged as collateral for a loan, or

(ii) borrowed,

other than as provided in subparagraph (E) or paragraph (2)(C),

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(E) all refunds of premiums, and all policyholder dividends or similar amounts, under such contract are to be applied as a reduction in future premiums or to increase future benefits, and

(F) such contract meets the requirements of subsection (g).

(2) Special rules

(A) Per diem, etc. payments permitted

A contract shall not fail to be described in subparagraph (A) or (B) of paragraph (1) by reason of payments being made on a per diem or other periodic basis without regard to the expenses incurred during the period to which the payments relate.

(B) Special rules relating to medicare

(i) Paragraph (1)(B) shall not apply to expenses which are reimbursable under title XVIII of the Social Security Act only as a secondary payor.

(ii) No provision of law shall be construed or applied so as to prohibit the offering of a qualified long-term care insurance contract on the basis that the contract coordinates its benefits with those provided under such title.

(C) Refunds of premiums

Paragraph (1)(E) shall not apply to any refund on the death of the insured, or on a complete surrender or cancellation of the contract, which cannot exceed the aggregate premiums paid under the contract. Any refund on a complete surrender or cancellation of the contract shall be includible in gross income to the extent that any deduction or exclusion was allowable with respect to the premiums.

(c) Qualified long-term care services

For purposes of this section—

(1) In general

The term "qualified long-term care services" means necessary diagnostic, preventive, therapeutic, curing, treating, mitigating, and rehabilitative services, and maintenance or personal care services, which—

(A) are required by a chronically ill individual, and

(B) are provided pursuant to a plan of care prescribed by a licensed health care practitioner.

(2) Chronically ill individual

(A) In general

The term "chronically ill individual" means any individual who has been certified by a licensed health care practitioner as—

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(i) being unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for a period of at least 90 days due to a loss of functional capacity,

(ii) having a level of disability similar (as determined under regulations prescribed by the Secretary in consultation with the Secretary of Health and Human Services) to the level of disability described in clause (i), or

(iii) requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment.

Such term shall not include any individual otherwise meeting the requirements of the preceding sentence unless within the preceding 12-month period a licensed health care practitioner has certified that such individual meets such requirements.

(B) Activities of daily living

For purposes of subparagraph (A), each of the following is an activity of daily living:

(i) Eating.

(ii) Toileting.

(iii) Transferring.

(iv) Bathing.

(v) Dressing.

(vi) Continence.

A contract shall not be treated as a qualified long-term care insurance contract unless the determination of whether an individual is a chronically ill individual described in subparagraph (A)(i) takes into account at least 5 of such activities.

(3) Maintenance or personal care services

The term "maintenance or personal care services" means any care the primary purpose of which is the provision of needed assistance with any of the disabilities as a result of which the individual is a chronically ill individual (including the protection from threats to health and safety due to severe cognitive impairment).

(4) Licensed health care practitioner

The term "licensed health care practitioner" means any physician (as defined in section 1861(r)(1) of the Social Security Act) and any registered professional nurse, licensed social worker, or other individual who meets such requirements as may be prescribed by the Secretary.

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Appendix F – Code Sections Related to Charitable Organizations Deemed to be a Designated Beneficiary of an AMBT

I.R.C. § 170(b)(1)(A)

(b) Percentage limitations

(1) Individuals

In the case of an individual, the deduction provided in subsection (a) shall be limited as provided in the succeeding subparagraphs.

(A) General rule

Any charitable contribution to−

(i) a church or a convention or association of churches,

(ii) an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on,

(iii) an organization the principal purpose or functions of which are the providing of medical or hospital care or medical education or medical research, if the organization is a hospital, or if the organization is a medical research organization directly engaged in the continuous active conduct of medical research in conjunction with a hospital, and during the calendar year in which the contribution is made such organization is committed to spend such contributions for such research before January 1 of the fifth calendar year which begins after the date such contribution is made,

(iv) an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(a)) from the United States or any State or political subdivision thereof or from direct or indirect contributions from the general public, and which is organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a college or university which is an organization referred to in clause (ii) of this subparagraph and which is an agency or instrumentality of a State or political subdivision thereof, or which is owned or operated by a State or political subdivision thereof or by an agency or instrumentality of one or more States or political subdivisions,

(v) a governmental unit referred to in subsection (c)(1),

(vi) an organization referred to in subsection (c)(2) which normally receives a substantial part of its support (exclusive of income received in the exercise or

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performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(a)) from a governmental unit referred to in subsection (c)(1) or from direct or indirect contributions from the general public,

(vii) a private foundation described in subparagraph (F),

(viii) an organization described in section 509(a)(2) or (3), or

(ix) an agricultural research organization directly engaged in the continuous active conduct of agricultural research (as defined in section 1404 of the National Agricultural Research, Extension, and Teaching Policy Act of 1977) in conjunction with a land-grant college or university (as defined in such section) or a non-land grant college of agriculture (as defined in such section), and during the calendar year in which the contribution is made such organization is committed to spend such contribution for such research before January 1 of the fifth calendar year which begins after the date such contribution is made,

shall be allowed to the extent that the aggregate of such contributions does not exceed 50 percent of the taxpayer's contribution base for the taxable year.

I.R.C. 509(a)(3) – Supporting Organization

an organization which−

(A) is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more specified organizations described in paragraph (1) or (2),

(B) is−

(i) operated, supervised, or controlled by one or more organizations described in paragraph (1) or (2),

(ii) supervised or controlled in connection with one or more such organizations, or

(iii) operated in connection with one or more such organizations, and

(C) is not controlled directly or indirectly by one or more disqualified persons (as defined in section 4946) other than foundation managers and other than one or more organizations described in paragraph (1) or (2)

A supporting organization is defined on the IRS website as follows:

A supporting organization is a charity that carries out its exempt purposes by supporting other exempt organizations, usually other public charities. This classification is important because it is one means by which a charity can avoid classification as a private foundation, a status that is subject to a more restrictive regulatory regime.

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Of course, supporting another public charity is not enough by itself to warrant status as a public charity – many private foundations support public charities as well. A supporting organization generally warrants public charity status because it has a relationship with its supported organization sufficient to ensure that the supported organization is effectively supervising or paying particular attention to the operations of the supporting organization.

A supporting organization is a Type I, Type II or Type III supporting organization depending on the relationship it has with its supported organization(s). A Type III supporting organization is either functionally integrated (FASO) or non-functionally integrated (non-FASO). This distinction is important because of additional restrictions that apply to contributions and certain grants made to non-FISOs.

https://www.irs.gov/charities-non-profits/section-509a3-supporting-organizations

I.R.C. § 4966(d)(2) – Donor advised fund

(A) In general

Except as provided in subparagraph (B) or (C), the term "donor advised fund" means a fund or account—

(i) which is separately identified by reference to contributions of a donor or donors,

(ii) which is owned and controlled by a sponsoring organization, and

(iii) with respect to which a donor (or any person appointed or designated by such donor) has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in such fund or account by reason of the donor's status as a donor.

(B) Exceptions

The term "donor advised fund" shall not include any fund or account—

(i) which makes distributions only to a single identified organization or governmental entity, or

(ii) with respect to which a person described in subparagraph (A)(iii) advises as to which individuals receive grants for travel, study, or other similar purposes, if—

(I) such person's advisory privileges are performed exclusively by such person in the person's capacity as a member of a committee all of the members of which are appointed by the sponsoring organization,

(II) no combination of persons described in subparagraph (A)(iii) (or persons related to such persons) control, directly or indirectly, such committee, and

(III) all grants from such fund or account are awarded on an objective and nondiscriminatory basis pursuant to a procedure approved in advance by the board of directors of the sponsoring organization, and such procedure is

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designed to ensure that all such grants meet the requirements of paragraph (1), (2), or (3) of section 4945(g).

(C) Secretarial authority

The Secretary may exempt a fund or account not described in subparagraph (B) from treatment as a donor advised fund−

(i) if such fund or account is advised by a committee not directly or indirectly controlled by the donor or any person appointed or designated by the donor for the purpose of advising with respect to distributions from such fund (and any related parties), or

(ii) if such fund benefits a single identified charitable purpose.

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Materials Pending: Speaker has requested that materials be distributed at or after the conference. Please check the online materials for availability, as these materials will not be included in the printed conference materials.

STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

Thursday
October 22, 2026

The POMS Problem: Deference, Distribution Decisions, and the Reality of Special Needs Trust Administration

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Afterword: A Decade Later: Why Trustee Judgment Matters More Than Ever

Edward Wilcenski & Tara Anne Pleat

When the *Administration of Special Needs Trusts: Development of an Improved Approach* series was first published, it advanced a proposition that was not universally accepted: the administration of supplemental needs trusts should be governed first by traditional principles of fiduciary law—not by ad hoc judicial preferences or mechanical application of administrative guidance.[1] The articles argued that trustees should be evaluated under the familiar abuse-of-discretion standard applicable to discretionary trusts, supplemented only by those additional considerations unique to disability and public-benefit eligibility.[2]

At the time, that proposal represented a departure from prevailing practice. New York decisions frequently reflected inconsistent approaches, excessive reliance on agency personnel, and judicial substitution of a generalized "best interests" analysis for traditional fiduciary review.[3] Trustees were left with little confidence regarding the standard by which their conduct would ultimately be judged. Two subsequent decisions—one from New York and one from the United States Supreme Court—suggest that the analytical framework proposed in the original article has aged well.

Matter of Ellen H.: Abuse of Discretion as the Organizing Principle

The most significant New York development came from *Matter of Ellen H. (Cassandra H.)*. Rather than evaluating every trust expenditure through the lens of whether it perfectly conformed to the Social Security Administration's Program Operations Manual System (POMS), the court framed its analysis as one of fiduciary discretion.[4] The court expressly stated that it was applying an abuse-of-discretion standard and examined whether the trustee exercised reasoned judgment by considering three familiar questions: whether expenditures primarily benefited the beneficiary, whether governmental benefits were considered before

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[1] Edward V. Wilcenski & Tara Anne Pleat, *Administration of Special Needs Trusts,* N.Y. STATE BAR ASS'N J. 12, 19 (Mar. 2019); Edward V. Wilcenski & Tara Anne Pleat, *Administration of Special Needs Trusts Part II,* N.Y. STATE BAR ASS'N J. 22, 22–24 (Mar. 2020).

[2] *See* Edward V. Wilcenski & Tara Anne Pleat, *Administration of Special Needs Trusts,* N.Y. STATE BAR ASS'N J. 12, 19 (Mar. 2019) (asserting that the abuse of discretion standard is the only standard that can effectively incorporate both the objectives of the benefit eligibility assessment *and* the best interest assessment); *see also* Edward V. Wilcenski & Tara Anne Pleat, *Administration of Special Needs Trusts Part II,* N.Y. STATE BAR ASS'N J. 22, 22–24 (Mar. 2020) (stating that the abuse of discretion standard "provides the flexibility and protection afforded the trustees of other discretionary trusts so long as the trustee follows the commonly accepted rules of fiduciary conduct, as supplemented by additional steps that acknowledge the beneficiary's disability and eligibility for government benefits.").

[3] Edward V. Wilcenski & Tara Anne Pleat, *Administration of Special Needs Trusts Part II,* N.Y. STATE BAR ASS'N J. 22, 24–25 (Mar. 2020) (discussing courts' reluctance to defer to trustee discretion and tendency to substitute judgment).

[4] Matter of Ellen H. (Cassandra H.), 82 Misc. 3d 1207(A), 2024 N.Y. Slip Op. 50248(U), at *3 (Sup. Ct. Broome Cnty. 2024).

trust assets were used, and whether the trustee reasonably concluded that trust funds nevertheless should be expended.[5]

Equally significant is what the decision did not do. The trustee was not surcharged because she failed to satisfy every administrative guideline. She was surcharged because she abandoned the fundamental obligations of fiduciary administration: maintaining adequate records, documenting decisions, avoiding self-dealing, accounting for trust assets, and demonstrating that expenditures were actually made for the beneficiary's benefit.[6] The deficiencies identified by the court were failures of fiduciary process rather than mere failures of regulatory compliance. That reasoning closely parallels our proposed administrative protocol in *Administration of Special Needs Trusts: Development of an Improved Approach Part II*. The article argued that courts should protect trustees who engage in communication, investigation, consideration, and documentation—even if another trustee or judge might have reached a different substantive decision.[7] Judicial review, we suggested, should focus on the quality of the fiduciary decision-making process rather than retrospective disagreement with the outcome.[8]

Loper Bright and the Proper Role of Administrative Guidance

Although *Loper Bright Enterprises v. Raimondo* arose outside the trust context,[9] its implications for supplemental needs trust administration are difficult to ignore. By overruling *Chevron*,[10] the Supreme Court rejected the notion that statutory ambiguity automatically requires judicial deference to an agency's interpretation.[11] Instead, courts must independently determine the best reading of the governing statute.[12] Thus, although POMS continues to serve an indispensable administrative function, explaining how the Social Security Administration administers SSI eligibility, it is not itself enacted law. After *Loper Bright*, courts are reminded that agency guidance informs legal analysis; it does not replace it. That principle mirrors the concern expressed in *Administration of Special Needs Trusts: Development of an Improved Approach* over the tendency of some courts to defer reflexively to public benefit administrators rather than independently applying trust law.[13] The article questioned whether trustees should be judged primarily by

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[5] *Id.*
[6] *See id*. at *17 (surcharging the Trustee after finding that she “failed to account properly or act in a prudent manner as fiduciary”).
[7] Edward V. Wilcenski & Tara Anne Pleat, *Administration of Special Needs Trusts Part II*, N.Y. STATE BAR ASS’N J. 22, 22–24 (Mar. 2020).
[8] *Id.*
[9] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (bringing suit to challenge a rule implemented by the National Marine Fisheries Service).
[10] *Id.* at 412.
[11] *See id.* at 413 (holding that “courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.”).
[12] *Id.* at 412.
[13] Edward V. Wilcenski & Tara Anne Pleat, *Administration of Special Needs Trusts,* N.Y. STATE BAR ASS’N J. 12, 16 (Mar. 2019).

administrative preferences or by established fiduciary principles.[14] *Loper Bright* reinforces the latter approach by reaffirming that legal interpretation ultimately remains a judicial responsibility rather than an administrative one.[15]

A Convergence of Fiduciary and Administrative Law

Viewed together, *Ellen H.* and *Loper Bright* suggest that supplemental needs trust administration is moving toward a more coherent analytical framework. *Ellen H.* demonstrates that New York courts can evaluate trustees through traditional fiduciary principles while still recognizing the importance of public benefit rules. *Loper Bright* confirms that administrative guidance should be respected because it is persuasive—not because it automatically controls judicial interpretation. Neither decision diminishes the importance of POMS or Medicaid guidance. Rather, both decisions place those authorities in their proper role: valuable sources of expertise that inform, but do not displace, the trustee's fiduciary judgment or the court's independent legal analysis.

Conclusion

The central recommendation of *Administration of Special Needs Trusts: Development of an Improved Approach* was straightforward: supplemental needs trusts should be administered as discretionary trusts.[16] Trustees should investigate, communicate, document, consider available public resources, and exercise reasoned judgment in light of the governing trust instrument and applicable law.[17] Courts, in turn, should review those decisions under an abuse-of-discretion standard rather than substituting their own preferences or treating administrative guidance as controlling.[18] A decade later*, Matter of Ellen H*. and *Loper Bright* point in the same direction. Together, they suggest that the law increasingly recognizes what we proposed all along—that the protection of beneficiaries and the protection of trustees are best achieved not through rigid adherence to agency guidance, but through faithful application of longstanding principles of fiduciary law.

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[14] Edward V. Wilcenski & Tara Anne Pleat, *Administration of Special Needs Trusts,* N.Y. STATE BAR ASS'N J. 12, 19 (Mar. 2019); Edward V. Wilcenski & Tara Anne Pleat, *Administration of Special Needs Trusts Part II,* N.Y. STATE BAR ASS'N J. 22, 22–24 (Mar. 2020).

[15] See *Loper Bright Enters.* 603 U.S. at 403 (asserting that "Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch.").

[16] Edward V. Wilcenski & Tara Anne Pleat, Administration of Special Needs Trusts, N.Y. STATE BAR ASS'N J. 12, 19 (Mar. 2019).

[17] Edward V. Wilcenski & Tara Anne Pleat, *Administration of Special Needs Trusts Part II*, N.Y. STATE BAR ASS'N J. 22, 23–27 (Mar. 2020).

[18] Edward V. Wilcenski & Tara Anne Pleat, *Administration of Special Needs Trusts,* N.Y. STATE BAR ASS'N J. 12, 19 (Mar. 2019); Edward V. Wilcenski & Tara Anne Pleat, *Administration of Special Needs Trusts Part II,* N.Y. STATE BAR ASS'N J. 22, 22–24 (Mar. 2020).

ADMINISTRATION OF SPECIAL NEEDS TRUSTS: [1]DEVELOPMENT OF AN IMPROVED APPROACH

By Edward V. Wilcenski, Esq. and Tara Anne Pleat, Esq.[1]

I. Introduction:

Most Elder Law and Special Needs Planning attorneys have developed a level of comfort with third party special needs trust practice. Many of the rules and concepts which apply to other trusts and which are used in a traditional estate planning practice carry over quite nicely.

The same cannot be said for the practice involving first party special needs trusts. Indeed, the very nature of first party trust practice defies efforts to create a uniform set of practice standards for drafting and administration.[2] By definition these trusts are funded with the property of individuals with disabilities (as opposed to parents or other benefactors), leading to practice variations based on:

* disability, which can be cognitive, physical, or some combination of them;
* the nature of the property interest, which can be the proceeds of a personal injury settlement, marital property, inherited or gifted assets, accumulated earnings, and federal and state benefits;
* procedural context, which can be governed by the rules of the guardianship court if the trust is being funded in connection with a guardianship proceeding, the civil practice statute if the trust is being funded as part of a court approved litigation settlement, or the rules of the family court if the trust is being incorporated into a divorce proceeding; and
* program rules for public benefits, including Supplemental Security Income, Medicaid and Section 8 among many others.

II. First Party Trust Administration: Uncertainty and Indecision

New York enacted a third party supplemental (special) needs trust (SNT) statute, Section 7-1.12 of New York's Estates Powers & Trusts Law (EPTL 7-1.12), in 1993. That same year Congress carved out an exception for first party trusts in the federal Medicaid

[1] The authors wish to express their thanks to NAELA Fellow Ron M. Landsman for his willingness to offer insight and comment on the ideas expressed in this article. His piece in the Spring 2014 issue of the NAELA Journal, cited in footnote 15, remains one of the most important writings in the area of special needs planning in many years.

[2] This article is based primarily on law and practice in New York State. While we have tried to focus on general concepts which we believe to be incorporated into special needs trust law and practice in other states, we are also aware that many states have modified these concepts by regulation and administrative rule.

program's transfer of asset penalty provisions,[3] and in 1994 our state legislature amended EPTL 7-1.12 to be used as the drafting template for both types of special needs trusts.[4] The result is something of a hybrid: a trust borne of federal Medicaid law governing asset transfers, framed within a state trust statute which codified the holding of a watershed state court decision on third party trusts.[5]

In New York, some courts – especially in the early years after the enactment of OBRA '93 – attempted to create drafting and administration standards for first party trusts.[6]

These early decisions are inherently fact- and forum-specific. They have led to as much confusion as clarity and offer little precedential value as trial court decisions. At best, they establish little pockets of common law applicable in similar proceedings involving cases with nearly identical facts.

A survey of New York case law[7] involving first party trusts shows that:

* statutory and regulatory guidance is limited;

* in the absence of guidance, courts give excessive deference to public welfare officials and program administrators; and

* the law continues to wrestle with the concept of disability, retaining vestiges of the outdated idea that all disabilities are alike and that every individual with a disability, regardless of the nature of the disability or the existence of informal supports, requires micromanagement and rigid oversight.

This lack of clarity has had a practical impact on the availability of qualified trustees. In our experience, many capable banks and trust companies – and especially the smaller regional institutions – are second guessing their commitment to the special needs trust market.

As special needs planning attorneys we feel their pain. Perhaps the most challenging aspect of first party trust practice is the lack of credible guidance in the area of administration, leaving the trustee unsure of the criteria being used to measure its

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[3] 42 U.S.C. §1396p(d)(4)(A), enacted as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (1993) ("OBRA '93").

[4] EPTL 7-1.12(a)(5(v).

[5] *In re Escher*, 94 Misc. 2d 952 (Sur. Ct. Bronx Co. 1978), *aff'd,* 75 AD2d 531 (1st Dep't 1980), *aff'd* 52 N.Y.2d 1006 (1981).

[6] *See, e.g., In re Morales*, N.Y.L.J., July 28, 1995, at 25 (Sup. Ct., Kings Co. 1995).

[7] Former New York State Bar Association Elder Law Section Chair David Goldfarb's chapter on supplemental needs trust practice in *Warren's Heaton on Surrogate's Court Practice,* 12-211.12 (Lexis 2018) includes a subchapter entitled "Court-Added Criteria for Supplemental Needs Trusts." The subchapter includes a summary of cases from a variety of New York State courts where judges required modifications to the trust document beyond what is required in our State statute, and which imposed administrative responsibilities on trustees beyond what is required in our state regulations. While the summary is interesting and informative, no credible reading of the cases would leave a practitioner with the impression that there is any uniformity of practice and procedure in in New York State.

conduct. Some courts are inclined to micromanage expenditures, others are not. Some rely heavily on the public benefit program representatives' opinions, others do not. Some courts have the personnel to review regular accountings of trust activity, others do not.

This uncertainty is compounded by a blurred line of demarcation between what types of activities should be considered part of the trustee's fiduciary responsibility, and which activities can and should be delegated to outside counsel, private case managers and others.

For their part, given the inconsistent decisional law in this area, court examiners and judges often substitute their judgment for that of the trustee, and default to a generalized and uncircumscribed 'best interest' standard to pick and choose which expenditures are deemed appropriate and which should be disapproved and subject to surcharge. This leaves trustees hesitant to make distributions for fear of being second guessed by someone with little or no firsthand knowledge of the beneficiary's day-to-day circumstances, and fearful of seeking professional assistance out of a concern that those expenditures will be challenged in the future.

Banks and trust companies bear some responsibility for the current state of affairs. Many entered the special needs trust market without much thought to how SNTs differ from other discretionary trusts, and they applied the same administrative and oversight practices to SNTs they used for other trusts.

As a result, in cases where beneficiaries are incapable of self-advocacy and lack any family or informal supports, SNTs often sit dormant. This was the situation in a well-publicized New York case where a professional fiduciary was chastised for failing to take affirmative steps to remain informed about the needs of its autistic beneficiary.[8] In other cases, the trustees fail to do their due diligence in investigating the availability of government benefits, instead relying exclusively on requests made by family members and guardians. This occurred in a case which received significant attention here in New York,[9] the result being a substantial surcharge against the fiduciary.

These two well-publicized decisions do not present the professional trustee in a particularly favorable light, justifiably so given the facts of the cases. But they have reinforced the perception that this area of administration is fraught with risk, and as a result many banks and trust companies are reluctant to administer SNTs.

The practical implications are significant and far reaching. The disability community needs credible, capable and competent professional trustees to administer special needs trusts, first party and third party alike. Parents and family caregivers are aging, and when they pass on, siblings and other family members may be unwilling or unable to fill their

[8] *Matter of the Accounting of JP Morgan Chase Bank, N.A, and H.J.P. as co-Trustees of the Mark C.H. Discretionary Trust of 1995 v. Marie H.* [also referred herein as "Matter of JP Morgan], 956 N.Y.S.2d 856 (Sur. Ct. N.Y. Co. 2012).

[9] *Liranzo v. LI Jewish Education/Research*, 28863/1996, *New York Law Journal* 1202609859342 (Sup. Ct. Kings Co. 2013).

shoes. Disability service providers will continue to face cuts in Medicaid and other sources of government funding. It is a simple matter of demographics and public finance: the safety net is not what it once was, and private dollars will be needed to fill in the gaps to ensure that individuals with disabilities do not suffer as a result.

While most attorneys practicing in this area are familiar with the concept of an SNT being a discretionary trust, little has been written on how a trustee's exercise of discretion should be measured in the context of a formal accounting of trust activity. We concentrate on first party trusts in this article because of the greater risk associated with the Medicaid program's right of repayment, but the discussion of an appropriate standard of review for discretionary distributions would apply to both first party and third party trusts.

The first part of this article focuses on the appropriate standard of review for discretionary decisions made by trustees of SNTs. The second part will provide suggestions on how a trustee might satisfy that standard by striking a balance between two credible objectives: (1) the need for court oversight of a trustee who is managing money for a beneficiary who cannot advocate for herself, and (2) deference to the trustee's right to make discretionary decisions which it reasonably believes to be consistent with its fiduciary responsibilities.

III. Developing a Standard of Review for the Administrator of a Supplemental Needs Trust

SNTs are discretionary trusts, but they require trustees in the exercise of discretion to consider the availability of government benefits before deciding to pay privately for a good or service. In New York, our statute allows for the distribution of "net income and/or principal of [the] trust as the trustee shall deem advisable, in his or her *sole and absolute discretion*."[10]

When it was enacted in 1993, New York's statute was intended to codify the holding of *Matter of Escher*,[11] the first case in New York to support the right of a discretionary trustee to refuse to pay for something that might be available from a publicly funded source (or, in that case, to repay the State for benefits provided in the past). The trustee's ability to exercise discretion was central to the holding in the case, later upheld by the highest court in our State.

New York's statute goes one step further. It allows a drafting attorney to provide the trustee with discretion to make a distribution *even if the distribution causes a reduction in benefits,* so long as the beneficiary will be better off as a result.[12] In exercising this grant of discretion, a trustee must:

1. consider *current* financial eligibility rules, understanding that government benefit eligibility is not static and will continually evolve due to changes in family

[10] EPTL 7-1.12(e)(1)(1).
[11] *Supra* n. 5.
[12] EPTL 7-1.12(e)(2)(i)(5).

composition, family financial condition, and beneficiary capabilities and preferences;

2. consider services and supports that are available to the beneficiary as a result of the beneficiary's participation in one or more government funded programs; and

3. ascertain whether services and supports available at the time of a proposed distribution are sufficient to meet the beneficiary's needs and preferences, or whether additional or alternative goods and services should be purchased privately with trust assets. If the latter, the trustee must be able to document the basis for the use of private funds.

But once a trustee has done its due diligence and made the distribution, what standard does a court use to review the trustee's decision to determine whether the distribution should be upheld in a proceeding for settlement of the trustee's accounts? We think the lack of a uniformly accepted answer to this question is the source of much conflict and consternation within the fiduciary community.

A. Federal law does not provide a standard of review

1. The Statute

The federal Medicaid statute 42 USC §1396p(d)(4)(A), provides the underlying foundation for first party trusts. It has four basic requirements: the trust must be established by a parent, grandparent, guardian, a court or by the individual with a disability, the beneficiary must meet the disability criteria under the Social Security Act, the beneficiary must be under the age of sixty-five (65) years at the time the trust is funded with the beneficiary's assets, and the trust must provide that upon the beneficiary's death, State Medicaid programs be repaid for medical assistance provided during the course of the beneficiary's life.

If a first party trust complies with these four criteria, the trust will receive the associated protections under federal Medicaid and Supplemental Security Income (SSI) law: trust assets will be disregarded in determining resource eligibility while the income counting rules of these two programs will determine how a distribution will impact benefit eligibility and amount.

With one important exception, the federal statute leaves fiduciary standards to be determined under the law of the state where the trust was established.[13] The federal transfer of asset provisions exempt transfers to first party trusts under both 42 USC §§1396 d(4)(A) and d(4)(C) which are established for the "sole benefit" of an individual

[13] *Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012), *cert. denied* 133 S. Ct. 933 (2013), involved the interplay between state trust law and federal Medicaid law. In Lewis, the State of Pennsylvania by legislation-imposed limits on pooled special needs trusts not contained in the federal Medicaid statute, including a limit on the trustees' discretion to make various distributions. In striking down all of the State's restrictions other than oversight by the State Attorney General, the Court agreed that the state could supervise special needs trusts, but only in the same manner it supervises all trusts under general state trust law.

with a disability. The term has been interpreted to impose a limitation on distributions, often leading to absurd results.[14] We agree with NAELA Fellow Ron M. Landsman, whose thoughtful analysis leads to the better interpretation of that term: a deviation from the traditional fiduciary obligation to treat all beneficiaries equally, both income beneficiaries and remainder beneficiaries.[15]

2. The Regulations

No federal regulations were ever issued in connection with the first party trust provisions of the federal statute.

3. The Administrative Guidelines

The Health Care Financing Administration ("HCFA", now the Centers for Medicare and Medicaid Services or "CMS") modified the State Medicaid Manual shortly after the enactment of OBRA '93 in order to provide guidance to the States in implementing the changes to federal Medicaid law.[16] As it relates to first party trusts, this federal guidance – commonly referred to as "Transmittal 64" – deals primarily with the impact of funding first party trusts on Medicaid eligibility.

The SSI program's Program Operation Manual System (POMS) contains quite a bit of guidance on how the establishment, funding and administration of trusts might impact eligibility for the SSI program. [17]

There is no discussion of a fiduciary standard of review under either set of rules.

B. New York courts have largely ignored the standard suggested in our statute

A reader might assume that SNT administration in New York is well settled in light of the fact that our statute says – clearly and unequivocally – that an SNT trustee has "sole and absolute discretion" to make distribution decisions. The reader would assume that trustee

[14] *In re: Estate of Skinner,* N.C.App.Ct. No. COA15-284(June 21, 2016), *reversed*, 804 S.E.2d 449 (N.C. S. C. 2017). The Court of Appeals found that the lower court's reading of the term "sole benefit" as a rigid distribution standard would lead to the "absurd" result of a beneficiary (for whose benefit a home was purchased by the trustee) living in "bizarre isolation." The Supreme Court reversed the decision of the Court of Appeals because it used the incorrect standard of appellate review.

[15] *See* Landsman, Ron M., Esq., *When Worlds Collide: State Trust Law and Federal Welfare Programs*, NAELA Journal Volume 10, No. 1 (Spring 2014) for a comprehensive and persuasive piece on this topic. Interestingly, the North Carolina Court of Appeals in Skinner, *supra* n. 14., similarly interpreted the term "sole benefit" as a deviation from the traditional standard of loyalty owed to all beneficiaries.

[16] State Medicaid Manual, "Transmittal 64," General and Categorical Eligibility Requirements, available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html (last visited September 12, 2018) (see, specifically, section 3259.7).

[17] *See* recent revisions to the Social Security Administration's Program Operations Manual System ("POMS") SI 01120.200 – 203, effective April 30, 2018.

conduct is measured in accordance with long standing New York law governing discretionary trusts.[18] The reader would be mistaken.

New York cases involving first party trusts include personal injury settlements, guardianship proceedings and family court proceedings. Because of the inherently fact specific nature of the cases, they do not provide a reliable and broadly applicable precedent for the drafting and administration of first party trusts.

While there are cases, including from our highest court, which explicitly acknowledge the discretionary nature of SNTs,[19] we are not aware of any decisions which considered a contested distribution from an SNT, acknowledged the trustee's discretion to make a distribution decision, and upheld the distribution notwithstanding the fact that the court might have made a different decision on the same set of facts.[20] This level of deference to the trustee of a discretionary trust – qualified by the trustee's responsibility to ensure that its decision is both supportable on the law and facts and is duly documented – is a familiar concept to the seasoned fiduciary.[21] It underlies the professional fiduciary's willingness to accept an appointment with the understanding that every decision may at some point be called into question.

Many attorneys who represent trustees of SNTs feel as if their clients do not receive the same level of deference, leaving them like fish in a barrel to be speared by the many parties who have standing to second guess: court examiners, judges, public welfare agency attorneys, and disgruntled beneficiaries who may have behavioral and cognitive deficits that make collaborative administration difficult. The fiduciaries' concerns are legitimate.

C. Identifying a standard of review

Most attorneys who represent fiduciaries know that the traditional standard of review for a discretionary trust is the "abuse of discretion" standard. Yet once government benefits and disability are added to the mix, conviction wavers and the analysis becomes diluted.

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[18] *See* Restatement [Third] of Trusts § 50(1)(b); *see also In re Estate of T. Harry Glick*, 2005 N.Y. Misc. LEXIS 7336 (Sur. Ct. Kings Co. 2005) at page 9, *citing In re Gilbert*, 156 Misc. 2d 379 (Sur. Ct. New York Co. 1992); *Trust of Frederick Brockway Gleason, Jr.*, 1999/4582 A, NYLJ 1202629074611, at 1 (Sur. Ct. New York Co. 2013).

[19] *Matter of Abraham XX*, 11 N.Y.3d 429 (2008) at 434.

[20] We are unaware of cases undertaking this analysis, with one important exception: the payment of attorney fees. These payments will always be subject to review (at least in New York), regardless of the grant of discretion and regardless of the consent of all interested parties to the amount paid. *See In re. Felice*, 1 Misc. 3d 909(A) (Sup. Ct. Suffolk Co. 2004), which specifically addressed a trustee's argument that the supplemental needs trust document deferred to the trustee on attorney fees, and *Stortecky v. Mazzone*, 85 N.Y.2d 518 (1995), which confirmed the right of a probate court to review fees paid by a fiduciary even if all parties to an accounting have agreed and consented.

[21] *See* Restatement [Third] of Trusts § 50(1)(b); *see also In re Estate of T. Harry Glick*, *supra* n. 18 at page 9, *citing In re Gilbert*, *supra* n. 18, *and Leigh v. Estate of Leigh*, 55 Misc. 2d 294 (Sup. Ct. New York Co. 1967).

There seem to be two assessment methodologies used by most practitioners, courts and commentators when analyzing distributions from SNTs. One focuses on benefit eligibility, the other uses a broad and uncircumscribed "best interest" analysis. Both assessments are relevant, but neither should be used as a substitute for the "abuse of discretion" standard when reviewing the accounts of the trustee of an SNT.

D. Benefit eligibility is only one factor to consider when making distributions

The language of a "typical" SNT requires consideration of the availability of publicly funded benefits before a distribution is made, with the understanding that the impact of a distribution will vary from program to program.[22] Benefit program rules are applied at the time of the distribution, and are based on the beneficiary's *current* eligibility status. So, for example, the payment of rent by a trustee will impact otherwise similarly situated beneficiaries depending on program eligibility: Medicaid, which in New York allows a trustee to make in-kind payments from an SNT, including for food and shelter, without a reduction in benefits;[23] Supplemental Security Income (SSI), the rules of which typically reduce the benefits of an SSI recipient if a trust pays for food and shelter;[24] and Supplemental Nutrition Assistance Program ("SNAP"), formerly Food Stamps, which (in New York) may treat payments to a beneficiary's household that are permissible for Medicaid purposes as countable income for SNAP purposes, thus reducing the monthly SNAP subsidy.[25]

It is not uncommon for a distribution to have an adverse impact on one benefit and no impact or limited impact on another. If a trustee decides to pay a beneficiary's rent, there may be a limited impact on the beneficiary's SSI payment, no impact on Medicaid eligibility, but a substantial reduction in the SNAP subsidy. If the trustee's decision to pay rent is reviewed (after the fact as part of an accounting proceeding) based on its impact on government benefits, which benefit program should serve as the baseline in determining the permissibility of the distribution by the trustee?

The answer is "none of them." Program rules do not restrict or permit a distribution; rather, the rules inform the trustee and beneficiary alike whether the contemplated distribution will have an impact on benefits. The trustee must decide whether a distribution – and the resulting impact on benefits – puts the beneficiary in a better place.

The failure to consider this distinction results in over-reliance on the often *ad hoc* and arbitrary decisions of government benefit agencies, excessive deference to public welfare agency attorneys in court proceedings involving SNTs, and an obsessive focus on

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[22] EPTL 7-1.12(a)(5)(ii).

[23] 18 N.Y.C.R.R. 360-4.3(e).

[24] POMS SI 01120.200E.1.b.

[25] *Temporary Assistance (TA) and Food Stamps (FS) Policy: The Treatment of Supplemental Needs Trusts and Reverse Annuity Mortgage (RAM) Loans,* New York State Office of Temporary and Disability Assistance, 01 INF- 8 (March 8, 2001).

informal and non-binding speculation by agency staff who opine on how an issue might be addressed in a future rule or decided in a future controversy. From our perspective, the result is that the tail ends up wagging the dog.[26]

Perhaps the best example of "excessive deference" can be found in *In re McMullen*,[27] a trial court case involving the review of a first party trust as part of a proceeding to settle a personal injury lawsuit. Initially, the decision includes a good explanation of the court's responsibility to ensure that a proposed trust document meets the statutory criteria for first party trusts such that the beneficiary's eligibility for Medicaid would be protected.

However, in trying to reconcile a disagreement between the petitioner and the attorney for the local Medicaid agency on the terms of the proposed trust, the court announced a "prophylactic" remedy that would be applied prospectively in all proceedings brought before that Court.[28] The 'remedy' was to require a petitioner to secure written approval for the terms of a first party trust from the local Medicaid agency before the court would entertain the petition. In other words, the court would require the petitioning party to concede to the demands of the Medicaid program representative - in advance and without the right to be heard - just for the matter to be accepted for consideration.

It is unlikely that such a position would be upheld on appeal (none was taken in the case), and one can understand why a court with little statutory guidance and without competent advocacy by special needs trust counsel would try to fashion a remedy to streamline future proceedings. But the case is badly decided.

Another recent New York decision, *Matter of Tinsmon* [29], illustrates how public welfare agency attorneys try to use program rules to control and limit fiduciary conduct. In *Tinsmon*, individual co-trustees of a first party trust sought court approval to use trust funds to purchase a one-half interest in the primary residence of the beneficiary, an SSI recipient. The beneficiary already owned the other one-half interest outright. The trust did not require prior court approval, but the co-trustees were also the parents and court appointed guardians. More important, the one-half interest was owned by one of the co-trustees who had helped the beneficiary finance the purchase prior to the injury.

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[26] Consider the April 2018 release of the revisions to the POMS on SNTs, *supra* n. 17. Most special needs trust practitioners would agree that the changes were favorable and provided much needed clarity. But they only involve one agency's interpretation of how a distribution or investment by a trustee might impact the benefits the agency provides. They do not create distribution and administration standards that are applicable across all SNTs, and yet our impression is that many special needs planning attorneys treat them this way. The result is a misplaced and outsized emphasis on that agency's often inconsistent and arbitrary application of its own rules.

[27] *In re McMullen*, 166 Misc.2d 117 (Sup. Ct., Suffolk Co. 1995).

[28] *Id.* at 121.

[29] *Matter of Tinsmon (Lasher)*, 79 N.Y.S. 3d 854 (Sur. Ct., Albany Co. 2018), *aff'd* 169 AD3d 1305 (Third Dept. 2019).

The co-trustees asked the court to approve the 'buy out' of the co-trustee's interest and, in effect, a distribution of the interest to the beneficiary, outright and free of trust, with the result being that the beneficiary would own the entire residence. The beneficiary was a young mother, and by leaving the home in her name, upon her death her interest would pass to her children without Medicaid estate recovery for expenses incurred prior to age 55.[30]

The local Medicaid agency was served with process because of the Medicaid program's right of recovery at death and – predictably - objected. The agency argued, among other things, that the transaction was prohibited under the POMS.

There is no such prohibition under the POMS. The POMS clearly contemplate that a trustee may use trust assets to purchase an item which would be exempt in determining SSI eligibility if owned by the beneficiary outright,[31] a point made clear by the guardian *ad litem* who represented the beneficiary in the transaction. The guardian *ad litem* recommended that the transaction proceed as proposed, and the Court ultimately approved. The Medicaid agency appealed the decision, which was upheld by the appellate court. [32]

But what if there was an adverse impact on SSI? So long as the trustee determined that the beneficiary would be left in a better position notwithstanding, the terms of the trust and the language of New York's statute give the trustee the discretion to proceed nonetheless. Benefit eligibility is just one factor to consider in the exercise of discretion; it does not independently permit or preclude a discretionary distribution.

E. "Best Interest" is another factor to consider, and should not be used as a substitute for the traditional standard of review

Courts considering the disposition of litigation settlements and guardianship property will render decisions based on what they determine to be in the "best interest" of the unemancipated minor or person with a disability. Predictably, decisional law in this area tends to be very fact specific, and commonly recites the courts' responsibility to protect those who are unable to speak for themselves.[33]

A best interest assessment is properly undertaken when a trust arrangement is being recommended to a court. Whether the use of a trust (versus some other custodial arrangement) is appropriate, whether the proposed trustee is acceptable, and whether the terms of the proposed trust are consistent with the objectives and concerns of the

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[30] 42 U.S.C. §1396p(b)(1)(B).
[31] POMS SI 01120.201(I)(1)(c).
[32] *Supra* n. 29.
[33] N.Y. Surrogate's Court Procedure Act (SCPA) 1713 ("reasonable, proper and just under the circumstances"); *Dinnigan v. ABC Corp.,* 35 Misc. 3d 1216(A) (Sup. Ct. New York Co. 2012); *Matter of Teitelbaum*, 11 Misc.3d 1067(A) (Sur. Ct. Rockland Co. 2006).

court should all be viewed through the "best interest" lens at the time the arrangement is being proposed.

The most frequently cited example of this practice in New York is in the *Matter of Morales*, where a court-appointed guardian sought to transfer litigation proceeds to a first party trust to protect benefit eligibility. Explaining that "the duties and responsibilities of the trustee to the incapacitated person are akin to those of a guardian," the court went on to require modifications to the language of the proposed document which it "deem[ed] necessary to protect the interests of the disabled person."[34] The judge then provided – right in the language of the decision – a sample trust document to be used as a "guide to the bar" for drafting first party trusts.

The "Morales Trust" document provided by the court includes provisions not required as a matter of statutory law and which many practitioners believe to be overly restrictive. The decision should be understood to provide guidance only in cases involving the establishment of SNTs in guardianship proceedings. But many New York courts continue to follow it in other types of proceedings when funding an SNT is proposed.

In the context of the *establishment and funding of an SNT*, the parties understand the rules of the game. The court must decide *whether* the SNT should be established, *who* should serve as trustee, and *how* the trust should be drafted to address the court's specific concerns in that particular case. Counsel have their opportunity to argue against modifications they believe exceed the statutory mandate or which are not necessary given the facts of that case, and ultimately the court will render its decision based on what it believes to be in the best interests of the individual before it.

But the question presented here is a different one: once an SNT has been established and funded in accordance with a court's best interest determination (or even in those cases where the SNT is established independently and without court involvement), what is the standard of review to be applied by a court when reviewing distributions made by the trustee? Little decisional law exists in New York, but one well publicized case illustrates the approach taken by most courts in our experience.

In *Matter of Liranzo*[35] the corporate trustee of a first party trust funded with litigation proceeds sought to settle its account and terminate the trust. The trust was initially funded with just over $420,000. Six years later, the trust had approximately $3,200 remaining. The accounting showed that most of the money was used to pay for private caregivers and taxi service for the beneficiary.

The decision begins with the judge's conclusion that the trustee breached a number of commonly understood, generalized rules of fiduciary conduct (the "duty of undivided loyalty," the obligation to administer the trust in the "sole interests of the beneficiary," and

[34] *In re Morales*, *supra* n. 6.
[35] *Liranzo*, *supra* n. 9.

the need to "act reasonably and in good faith"). But the decision goes on to recite concepts that are less precise (criticism of distributions that "could have either been avoided or were unreasonable," the failure to "provide support for the plaintiff for as long as possible," and "authorizing each and every discretionary disbursement requested by the infant plaintiff's mother"[36]).

In addressing the private caregiver payments, the judge criticized the trustee for accepting the mother's claim, supported by a private social worker, that the beneficiary was better off with private caregivers as opposed to Medicaid funded aides. This was not sufficient for the judge, who wrote that "the trust agreement requires that a good faith effort be made by the trustee to inquire about providers of home healthcare whose costs are covered under Medicaid."

The court also penalized the trustee for spending more than $50,000 on private taxi services based on the mother's representation that driving in a taxi was a form of therapy for the beneficiary. In the words of the judge, the trustee "should have further investigated before allowing the disbursements. This "taxi therapy" does not appear to be a responsible use of Trust fund monies consistent with prolonging the life of the Trust."[37]

A trustee might be able to work with the court's analysis of caregiver expenses, as the decision suggests that an investigation of Medicaid funded alternatives might have saved those distributions from surcharge. But testimony did show that the mother and a social worker were consulted prior to making the discretionary decision to pay privately for that care. Is that not a "good faith effort"? Was the issue the lack of independent inquiry by the trustee or a matter of inadequate documentation?

The court's analysis of the taxi expenses is more troubling. The statement that the expense "does not appear to be a responsible use of trust funds" is vague. Taxi therapy *did* appear to be responsible in the mother's eyes and in the eyes of the social worker. If the expense was hippotherapy would that have made a difference? And who better to make that assessment than the primary caregiver and a professional advocate?

Had the court articulated a clear standard of review to be applied to each trust expense, the decision would be more helpful. Instead, the judge substituted her judgment for that of the trustee as to what types of expenditures were in the best interest of the beneficiary, relying primarily on generalized statements of fiduciary responsibility to support her decision.

In the end the court refused to approve the private caregiver and taxi expenses (and a few others as well), resulting in a surcharge of over $170,000. Admittedly, when a trust with well over $400,000 is almost fully depleted in six years it does not bode well for the trustee. But egregious facts should not relieve the court of its responsibility to frame its

[36] *Id*. at p. 4.
[37] *Id.* at p. 7.

surcharge and write its decision in a manner that leaves the parties with a clear understanding of the criteria being used to measure conduct.

What trustees need is a workable methodology for analyzing distributions – be they modest or significant, mundane or out-of-the-ordinary - once an SNT is up and running. The first step in developing such a methodology is an agreement on the correct standard of review.

F. Abuse of discretion is the correct and the only workable standard of review to be applied when assessing distributions from special needs trusts.

The abuse of discretion standard is the traditional standard applied to the conduct of all discretionary trustees under New York law,[38] and is also consistent with a recent line of New York cases which take the position that SNTs should be treated no differently than other irrevocable trusts established under state law.[39]

The abuse of discretion standard is the only standard which can comfortably incorporate the legitimate objectives of the benefit eligibility assessment and the best interest assessment. Under the abuse of discretion standard, the trustee must consider the impact on eligibility and services (the benefit eligibility assessment) and the resulting benefit to the beneficiary (the best interest assessment) when making a distribution decision. Once these two factors have been reviewed, considered and documented and the distribution has been made, a reviewing court should defer to the trustee and approve the distribution unless the trustee abused its discretion by acting in bad faith or beyond the bounds of reasonable judgement.[40]

The abuse of discretion standard does not provide a 'pass' to the trustee of an SNT any more than it provides a pass to trustees of other types of discretionary trusts. All of the traditional obligations of fiduciary conduct would still apply: the need to invest prudently, the need to account in detail, the prohibition against self-dealing, etc. But the abuse of discretion standard will protect the trustee who has complied with the traditional obligations of fiduciary conduct, and who can demonstrate that it has done its due diligence in considering a beneficiary's benefit eligibility and best interest when making a distribution decision.

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[38] *Supra* n. 18. In fact, the trustee's discretion as granted under the terms of a will drafted decades ago was a critical part of the court's analysis in the seminal case on special (supplemental) needs trusts in New York, *In re Escher supra* n. 5.

[39] *Matter of Kaidirmouglou*, N.Y.L.J. November 5, 2004, at page 28 (Sur. Ct. Suffolk Co. 2004); *Matter of KeyBank*, 58 Misc.3d 235 (Sur. Ct. Saratoga Co. 2017); *Matter of Feuerstein*, 147 A.D.3d 688 (1st Dep't 2017). New York attorneys are well advised to remember that even a wholesale adoption of the 'abuse of discretion' standard in evaluating distributions from all supplemental needs trusts will not shield attorney fees from later scrutiny. *Matter of Felice*, *supra* n. 20.

[40] *Trust of Frederick Brockway Gleason, Jr.*, 1999/4582 A, N.Y.L.J. 1202629074611, at *1 (Sur. Ct. New York Co. 2013).

Adoption of the abuse of discretion standard would help address many of the concerns of banks and other professional fiduciaries about assuming trusteeship of first party (and even third party) special needs trusts, and it would encourage more capable and credible institutions to offer their services to individuals with disabilities and their families. If clients prefer to use family members or other individuals as trustees, counsel can advise that their conduct will be measured in a fair and understandable way.

IV: Developing a Protocol for Administration Under the Abuse of Discretion Standard

The abuse of discretion standard provides the flexibility and protection afforded the trustees of other discretionary trusts so long as the trustee follows the commonly accepted rules of fiduciary conduct, as supplemented by additional steps that acknowledge the beneficiary's disability and eligibility for government benefits.

To obtain the protection afforded to trustees of other discretionary trusts, the SNT trustee should acknowledge and address three aspects of SNT administration that are not at issue in the administration of other discretionary trusts:

1. A beneficiary's cognitive disability may prevent reliable communication with the trustee,

2. Programs and services available to support the beneficiary in the community represent an additional resource to be considered before using trust funds to purchase a good or service, and

3. Traditional, informal means of settling accounts may be insufficiently protective.

Effective SNT administration requires the trustee to establish a means of communication with the beneficiary or a beneficiary's representative, a protocol for assessing programs and services, and a plan for regular accounting and periodic settlement. If followed, and presuming that the trustee has satisfied the other, traditional obligations of fiduciary conduct, the trustee's reasonable exercise of discretion should be supported upon judicial review under an abuse of discretion analysis, even if the court would have made a different decision on the same set of facts.

A. Basic rules of fiduciary conduct applicable to all trustees

All trustees must follow the basic rules of fiduciary conduct, requiring them to apply income and principal in accordance with the terms of the governing document,[41] account for the application of principal and income,[42] invest prudently and in accordance with the

[41] New York Estates Powers & Trusts Law (EPTL) 11-1.1(a)(2).
[42] *Matter of Francis*, 19 Misc. 3d 536 (Sur. Ct., Westchester County 2008).

terms of the trust,[43] prepare and file tax returns,[44] and keep beneficiaries informed of how trust funds are being invested and/or utilized.[45]

B. Exercising discretion

Trustees of discretionary trusts must use judgment when making distribution decisions. In New York, case law follows a few common lines of inquiry in determining whether a trustee properly exercised discretion:

1. Does the trustee have an established process for review and consideration of beneficiary requests?[46] In other words, is there evidence that the trustee is making *informed* decisions?

2. Did the trustee follow its own established policies in making distribution decisions, and did it document the basis for those decisions?[47]

3. Did the trustee exercise independent judgment rather than deferring to a beneficiary or a beneficiary's representative?[48]

4. Does the document require the trustee to consider whether the beneficiary had other assets and resources that could be used in lieu of using funds from the trust, and if so, did the trustee do so?[49]

5. For significant or long-term expenditures, did the trustee balance the immediate needs of the beneficiary with probable future needs?[50]

If the trustee can answer these questions in the affirmative, courts will typically support the trustee's discretionary decisions even if the judge or another party to the proceeding might have made a different decision on the same set of facts. In the realm of discretionary trusteeship, the *process* of proactive administration protects the fiduciary and beneficiary alike. When the trustee follows the *process* of communication, investigation, consideration and documentation, the beneficiary receives the benefits of the fiduciary arrangement. In exchange, the trustee is protected from later challenge to its distribution decisions simply because another might have reached a different conclusion.

This *quid pro quo* assumes that both the trustee and the beneficiary are capable of self-advocacy. But when a beneficiary has a cognitive disability, she is at a disadvantage.

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[43] EPTL 11-2.3 ("Prudent Investor Act").
[44] New York Tax Law § 651(a)(2).
[45] *Matter of Spacek*, 45 Misc. 3d 1210(A) (Sur. Ct. Nassau County 2014), *aff'd.* 155 AD3d 747 (2d Dep't. 2017).
[46] *Matter of Ralph Manny*, 2010 N.Y.L.J. LEXIS 4508 (Sur. Ct. Westchester County 2010).
[47] *In re: Judicial Settlement of the Account of Bank of Am., N.A.*, 2013 N.Y.L.J. LEXIS 2388 (Sur. Ct., N.Y. Co. 2013).
[48] *Matter of Hammerschlag*, 2001-3772, NYLJ 1202597358371 (Sur. Ct., New York Co. 2013).
[49] *In re Levison's Will*, 29 Misc. 2d 697 Sur. Ct. Rockland County 1961); *Matter of McDonald (Luppino*), 100 A.D. 3d 1349 (2012).
[50] *Estate of T. Harry Glick*, *supra* n. 18.

Courts struggle to find the correct balance between oversight for the benefit of those who cannot fully advocate for themselves and the well-established body of law which protects a fiduciary's authority to make discretionary decisions.

C. Disability and discretion

Supplemental Needs Trusts are discretionary trusts[51] for a reason. These trusts often have to last for the lifetime of a beneficiary with a disability. Circumstances change, and the authority to exercise discretion allows the trustee to respond to changes in need.

Where a beneficiary is unable to adequately advocate for herself because of a cognitive disability, courts have a responsibility to provide oversight.[52] In proceedings for the ***establishment*** of supplemental needs trusts in New York, this equitable authority is often cited as justification for imposing administrative obligations on the trustee that are above and beyond what the federal and state statutes would otherwise require.[53] So, for example, even though there is no statutory or regulatory or administrative requirement that the trustee of a supplemental needs trust prepare annual accountings, guardianship courts often impose such a requirement in order to protect a beneficiary who is incapable of self-advocacy.

No one would question the courts' *parens patriae* responsibility to protect the interests of those who cannot protect themselves. But simply reciting the obligation does not provide any practical ***administrative*** guidance to the trustee of a discretionary trust. In the context of SNT ***administration,*** the question is not whether a court has the authority to protect the interests of a beneficiary with a disability. The question is how that protection is provided.

D. Court reluctance to substitute judgment

Courts typically do not substitute their judgment for that of a trustee so long as the trustee's exercise of discretion was reasonable, consistent with the terms of the trust, and made in good faith.[54] Courts often refuse to provide guidance when the trust document gives the trustee the responsibility to make a discretionary decision.[55] This narrow role

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[51] New York's statute defines a supplemental needs trust as "a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability." EPTL 7-1.12(a)(5).

[52] *In re Goldblatt*, F (Sur. Ct., Nassau County 1994); *Cano v. Shmonie Corp.*, 2004 N.Y.L.J. LEXIS 3059 (Sup. Ct., Bronx County 2004). The decision in *Cano* is a good illustration of the difficulty that courts have in drawing a line of demarcation between guardianship oversight and discretionary trusteeship.

[53] *In re Morales*, *supra* n. 6; *Cano v. Shmonie Corp.*, *supra n.* 52.

[54] "The rule is so well established that it may be said to be fundamental and elemental that courts will not substitute their judgment for the discretion fairly exercised which is lawfully reposed in officials, courts or tribunals. This rule has long been applied to the office of executor and trustee." *In re Estate of Messer*, 34 Misc. 2d 416 (Sur. Ct., Cattaraugus Co. 1962) at p. 8; see also *Estate of T. Harry Glick*, *supra n.* 18; *In re William M. Kline Revocable Trust*, 196 Misc. 2d 66 (Sur. Ct., Fulton County 2003); *In re: Judicial Settlement of the Account of Bank of Am., N.A.*, *supra n.* 47.

[55] *Matter of Sheppard*, 147 AD3d 1239 (3d Dep't 2017).

for the courts is codified by statute in New York, where courts render "advice and direction" in a limited number of enumerated situations.[56]

This structure breaks down when cognitive disability enters the picture. Courts are reluctant to defer to the discretion of the trustee and often substitute their judgment when reviewing discretionary distributions.[57] The net effect is that trustees – unsure of how their discretionary decisions will be measured – are often reluctant to make any significant distributions, or refuse to do so without regular input from a court.

This is precisely the type of micromanagement that a discretionary trust is intended to avoid.[58] A beneficiary's disability is no reason to deviate from the standard practice of deferring to the trustee's judgment, so long as the trustee has not abused its discretion. Under an "abuse of discretion" analysis, if the trustee of an SNT follows the traditional rules governing trustee conduct, the trustee's exercise of discretion should be upheld even if a court would have made a different decision on the same set of facts.

E. Establishing a protocol for communication with a beneficiary

Trustees need information to make ***informed*** discretionary decisions. In a typical administration, the trustee can communicate directly with an adult beneficiary, and in the case of a minor a trustee can communicate with a legally responsible adult such as a parent. Communication is relatively straightforward and unencumbered.

SNT beneficiaries may lack the ability to communicate. They may not have court appointed guardians or voluntarily designated agents under power of attorney. They may lack informal supports like family members and friends, or those informal supports may be unreliable or dishonest.

These practical challenges defy simple solution. If a beneficiary with a developmental disability needs a winter coat, the trustee may have the authority to purchase the coat, and the purchase may be an appropriate exercise of discretion. But how would the trustee know that the beneficiary needs a coat? How does the trustee buy an appropriate coat? How does the trustee get the information it needs to appropriately exercise its discretion and facilitate the purchase?

1. Identifying Sources of Information:

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[56] New York Surrogate's Court Procedure Act (SCPA) § 2107.

[57] *See Cano v. Shmonie Corp*, *supra* n. 52. See also *Liranzo*, *supra* n. 9. In *Liranzo*, the Court did not specifically articulate a standard of review; rather, the authors read the decision as applying a substituted judgment analysis, as various criteria are cited in the decision. One may also read decisions allowing for the review of counsel fees paid by trustees of SNTs as undermining the trustee's discretion because of a beneficiary's disability. *See, e.g., In re Examination of the Annual Inventory & Account of Susan Felice & the Bank of N.Y.*, 2003 N.Y. Misc. LEXIS 990 (Sup. Ct., Suffolk Co. 2003).

[58] Some transactions should require court approval, such as the use of funds in a trust for a minor to purchase a home where the minor will live with the family. But in New York, this transaction is contemplated in our advice and direction statute, based on the potential conflict of interest.

Family members might be able and willing to provide relevant information. But what if the beneficiary has no reliable family members (or no *honest* family members), no court appointed guardian, and no other reliable, informal advocates?

SNT beneficiaries might have Medicaid funded staff to provide this information, but the continued erosion of Medicaid funding for this type of service has made this a less reliable option. Medicaid funded care managers have increased caseloads, and disability provider agencies face high staff turnover (or are simply unable to locate staff in the first place). As a result, the trustee's affirmative obligation to make informed discretionary decisions[59] often cannot be met through communication with Medicaid funded staff alone.

If there are no credible family supports, no court appointed guardian, and no reliable Medicaid funded staff, the trustee should consider retaining a private care manager, social worker or other advocate to serve as its "boots on the ground" to obtain information that the trustee can consider when making a distribution decision.

2. Recommendation:

In determining whether a trustee of a supplemental needs trust reasonably exercised discretion, judicial review should consider whether the trustee established an effective protocol for communication and a credible means of obtaining reliable information about the beneficiary's needs.

Upon being appointed the trustee should undertake the following analysis:

1. Is the beneficiary competent to correspond and advocate directly? Many SNT beneficiaries with physical disabilities are fully capable of communicating directly with the trustee.

2. If the beneficiary cannot communicate directly, is there a court appointed guardian or agent under power of attorney who is able to speak reliably on behalf of the beneficiary and provide important information and documentation?[60]

3. Is the beneficiary supported by reliable[61] family members, friends or other informal advocates? While the trustee may be precluded from sharing information about the trust with individuals who lack legal authority to access it, the trustee is free to *receive* information from any credible source, supplementing whatever other information the trustee receives.

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[59] "Once the trustees were required to make themselves knowledgeable about [the beneficiary's] condition and his needs, and the availability of services that would enable them to provide for those needs, they began, and continue to use funds from his trust for the purposes [the testator] anticipated and so deeply desired.." *Matter of JP Morgan Chase Bank N.A. (Marie H.)* [also referred to herein as *"Matter of JP Morgan*"], *supra* n. 8.

[60] If all else fails, a trustee has the authority (in New York) to apply to a court for the appointment of a professional guardian who would have authority to obtain information and provide documentation that a trustee would need to make informed decisions. N.Y. Mental Hygiene Law 8 1.06(a)(4).

[61] Whether a family member is "reliable" is also a judgment call.

4. Does the beneficiary have program staff who could help communicate requests for goods and services to supplement what government benefit programs provide?

5. Can the trustee hire a private care manager or other advocate to provide periodic assessments and recommendations for distributions?[62]

F. Developing a process for assessing and reviewing programs and services

Professional trustees are required to have a basic knowledge and understanding of the rules governing investments, income taxes, and other financial issues common to all fiduciary appointments. Most institutions have a process in place to review these issues on a regular basis.

When an issue falls outside of a trustee's traditional area of expertise, trust documents are typically written to allow the trustee to retain outside professionals and to pay those professionals with trust funds. For example, fiduciaries often retain outside professionals to address complicated tax questions. The reasonableness of the fee paid is always subject to review on an accounting, but the authority to retain outside expertise is well established.[63]

SNTs – by their terms and by statute – require a trustee to consider factors that are outside the traditional realms of trustee expertise: the availability of public benefits and the means tested goods and services they provide, the adequacy of those goods and services, and the potential impact of a distribution on continuing eligibility.[64]

This requirement is a variation on a common theme found in cases analyzing a trustee's exercise of discretion. Government benefit programs represent a valuable source of funding for goods or services that the trustee must consider before making a discretionary distribution.[65] To adequately consider these other sources, the trustee must answer a few questions.

1. <u>Determining whether Medicaid (or another program) pays for a good or service.</u>

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[62] This was the recommendation of the court in *Matter of JP Morgan*, *supra n.* 8. It is important to note that the beneficiary resided in a residential program with 24-hour Medicaid funded staffing. *Matter of JP Morgan* at p. 369. The case illustrates the fact that a trustee's obligation to remain informed goes beyond simply ensuring that a beneficiary is participating in a Medicaid funded program, and requires independent assessment and review.

[63] *Matter of U.S. Bank N.A.*, 51 Misc. 3d 273 (2015).

[64] New York's statute defines a supplemental needs trust as a discretionary trust which, by its terms "prohibits the trustee from expending or distributing trust assets in any way which may supplant, impair or diminish government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving; provided, however, that the trustee may be authorized to make such distributions to third parties to meet the beneficiary's needs for food, clothing, shelter or health care but only if the trustee determines…that the beneficiary's basic needs will be better met if such distribution is made." EPTL 7-1.12(a)(5)(ii).

[65] *In re Levison's Will*, *supra* n. 49. Decisional law in this area focuses on the trust creator's intentions in determining whether the trustee should consider a beneficiary's other resources when making a discretionary distribution. There is no ambiguity with an SNT, as the requirement to consider other resources (government benefits) is written into the New York statute and the language of the document.

This requires more than simply asking, "Is the beneficiary Medicaid eligible?" Medicaid is a payment source for certain goods and services, but the question for the trustee is whether Medicaid will pay for the specific good or service that the beneficiary needs. It is not uncommon for a beneficiary to be eligible for Medicaid (meaning that the Medicaid program is willing to pay for a good or service), but the good or service itself may be *unavailable*. This dilemma is often seen in the area of Medicaid funded staffing, where the hourly rate paid to community-based staff is so low that service providers either cannot find people to fill the positions, or they are forced to hire individuals with minimal experience.[66]

Medicaid funded waiver[67] programs offer a broad range of services to beneficiaries, some with more generous housing supports, and others with better hourly reimbursement rates for staff. But it is the responsibility of the beneficiary (or the beneficiary's family or staff) to ensure that those services are being fully utilized. In our experience, parents and other family members spend so much time and effort simply managing the affairs of the person with the disability that they have neither the time nor the inclination to develop a comprehensive understanding of program requirements. And if staff are overworked, underpaid or inexperienced, they will be minimally resourceful. Available services often go underutilized.

2. Assessing whether the government funded option is adequate, or whether trust funds should be used to supplement or replace it.

In order to comply with the terms of the trust and (in New York) the language of the governing statute, the trustee of a supplemental needs trust must determine whether funds in the trust should be used to *supplement* (or supplant) an available good or service.

Consider a beneficiary in need of a wheelchair. Medicaid pays for a basic wheelchair, but the beneficiary might do better with a more expensive wheelchair that is a better fit for her needs – safer, more comfortable, with more sophisticated positioning systems and other controls. The trustee might be able to acquire the chair immediately and without having to go through the Medicaid program's administrative review and approval process. The trustee has the discretion to pay for the better chair.

Consider a beneficiary with Medicaid funded staffing in the home. A beneficiary may be approved for three hours per day, two days per week. But the beneficiary and her family would rather not work with inexperienced Medicaid-funded staff, or they may want more

[66] In New York the issue has reached critical proportions. *See* testimony of Mark Van Voorst, Executive Director of NYSARC before the New York State Legislature warning of the impending crisis. https://bfair2directcare.com/2019/02/07/the-arc-new-york-executive-director-mark-van-voorst-asks-new-york-state-do-we-need-a-tragedy-to-occur-before-you-will-fund-a-living-wage-for-direct-support-professionals/.

[67] Medicaid Waiver programs provide services to people who would otherwise be in an institution, nursing home, or hospital, allowing them to receive Medicaid funded long-term care in the community. https://www.medicaid.gov/medicaid/hcbs/authorities/1915-c/index.html.

hours of coverage. If there are funds in the trust to pay, then the trustee has the discretion to purchase those extra hours, or hire other, more experienced staff.

Before using trust assets to *supplement* (or supplant) a government funded good or service, the trustee should have some process in place to confirm what the program is providing, and some means of documenting that the beneficiary would benefit from other or additional goods or services.

3. Determining whether using trust funds used to pay for a good or service will negatively impact benefit program eligibility.

Programs such as the Supplemental Security Income ("SSI") and Supplemental Nutritional Assistance Program ("SNAP") provide direct financial benefits to their participants. Others – like Medicaid – provide a payment source for goods and services, but do not make payments directly to a beneficiary.

The same distribution from an SNT can impact different programs in different ways. For example, the payment of rent from a trust will have no impact on Medicaid[68] but may result in a reduction in a monthly SSI payment and an increase in the rent paid for HUD subsidized housing.[69]

The trustee is charged with knowing which benefit programs a beneficiary is participating in *at the time of the distribution,* understanding that many beneficiaries migrate in and out of different benefit programs based on changes in family composition, financial condition, and other circumstances, and knowing how the proposed distribution might impact those benefits.[70]

If a trustee exercises discretion and uses funds in the trust to pay rent so that the beneficiary can move into a nicer neighborhood, the trustee must understand the impact of its discretionary distribution on the SSI benefit, and document why the beneficiary would be better off with less monthly income but a better place to live.

4. Recommendation:

In determining whether a trustee of a supplemental needs trust has reasonably exercised discretion, judicial review should consider whether the trustee developed a protocol for assessing government benefits and available services, and a process for periodic review and update.

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[68] 18 N.Y.C.R.R. § 360-4.3(e).

[69] POMS SI 01120.200E.1.b; *see also The Impact of Special Needs Trusts on Eligibility for Subsidized Housing*, The Voice, Volume 5, Issue 4 (March 2011), https://www.specialneedsalliance.org/the-voice/the-impact-of-special-needs-trusts-on-eligibility-for-subsidized-housing-2/.

[70] New York's statute makes clear that "neither principal nor income held in trust shall be deemed an available resource to the beneficiary under any program of government benefits or assistance; however, *actual distributions from the trust may be considered to be income or resources of the beneficiary to the extent provided by the terms of any such program*." EPTL 7-1.12(b)(3) (emphasis added).

Upon being appointed the trustee should promptly develop a plan to confirm government benefit eligibility and available goods and services, to assess whether those services and supports are adequate, and to review that information on a regular basis. The trustee should consider the following resources and suggestions:

1. For beneficiaries participating in a waiver program, disability service providers prepare periodic reports (called Service Plans or Life Plans in New York[71]) which include information on a beneficiary's preferences, health, family supports, and professional providers. Different programs have different reporting requirements, but most publicly funded programs will require a summary report of some type. These reports can often provide useful information on what services might be available through a government benefit program.[72] The trustee should regularly obtain these reports.

2. If a beneficiary has proactive and well-informed family members, they may be able to provide the trustee with information needed to determine whether a government benefit program is providing an adequate level of goods and services.

3. The trustee can hire a private care manager or other advocate to conduct a comprehensive review of benefit eligibility and available services and provide options for supplementing those benefits and supports.[73]

G. Preparing annual accountings and periodically seeking judicial settlement

At some point, every trustee seeking to be discharged must account to its beneficiaries. If those beneficiaries are competent and willing, they can "settle" the trustee's accounting voluntarily and without court order. This is often not an option for SNT trustees.

1. What is an "accounting"?

We use the term "accounting" to refer to a summary of financial activity over a given time period, presented to the beneficiaries of a trust to keep them informed about trust activity. Sometimes they are filed with a court, sometimes not.

Some courts provide forms that trustees must use in summarizing financial activity. Some court forms are very simple, requesting only opening and ending balances and a summary of distributions made over the accounting year. Others are more elaborate and

[71] For individuals served by the NYS Office of People With Developmental Disabilities, see Administrative Directive 18 ADM 06, "Transition to People First Care Coordination" (June 26, 2018).

[72] A word of caution is warranted here. Those with experience reviewing Life Plans (formerly called "Individualized Service Plans" or "ISPs") know that these documents often contain outdated and inaccurate information, largely a result of staff having too many reports to prepare and not enough time and experience to prepare them in a thorough and detailed fashion.

[73] In 2016, the New York State Bar Association Trust and Estates Section Subcommittee Reviewing Changes to EPTL 7-1.12 recommended that the statute be modified so as to require the trustee of a supplemental needs trust to investigate the need for a case manager, to retain a case manager where necessary, and to pay the case manager from trust funds. *See* Memorandum dated March 30, 2016, from Nina P. Silfen, Esq. Stephanie Hamberger, Esq., and Jonathan Byer, Esq. to Michael Schwartz, Esq., Chair of the Trust and Estate Administration Committee of the Trusts and Estates Section of the New York State Bar Association.

track unrealized gain and loss, allocate expenses to principal and income, and allow the trustee to provide additional information on explanatory schedules.

Used here, the term "informal accounting" refers to accountings which are filed with a court or presented to a beneficiary for informational purposes. In some cases, they are required by statute, by court order or by the terms of the trust document. In others they are not required but are prepared voluntarily by a trustee to keep the beneficiaries informed of trust activity.

In New York, many SNT trustees are required to file annual informal accountings when the trusts were established and funded by court order in a guardianship proceeding or personal injury action. These informal accountings are reviewed by an examiner or fiduciary clerk, but they will not receive formal judicial review. We refer to them as informal accountings even though they are filed with a court.

The format used for an informal accounting can vary. A year-end financial statement that a trustee provides to a beneficiary could be considered an informal accounting. A checkbook ledger and accompanying bank statements might be appropriate in some circumstances. If a trustee is required to account by court order and the court has a preferred form, then the trustee will use that form. If there is no court filing requirement, a trustee wishing to keep its beneficiaries informed of trust activity can use whatever form it deems appropriate. Some trustees may send financial statements, others may use a more elaborate format similar to what would be used in an estate accounting.

A proceeding for "judicial settlement" involves a petition to a court asking for review and approval of the trustee's accounting. These proceedings are filed with notice to all interested parties. In New York, the form of the accounting which must accompany the petition is promulgated by the Chief Administrator of the State of New York and is comprehensive.[74]

2. Accounting requirements for SNTs vary by state.

There is no requirement under the federal or many state supplemental needs trusts statutes that a trustee prepare annual accountings of any type or with any frequency. Such is the case in New York, where there is no statutory, regulatory or administrative requirement that a trustee of an SNT prepare annual accountings.[75] As a result, many first party and third party SNTs in New York and elsewhere are administered without ongoing oversight. If the trustee wants to resign during the beneficiary's life or seeks to have its accounts settled upon the beneficiary's death, the trustee's discretionary decisions will be subject to second guessing inherent in proceedings for judicial settlement of multi-year accountings, a process familiar to trustees of discretionary trusts.

The proactive trustee can mitigate the risk of belated challenge by keeping the beneficiaries regularly informed of trust activity, but the effectiveness of this approach will

[74] SCPA 106; Official Form JA-4, "Trust Accounting With Instructions."
[75] *Matter of Kaidirmouglou*, *supra* n. 39; *Matter of KeyBank*, *supra* n. 39; *Matter of Feuerstein*, *supra* n. 39.

be determined in part by the accounting format used, the frequency of the disclosure, and the capacity of the beneficiary.

3. Financial statements alone provide insufficient disclosure.

In a traditional trust administration, the trustee provides a beneficiary with monthly, quarterly or annual financial statements. These statements keep the beneficiaries informed and can serve as the basis for an informal settlement of the trustee's accounts when the trust terminates or when a trustee is otherwise seeking to be released.

This level of informality is inappropriate in the context of SNT administration for at least four reasons:

1. A beneficiary with a cognitive disability may not have the ability to review and understand financial statements and therefore would be unable to provide informed consent to the settlement of a trustee's account. While a trust could be drafted to allow a third party (like a parent or guardian) to review and approve a trustee's accounts, courts tend to frown on informal settlements by guardians,[76] especially in cases where the guardian has a conflict (such as when the parent-guardian resides in a home owned by and financially supported by the trust).

2. Evidence that a fiduciary has provided all beneficiaries with copies of financial statements, tax returns and other trust activity will not preclude a later challenge in a proceeding for settlement of the fiduciary's account, especially where a beneficiary has a cognitive disability.[77]

3. Relying solely on the delivery of financial statements presents even greater risk for the trustee of a first party supplemental needs trust, where the Medicaid program is entitled to be repaid upon the death of the beneficiary and is thus an interested party in any proceeding for settlement of the trustee's accounts. Financial statements reviewed as part of a Medicaid application or redetermination do not bind the agency and do not preclude a later proceeding to recover incorrectly paid Medicaid.[78] Nor do they address the prospect that the trust remainder may not be sufficient to satisfy the Medicaid claim upon the beneficiary's death to recoup correctly paid Medicaid. Medicaid program representatives insist on formal judicial settlement for a fiduciary to be released when a trust is terminating, payment of the Medicaid recovery is due, and the recovery cannot be fully satisfied by the trust remainder.

4. Information presented on complex financial statements can be confusing and difficult to understand. If the information is not clear and complete, a release based on that information may be unenforceable.[79]

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[76] 7 Warren's Heaton on Surrogate's Court Practice § 94.02(2)(a) (2019).
[77] In determining whether an informal account by a trustee is adequate, "the court must consider that [the beneficiary] is an adult under no disability." *Matter of Spacek*, *supra n.* 45 at 8.
[78] N.Y. Soc. Serv. L 366(2)(b)(2)(v); *Oxenhorn v. Fleet Trust Co.*, 94 NY2d 110 (1999).
[79] *Matter of Spacek*, *supra n.* 45.

4. Traditional accountings do not address the unique responsibilities associated with SNT administration.

Some trustees provide informal accountings to their beneficiaries on an annual or other periodic basis. The format and level of detail vary, but these informal accountings rarely identify and address issues that would be the subject of inquiry by the agencies administering the Medicaid or SSI programs. [80]

Accountings prepared by corporate trustees frequently combine reimbursements for various items into a single 'discretionary distribution' rather than separate them by category. Thus, a reimbursement to a family member might include items which would impact SSI (such as groceries) as well as items which would not (such as a cell phone bill). Supplemental needs trust accountings should segregate distributions by the type of expense and use the informational schedules to identify distributions which may impact public benefits.

Similarly, these informal accountings may not identify transactions which provide a derivative benefit to third parties or may not address those transactions in the explanatory schedules.[81]

Consider a trustee who, after consulting with a beneficiary and her guardian, decides to use funds in an SNT to pay rent so that the beneficiary and her guardian can move into a decent apartment. That payment would be reflected on the informal accounting. An accompanying note in the explanatory schedule would confirm that the guardian is paying his portion of the rent, that payment from the trust is being made with the understanding that there will be an offset to the beneficiary's monthly SSI payment, and that the beneficiary and her guardian have reported the ongoing payment to the SSI program in anticipation of the adjustment. By doing so, the informal accounting will reflect that the trustee has made an *informed* decision and that the trustee has *considered the impact of the distribution on government benefits.*

5. Filing an informal accounting is not the same as petitioning for judicial settlement.

When an SNT is funded by court order, the order will often require that an annual accounting be filed with the court for review by an examiner or fiduciary clerk. Accounting format varies, and the review is more of a financial reconciliation to ensure that the accounts balance and that distributions were made in compliance with any restrictions or limitations that may have been imposed by the court.

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[80] Lewis, Kristen M., Esq. and Lowder, Janet L., Esq., *SNT Beneficiaries on the Move: Issues with SNT Portability*, at p. 7 (Stetson University College of Law 2017 National Conference on Special Needs Planning and Special Needs Trusts).

[81] See recent revisions to the Social Security Administration's Program Operations Manual System ("POMS") SI 01120.200–203, effective April 30, 2018, which adopted the "primary benefit" test for SNT distributions. New York has utilized the primary benefit test since 1996. *See* OBRA 93 Provisions on Transfers and Trusts, NYS Department of Social Services Administrative Directive, 96 ADM 8 (March 1996), at (IV)(7)(b)(ii).

This administrative review does not formally settle the trustee's accounting.[82] As such, these *ex parte* submissions do not protect a trustee from later challenge by a remainder beneficiary or, in the case of a first party SNT, by the Medicaid program.[83] In order for the trustee to be formally released from any further liability for information contained in the accounting it would have to petition for judicial settlement with service on all interested parties.[84]

This lack of a binding determination presents a particular risk for trustees of first party supplemental needs trusts. Eventually these trusts will terminate, and the trustee will need to formally account, a process which includes the determination of the Medicaid program's repayment amount. Increasingly, state Medicaid programs are hiring national for-profit entities known as "Medicaid Recovery Audit Contractors" to pursue their recovery rights.[85] These companies have their own proprietary procedure for review and interpretation of the responsibilities of the trustee of a supplemental needs trust and would not be bound by informal filings with a state court.

Finally, the scope of a trustee's responsibility to the Medicaid program upon the death of the beneficiary remains unclear. The Social Security Administration takes the position that the trustee of a trust where the beneficiary is receiving an SSI benefit is responsible to ascertain and resolve repayment obligations to every state in which a beneficiary has ever resided,[86] although the language of the federal supplemental needs trust statute contains no such affirmative obligation. If a deceased beneficiary lived in a number of states, will service on the Medicaid program representative in the state where the beneficiary last received Medicaid be sufficient to bind the Medicaid program? There are apparently no reported decisions on this issue.[87]

6. Annual proceedings for advice and direction or judicial settlement would be impractical and cost ineffective.

The aspects of SNT administration highlighted here – communication challenges, unfamiliar government benefit programs, and the inability to informally settle accounts – present unique risks for SNT trustees.

Given these risks, a prudent trustee might be inclined to seek judicial approval of its actions on a regular – and perhaps an annual – basis. The trustee could petition for

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[82] In some counties the examiner's approval will be accompanied by an order acknowledging its submission and approving the examiner's fee, but the informational accounting is still an *ex parte* submission and will not have the same legal effect as an order obtained in a proceeding for judicial settlement of the trustee's accounts.

[83] *Matter of Salvati*, 90 A.D.3d 406 (1st Dep't 2011).

[84] *Comm'r. of the NYC Dept of Social Services v. New York Presbyterian Hospital, Chi Young Lee and BNY Mellon, N.A.*, 47 Misc. 3d 1204(A) (Sup. Ct., N.Y. Co. 2015).

[85] Lewis and Lowder, *supra* n. 80. *See also* http://hms.com/special-needs-trust-recovery-services/.

[86] POMS SI 01120.203(B)(10).

[87] The POMS are not statute or regulation, and the agency's interpretation of this statutory reimbursement requirement should be given limited weight in a state court proceeding for the settlement of a trustee's accounts.

judicial settlement of its accounting or could seek "advice and direction" on a proposed distribution plan. Both proceedings present risks of their own, and neither approach – if undertaken annually - would be cost effective.

A trustee could present a formal accounting for judicial settlement on an annual basis.[88] Where the beneficiary has a cognitive disability, and regardless of whether a property guardian has been appointed, most courts will appoint a guardian *ad litem,* especially where a court-appointed guardian resides with the beneficiary and has indirectly benefitted from the use of trust funds. Some guardians *ad litem* are attorneys with significant experience in special needs planning and disability benefits, but many are not. Inexperienced guardians *ad litem* can complicate a proceeding for settlement.

Because the Medicaid program is considered to have a remainder interest in a first party supplemental needs trust,[89] the Medicaid program representative will be a necessary party to the proceeding for judicial settlement. The Medicaid program representative will then have an unfettered opportunity to challenge discretionary distributions appearing on the accounting, focusing on distributions which would have an impact on “benefit eligibility"[90] or reduce the amount available for post-mortem recovery.

Alternatively, a trustee could seek "advice and direction" on an annual basis: court approval for a distribution plan developed in conjunction with the beneficiary (or the beneficiary’s guardian), a care manager, or others involved in the beneficiary’s life. By having a distribution plan approved in advance, the trustee would be insulated from challenge so long as a later accounting showed that distributions were made in compliance with the court approved plan.

Yet courts regularly refuse to entertain petitions for advice and direction when a matter is considered to be within the discretion of a trustee or guardian.[91] Moreover, this approach would require a return to court whenever a plan needed to be modified based on changes in health, household composition or other factors that are impossible to predict with certainty. And as with a petition for judicial settlement of the trustee's accounting, the Medicaid agency will be a necessary party to the proceeding and will have standing to dispute the proposed plan of care or the budgeted amount, or otherwise seek to limit distributions and increase the amount available to satisfy the Medicaid program's recovery upon the beneficiary's death.[92]

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[88] SCPA 2208(3)(b).
[89] N.Y. Soc. Serv. L. § 366(2)(b)(2)(v).
[90] *See Matter of Tinsmon (Lasher)*, *supra* n. 29, where a representative from New York's Medicaid program argued against an otherwise permissible distribution from an SNT based on its interpretation of the SSI program rules, a program that the agency had no authority to administer, and no particular expertise to interpret. Both the lower court and the appellate court disposed of the agency's arguments in short order, but the trustee still had to spend the time and money in litigation.
[91] *In re Hagadorn*, 176 Misc. 233 (Sup. Ct. New York County 1941); *In re Meenan*, 46 NYS2d 282 (Sur. Ct. Westchester County 1944); *In Re William M. Kline Revocable Trust*, *supra n.* 54.
[92] *Matter of Tinsmon (Lasher), supra n.* 29.

7. Recommendation:

In order to manage and mitigate risk, the trustee should take the following steps:

1. The trustee should prepare an informal accounting of trust activity on an annual basis, and provide copies of the accounting to the beneficiary with the disability (if competent, or to the court appointed guardian or agent under power of attorney if not) and to the Medicaid program representative if the trust is a first party SNT.[93] If the beneficiary is a minor, the beneficiary's parents should also receive a copy.

The informal accounting should clearly delineate distributions which would have an impact on benefit eligibility, or which provide a derivative benefit to third parties, and should include clarifying information in the explanatory schedules as appropriate.

Finally, the informal accounting should be prepared in the same format that would be required in a proceeding for judicial settlement so that the trustee can move quickly to have its accounts settled if any party receiving a copy raises an issue. This is especially important for first party supplemental needs trusts where the Medicaid program will be a necessary party to any settlement proceeding.

2. On a periodic basis, the trustee's accounts should be judicially settled. Even if a trustee is providing comprehensive informal accountings on an annual basis to all beneficiaries and none of the beneficiaries raise an issue, the trustee should nonetheless petition for judicial settlement after a number of years in order to wipe the slate clean. Frequency will depend on a number of factors. If a trustee is making regular and significant distributions from a well-funded trust, it might petition for judicial settlement every few years. If the trust is modestly funded and relatively inactive, it might petition less frequently.

This recommendation is not limited to SNT trustees. Circumstances which can complicate the settlement of a trustee's accounting (whether informally by agreement or by court order) are familiar to attorneys who represent trustees in contested accounting proceedings. Older financial records are lost or unavailable, a common occurrence in an era of bank consolidation. Trust officers retire, taking with them the first-hand knowledge of a beneficiary's circumstances and the basis for certain discretionary distributions. Relationships with beneficiaries may sour over time, increasing the likelihood of objections.

For trustees of SNTs, there are additional variables and uncertainties. Government benefit program rules change over time, and a distribution that might have had no impact on a particular benefit under a prior policy may now result in a penalty. New programs might emerge which provide funding for services that the trustee has been paying for with trust funds for many years. Finally, attorneys who represent the Medicaid program in proceedings for judicial settlement also retire, and their replacements may take a much

[93] In our first party supplemental needs trust practice we provide copies of annual accountings to the Medicaid program representatives, and to other remainder beneficiaries when possible and practical.

more adversarial approach in settlement proceedings. Periodically seeking judicial settlement puts all parties on notice – the beneficiary with the disability, the Medicaid program (for first party SNTs), and the remainder beneficiaries – and requires them to present their objections for review by the court.

3. For significant transactions or transactions which would clearly result in a derivative benefit to someone other than the beneficiary, the trustee should seek prior court approval. In New York, this is typically done through a petition for advice and direction.

8. Acknowledging the deviation from standard practice.

This approach – comprehensive informal annual accountings, regular petitions for judicial settlement, and periodic applications for court approval - is antithetical to traditional estate planning, where attorneys try to limit administrative expense and judicial oversight when drafting trusts, and where trustees try to avoid interaction with the courts. Disability advocates may be concerned over the financial impact of this approach on individuals with disabilities who have trusts of more limited amounts. We understand these concerns.

On the other hand, attorneys and other advocates do a disservice to SNT beneficiaries and trustees when they fail to explain the level of exposure faced by the trustee of an SNT (especially a first party SNT), or when they try to draft around the formalities associated with trust administration. If all trust beneficiaries are competent and capable of self-advocacy, estate planners can draft documents to minimize administrative responsibilities and the associated costs. If a trustee cuts corners in keeping records, providing financial statements, or filing tax returns, the beneficiaries may decide to look the other way rather than endure the time and expense of a formal accounting.

But such informal settlement is typically not an option for SNTs, especially first party SNTs where the Medicaid program is one of the interested parties. Medicaid's priorities are contrary to those of the beneficiary with the disability and the remainder beneficiaries. The less the trustee spends during the beneficiary's life, the more that this statutory creditor will recover upon the beneficiary's death.

Informal accountings prepared and presented on an annual basis create a record of full disclosure which may serve as a basis to defend against objections in a proceeding for judicial settlement,[94] periodic judicial settlement limits the trustee's ongoing risk, and petitions for advice and direction protect future distributions from later challenge.

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[94] In New York, the failure to object may be considered 'ratification' and serve as a basis for a motion to dismiss the objections of an informed remainderman. *Rajamin v. Deutsche Bank Nat'l Trust Co.*, 757 F.3d 79 (2d. Cir. 2014). Would the Medicaid program be similarly bound? One might argue that a government agency cannot be estopped. See *Oxenhorn v. Fleet*, *supra n.* 78. This position fails to recognize that in New York, the Medicaid program is named as a beneficiary by statute (N.Y. Social Serv. L. § 366(2)(b)(*2*)(v)). In a state court proceeding for settlement of a trustee's accounts, the Medicaid program's interest should be no greater and no less than that of any other remainder beneficiary.

V. Matter of J.P. Morgan and Matter of Liranzo revisited

Two New York decisions which received significant attention within the fiduciary community involved surcharge (or the threat of surcharge) against a trustee for failing to fulfill its responsibilities under the terms of a supplemental needs trust – one for spending too little, the other for spending too much. Here we revisit those decisions to see how the courts approached the standard of review, and to determine whether implementation of some of the procedural recommendations outlined in this article might have led to a different result.

A. Matter of JP Morgan

In *Matter of JP Morgan*,[95] the Court criticized the trustee of a well-funded third party SNT for collecting commissions while trust funds sat dormant. The beneficiary lived at a residential school for individuals with disabilities in upstate New York. The beneficiary's mother funded the trust upon her death in 2005, appointing her attorney and a bank as co-trustees. The attorney later petitioned to become the beneficiary's guardian, and in connection with that proceeding the Court directed the trustees to petition for judicial settlement of their accounts.

The Court learned that in the five years subsequent to the mother's death, no distributions were made for the beneficiary. Neither co-trustee visited the beneficiary nor contacted staff at the school to inquire of his needs. Neither co-trustee notified school staff of the existence of the trust. The bank co-trustee testified that it lacked the "institutional capacity to ascertain or meet the needs of this severely disabled, institutionalized young man."[96] Both co-trustees took their commissions.

1. <u>The co-trustees satisfied the basic obligations of fiduciary conduct.</u>

The decision suggests that the trustees satisfied their traditional fiduciary responsibilities: they invested the funds in the trust, filed tax returns, and were able to fully account when directed by the Court.[97]

2. <u>The co-trustees failed to establish a protocol for communication or a plan to assess and review programs and services.</u>

Satisfying the basic responsibilities of fiduciary conduct was not enough. In the words of the Court:

> It was not sufficient for the trustees merely to prudently invest the trust corpus and to safeguard its assets. The trustees here were affirmatively charged with applying trust assets to [the beneficiary's] benefit and [were] given the discretionary power to apply additional income to [the beneficiary's] service providers. Both case law

[95] *Matter of JP Morgan*, *supra n.* 8.
[96] *Id.* at 370.
[97] While the trustees were able to account for funds held in the SNT, the Court questioned the accuracy of the accounting for the prior estate and the initial SNT funding amount. *Id.* at 379.

> and basic principles of trust administration and fiduciary obligation require the trustees to take appropriate steps to keep abreast of [the beneficiary's] condition, needs, and quality of life, and to utilize trust assets for his actual benefit.[98]

The judge directed the trustees to hire a care manager to investigate, report and facilitate distributions for the beneficiary. The care manager visited the beneficiary, attended team meetings, provided the co-trustees with quarterly reports, made purchases, and served as an intermediary between residential staff and the trustees.[99] The care manager made a number of recommendations, including a consultation with a "non-Medicaid neurologist" who recommended medication that was not covered by Medicaid but had fewer side effects, the purchase of computer equipment and software for adaptive communication, recreational equipment, and gift certificates for local merchants so that the beneficiary could experience the outside community. The beneficiary made "extraordinary - and heartwarming – progress"[100] as a result of these expenditures.

3. The drafting attorney attempted to limit the trustees' obligation to account.

The attorney co-trustee drafted the SNT and apparently tried to limit the trustees' obligation to account to its beneficiaries, something which the Court held:

> violates public policy and cannot be enforced, where, as here, the beneficiary is a person under a disability, and no one is protecting the beneficiary's interests.[101]

The decision does not provide any insight into why the drafting attorney tried to limit the accounting requirement. The provision might have been taken from a standard discretionary trust and intended to limit administrative costs. Regardless, had the trust included a provision requiring the trustees to prepare an informal accounting on an annual basis, it is likely that a representative of the residential program would have become aware of the trust and could have provided the trustees with information on the beneficiary's needs.

4. The Court clearly articulated a standard of review.

The Court held that the trustees' actions – or, more specifically, their inaction – constituted an abuse of discretion:

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[98] *Id*.

[99] *Id.* at 371. It is important to note that the beneficiary resided in a Medicaid funded residential program with round the clock staffing and related support. The Court nonetheless directed the co-trustees to retain and pay a private care manager to monitor those supports, and in some cases provide services that would otherwise have been provided by Medicaid-funded staff, such as scheduling doctors' visits or consulting with specialists. The case illustrates the difference between the baseline or "floor" provided by public benefit programs and the optimal level of services and support that might be available through the proactive expenditure of funds from an SNT. *See Foote v. Albany Med. Ctr. Hosp*., 71 A.D. 3d 25 (3d Dep't 2009), *aff'd.* 16 N.Y. 3d 211 (2011).

[100] *Matter of J.P. Morgan, supra n.* 8 at 370.

[101] *Id.* at 377, citing *Matter of Malasky*, 290 A.D. 2d 631 (3d Dept 2002), and *Matter of Shore*, 19 Misc. 3d 663 (Sur. Ct., N.Y. Ct. 2008).

> Courts will intervene not only when the trustee behaves recklessly, but also when the trustee fails to exercise judgment altogether ("even where a trustee has discretion whether or not to make any payments to a particular beneficiary, the court will interpose if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion").[102]

In *Matter of JP Morgan*, the trustees' mistake was not necessarily the failure to make expenditures for the beneficiary's benefit. Rather, the trustees failed to promptly establish a protocol for communicating with the beneficiary's staff and assessing his needs. Had the trustees retained the private care manager promptly upon being appointed, they would have had the information needed to enhance his quality of life by supplementing the care and support he was receiving at the residential school.

Alternatively, the care manager's report might have reflected that the beneficiary was thriving, that the beneficiary's mother (who died just a few years earlier) had already purchased many items to enhance her son's quality of life, and that - at the moment - the beneficiary needed for nothing. On these facts the accounting might have looked substantially the same, but the trustee would have been able to document that it met all of its traditional fiduciary obligations, and it would also be able to show that its decision not to spend funds over the past few years was not an abuse of discretion, but rather an *informed decision* made after a comprehensive review.

B. Matter of Liranzo

In *Matter of Liranzo*,[103] a bank serving as corporate trustee of a first party supplemental needs trust funded with litigation proceeds sought to settle its account and terminate the trust. The trust was initially funded with just over $420,000. Six years later, the trust had approximately $3,200 remaining. The accounting showed that the largest expenditures were for private caregivers and taxi service for the beneficiary.

1. The trustee failed to satisfy some basic obligations of fiduciary conduct.

There did not appear to be any credible analysis of the long-term financial impact of the level of spending undertaken by the trustee.[104] Additionally, the trustee authorized "each and every discretionary disbursement requested by the infant plaintiff's mother"[105] rather than exercising independent judgment on the propriety of those distributions.

2. The trustee maintained communication with the beneficiary's family member.

[102] *Id.* at 377, quoting Restatement (Third) of Trusts, § 50, comment b.
[103] *Liranzo*, *supra n.* 9.
[104] *Id.* at 4.
[105] *Id.* at 5.

In *Matter of Liranzo* there ***was*** an involved parent – the beneficiary's mother – and the trustee was in regular communication with her.[106]

3. The trustee did not adequately assess the availability of Medicaid funded services.

Regarding the private caregivers, a representative from the bank trustee testified that an "advocate for the [beneficiary]"[107] communicated with the local Medicaid agency about the availability of Medicaid funded staff and informed the trustee that Medicaid funded aides were unavailable. The trustee also testified that it "consulted with [the beneficiary's mother] and social workers that concluded private caregivers were in the best interest of [the beneficiary]."[108]

While there were a number of hearings and conferences, the decision does not reference testimony from the "advocate for the [beneficiary]" or any of the social workers upon whom the trustee relied in deciding to pay privately for caregivers. The decision suggests that the trustee communicated primarily with the mother and did not retain its own professional to corroborate the information that the mother was providing.

Similarly, the Court held that the trustee should have "further investigated" the mother's representation that riding in a taxi helped ease the beneficiary's stress before agreeing to spend more than $50,000 on the expense over a six-year period.[109]

4. The Court did not clearly articulate a standard of review.

In Part V of this article we reviewed the various explanations that the Court used in finding that the trustee breached its fiduciary duty to the beneficiary. The decision begins with the statement that the trustee breached its fiduciary duty by "failing to make decisions based on the long-term needs of the beneficiary that would extend the life of the Trust for as long as possible."

In surcharging the trustee for payments made to the taxi service, the Court found that such payments "do not appear to be a responsible use of Trust fund monies consistent with prolonging the life of the Trust."

Later in the decision the Court criticizes the trustee for making distributions which "could have either been avoided or were unreasonable" or reflected a failure to administer the trust in the "sole interests of the beneficiary."

At no point did the Court clearly articulate the standard it was applying in assessing the trustee's conduct. As a result, the decision does not provide any practical guidance beyond the specific (and admittedly concerning) facts of the case.

5. An abuse of discretion analysis would provide the same result with better guidance.

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[106] The decision does not say whether the mother was also a court appointed guardian.
[107] Liranzo, *supra n.* 9 at 5.
[108] *Id.* at 6.
[109] *Id.* at 7.

If the Court applied an abuse of discretion analysis, it could have reached the same conclusion, but with better guidance for SNT trustees.

The trustee's failure to consider the long term impact of paying for private caregivers and taxi rides would support a finding that it abused its discretion under the basic rules of fiduciary conduct which require a trustee to balance the immediate needs of the beneficiary with probable future needs.[110]

The trustee's blind reliance on representations made by the beneficiary's mother would support a finding that it abused its discretion by failing to independently investigate its beneficiary's needs.[111]

The trustee's failure to thoroughly investigate Medicaid funded alternatives would support a finding that it abused its discretion by failing to follow the terms of the governing document, which require consideration of public benefits and services before expending trust funds.[112]

6. <u>The trustee's biggest mistake was the failure to promptly obtain an independent assessment of its beneficiary's needs.</u>

Upon being appointed, the trustee should have promptly investigated the availability of Medicaid-funded goods and services and determined whether they were adequate, or whether they should be supplemented by expenditures from the trust. Had the trustee retained a private care manager to conduct an independent assessment, it might have learned that there were indeed Medicaid funded home care programs that would have provided aides for its beneficiary, and it might have learned of other, less expensive but equally effective therapeutic alternatives to riding in a taxi to calm the nerves.

Alternatively, the trustee might have decided to spend money in the same way. For example, the care manager's report might have disclosed that the beneficiary was approved for Medicaid funded staff but was unable to find aides willing to work at the Medicaid payment rate. The report might have disclosed that the beneficiary had unique and complicated behavioral issues, and that the privately paid aide (who did not accept Medicaid) was the only one capable of managing those behaviors. The report might have disclosed that taxi rides did indeed calm the beneficiary, but without the debilitating side effects caused by the anti-anxiety medication he would otherwise have to take. Finally, the report might have disclosed that the beneficiary had a shortened life expectancy and the mother wanted him to have the best quality of life possible in his final years.

Based on the care manager's report, the beneficiary's limited life expectancy, and the support of the mother, the decision to aggressively apply income and principal to pay for

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[110] *Estate of T. Harry Glick*, *supra* n. 18.
[111] *Matter of Hammerschlag*, *supra* n. 48.
[112] New York Estates Powers & Trusts Law (EPTL) 11-1.1(a)(2).

private caregivers and taxi services rather than rely on Medicaid funded supports would not necessarily be an abuse of discretion, notwithstanding the fact that it depleted the trust in a short period of time, [113] and notwithstanding the fact that the Court might have made a different decision on the same set of facts.

7. A petition for advice and direction would have insulated the trustee from liability.

Even with a comprehensive assessment from a private care manager and the support of a parent, a prudent trustee should be concerned about spending so much in such a short period of time. To mitigate risk, the trustee could seek prior court approval of its proposed distribution plan.

A court might refuse to consider the application, as it is essentially a request to substitute the court's judgement for that of a trustee with full discretion under the terms of the governing document. But in such a case, the trustee would have a record of its attempt to secure court approval. While not binding in a subsequent proceeding for settlement of its accounts, it would buttress the argument that the trustee's exercise of discretion was encouraged by the court and should be upheld over later objections.

VI. Conclusion

The need for professional advocates for individuals with disabilities will continue to grow with each passing year. With aging parents increasingly unable to provide support to their sons and daughters with disabilities, and with disability service providers stretched thin by cuts in government funding, professional caregivers and fiduciaries will be asked to take on greater responsibility in serving the needs of those who cannot care for themselves.

In recent years many otherwise capable financial institutions have declined to administer supplemental needs trusts, in large part because of the uncertainty over how their conduct will be measured after the fact. Cases like *Matter of JP Morgan* and *Matter of Liranzo* reinforce these concerns.

The well-established body of law governing discretionary trusts is more than capable of accommodating the unique aspects of supplemental needs trust administration. The failure to apply the abuse of discretion standard has discouraged the development of commonly accepted "best practices" which, if followed, would better serve beneficiaries of supplemental needs trusts, and help insulate trustees from the risks associated with this type of administration.

[113] New York's supplemental needs trust statute makes clear that the trustee may exhaust trust principal "even to the extent of the whole" for the benefit of the beneficiary. EPTL 7-1.12(e)(1).

The POMS Problem

Deference, distribution decisions, and the reality of special needs trust administration.

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Overview

01 A question about travel

02 POMS' internal tension

03 Should POMS control?

04 The New York Experience

05 Putting it Together

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A question about travel

3

It started with a narrow question. . .

- The question: May a first-party supplemental needs trust reimburse family members who travel to visit a minor beneficiary, when maintaining contact is beneficial to the beneficiary?
- The tension: *During a recent Stetson presentation, an SSA representative said that language in an SNT which provides for payment for 'others' to visit the beneficiary would be denied and rejected, as the agency took the position that such payment was benefiting others instead of the beneficiary.*
- The practical effect: some practitioners revised trust language to avoid or limit provisions authorizing family visits

4

The factual scenario

THE RECORD

- First-party supplemental needs trust
- Minor beneficiary with a disability
- Family travels to provide companionship and emotional support
- The trustee believes maintaining contact benefits the beneficiary
- Trust authorizes distributions for companionship and well being

THE QUESTION

May the trust reimburse the family member's travel expenses without violating the sole-benefit rule?

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POMS' internal tension

A paid stranger: yes.
A sibling's plane ticket: no.

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POMS Provision #1: Sole Benefit Rule

SI 01120.201F.1

General Rule

"Consider a trust 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."

SI 01120.201F.3

Explanation of Rule For Third Party Payments

"The key to evaluating this provision is that, when the trust makes a payment to a third party for goods or services, the goods or services must be for the **primary benefit** of the trust beneficiary . . . . "

Reimbursable: "an Alzheimer's patient cannot be left alone and requires a sitter… Family members may normally do some of these things without compensation, but that does not prohibit the trust from paying for these services."

Not reimbursable: "trust purchase[s] a car for the beneficiary's grandchild to take the beneficiary to their doctor's appointments twice a month, but the grandchild [is] also driving it to work every day."

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POMS Provision #2: Travel Expenses

POMS SI 01120.201F.3.c

Payment of third-party travel expenses to visit a beneficiary to ensure the safety or medical well-being of the trust beneficiary… A third party can be a family member.

Allowed travel category #1

"Travel for a service provider to oversee the beneficiary's living arrangements when the beneficiary resides in an institution, nursing home, or other long-term care facility (for example, group homes and assisted living facilities), or other supported living arrangements."

Allowed travel category #2

"Travel for a trustee, trust advisor named in the trust, or successor to exercise their fiduciary duties or to ensure the well-being of the beneficiary when the beneficiary does not reside in an institution."

8

On the one hand…

F.3.a. allows a trustee to pay a family member to be a companion, and to pay the companion's museum admission.

On the other…

F.3.c. disallows reimbursement to the same family member for a plane ticket to provide companionship, unless the visit concerns the beneficiary's "safety or medical well-being."

Query: What if it was an exclusive museum event in the first example, and a short flight in the second, such that the museum ticket cost more than the flight?

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Should POMS control?

Landsman's answer in light of Loper Bright

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Landsman reframes the question

THE USUAL QUESTION

What does POMS allow?

THE ISSUE

This question treats a benefits-administration manual as the source of fiduciary obligation and leaves the trustee and beneficiary at the mercy of case worker interpretation.

LANDSMAN'S QUESTION:

Should POMS define a trustee's duties at all?

LANDMAN'S ANSWER

"Sole benefit" is a trust-law question first

Sub-regulatory guidance should *inform*, not *replace*, trust law – thus, agency readings should not be granted controlling deference

Agency readings earn persuasive weight when they are (1) thorough; (2) consistent with other agency actions;(3) reflect a procedural formality synonymous with careful consideration; (4) possess expertise; and (5) provide valid and persuasive reasoning (i.e. "*Skidmore* weight").

Landsman concludes that the agencies' interpretations fail several of these factors as federal welfare officials have no expertise in state trust law, they employ inconsistent reasoning, and they lack persuasive justification

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Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024)

What it held

- Chevron is overruled
- Courts must decide the best reading of a statute themselves
- Agency interpretations get weight only to the extent they persuade (*Skidmore*)

Why it matters here

- POMS was never entitled to Chevron deference; it's a manual, not a regulation
- Some courts gave the POMS Chevron-style deference
- Loper Bright removes the basis for that approach

Bottom line

In court, POMS must earn its weight. But in practice, SSA offices still treat it as the rulebook.

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What *Loper Bright* does for our argument (and Landsman's)

- POMS is sub-regulatory guidance. It is not enacted law, and it never was.
- A trustee's duties arise from the instrument and state trust law — not from an agency manual.
- Courts now determine the meaning of "sole benefit" for themselves.
- The question is what the statute, the trust, and fiduciary duty require. Not what the manual permits.

Loper Bright places courts in the role Landsman envisioned: trust law as the primary guide, POMS as persuasive authority.

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Congress relied on state trust law...

"There is no reason to believe [Congress] abrogated States' general laws of trusts or their inherent powers under those laws... [and] we reject the conclusion that application of these traditional powers is contrary to the will of Congress. After all, Congress did not pass a federal body of trust law, estate law, or property law when enacting Medicaid. It relied and continues to rely on state laws governing such issues." ***Lewis v. Alexander*, 685 F.3d 325, 340 (3d Cir. 2012).**

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The New York experience

Administrative practice based on New York's statute and recent case law

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New York's Framework: Discretion Built In

The statute (EPTL 7-1.12)

Enacted in 1993 to codify *Matter of Escher:* an SNT is a discretionary trust

The trust may authorize a distribution that reduces or eliminates benefits, if the beneficiary is better off as a result

Benefits eligibility is a factor in the decision, not a limit on it

The practice

Inconsistent decisions, with heavy reliance on agency personnel

A generalized "best interests" inquiry substituted for fiduciary review

Trustees could not predict the standard their conduct would be judged by

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Matter of Ellen H., 82 Misc. 3d 1207(A), (Sup. Ct. Broome Cnty. 2024)

Facts

- Former trustee/guardian failed to maintain accurate accountings and made numerous undocumented expenditures from a first-party SNT.
- Questioned expenditures included personal loans, vehicle expenses, RV costs, home improvements, vacations, and cash withdrawals unrelated to the beneficiary.

Holding

- Court found the trustee breached her fiduciary duties, abused her discretion, and failed to prove expenditures were for the beneficiary's primary benefit.
- Trustee was surcharged $450,000 for unsupported and imprudent administration.
- References POMS, but decides the case on fiduciary grounds

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Ellen H. Methodology for Trustee-Decision Making

The Court undertook a three-part analysis (abuse of discretion standard):

1. Was the distribution made for the beneficiary's primary benefit?
2. Could the expense have been paid through an available governmental benefit program?
3. If so, did the trustee reasonably conclude the trust expenditure better served the beneficiary's needs?

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Putting it together

Drafting, documenting, defending.

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Protocol for the trustee

Communicate. Ask the beneficiary, the family, and the care team what the expenditure is actually for

Investigate. Check whether a benefit program covers it, and price the alternatives

Consider. Read the instrument's language before reading the manual's

Consult the guidance. Note what POMS says, including possible inconsistencies

Decide, and say why. One paragraph of reasoning, contemporaneous, in the file

Prove delivery. Invoices, receipts, and a record that the goods or services reached the beneficiary

Never self-deal. Nothing survives a self-interested distribution; if any question, get court approval

Account. Annual, accurate, and reconcilable to the penny

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Documenting the file

REQUEST	Reimburse $1,180 — mother's travel to visit beneficiary, age 14, in a group home four hours away.
TRUST AUTHORITY	Article IV(b) authorizes payments for companionship and well being.
PRIMARY BENEFIT	Care plan and clinician note tie regular family contact to the beneficiary's treatment goals; travel is the incidental cost of that contact.
PUBLIC BENEFITS	No program funding covers family visitation; confirmed with the care coordinator, March 14, 2026.
GUIDANCE CONSIDERED	SI 01120.201F.3.a. and F.3.c. read together — the primary-benefit analysis alongside the travel provisions.
DECISION	Approved at actual coach cost; receipts required, no per diem. Reasoning recorded this date.

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Draft for discretion, counsel for process, proceed to settlement

DRAFTING

Subject to state specific guidance/limitations:

- Grant broad discretion
- Allow distributions that impact benefits if it puts the beneficiary in a better position
- Include limited modification and amendment power in order to protect benefit eligibility after SSA review

COUNSELING THE TRUSTEE CLIENT

- Continue to counsel as you would any trustee client: the traditional rules of fiduciary conduct still apply
- In the exercise of discretion, establish a system for regular analysis of benefit program eligibility and program availability
- Consider administrative guidance as informative, not dispositive
- Settle your accounts regularly if trust activity is significant, periodically if it is not

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POMS informs. Fiduciary law governs.

Protecting the beneficiary and protecting the trustee are the same project — and neither is achieved by rigid adherence to an agency manual.

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Tax Law Update

What OBBBA Changed, and What It Did Not:
Medicaid Financing, the Lifetime Retirement Stretch, and the New Section 68 Trap for Nongrantor Special Needs Trusts

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I. Introduction: What OBBBA Changed for Our Clients, and What It Did Not

Public Law 119-21, the 2025 reconciliation act commonly called the One Big Beautiful Bill Act (OBBBA), is usually discussed as two unrelated laws: a tax bill and a Medicaid bill.[1] For special needs planners they are one story. The Medicaid provisions reshape the public-benefits landscape our clients depend on, especially the financing of home- and community-based services (HCBS). The tax provisions, together with what Congress chose not to change, determine how private resources set aside for a person with a disability—SNTs, ABLE accounts, and inherited retirement savings—can best be used to fill the gaps.

This paper follows that arc in four movements.

1. **Medicaid: the headline versus our clients (Part II).** A large part of OBBBA's health title is designed to reduce federal Medicaid spending, and the Congressional Budget Office attributes much of those savings to reduced enrollment. But the provisions that drive the widely reported coverage losses are aimed mainly at adults covered through the Affordable Care Act (ACA) Medicaid expansion, not at people who are disabled under Social Security definitions. For our clients, the more serious threat comes later and indirectly: financing reductions that will squeeze state budgets and, over time, the optional HCBS programs on which people with disabilities most depend.

[1] An Act to Provide for Reconciliation Pursuant to Title II of H. Con. Res. 14, Pub. L. No. 119-21, 139 Stat. 72 (July 4, 2025) (commonly called the One Big Beautiful Bill Act, or OBBBA), https://www.govinfo.gov/app/details/PLAW-119publ21

2. **The tax provisions that matter to SNT practice (Part III).** OBBBA made the compressed trust rate structure permanent, set a permanent $15 million indexed estate and gift exclusion, extended and expanded ABLE provisions, added a temporary senior deduction, and rewrote § 68.
3. **What did not change: the lifetime stretch (Part IV).** OBBBA left intact the SECURE Act rule allowing a disabled or chronically ill beneficiary—including through an accumulation-style SNT—to receive inherited retirement benefits over the beneficiary's life expectancy. That makes yet-untaxed retirement savings one of the most benefits-protective assets a parent can leave, and it should prompt planners to rethink how inheritances are divided among siblings who face very different payout rules.
4. **Who pays the tax, and the new § 68 trap (Parts V through XIV).** A refresher on grantor and nongrantor status for first-party and third-party SNTs leads to the new, underappreciated interaction of compressed brackets, the 3.8% net investment income tax, and the rewritten § 68 limitation for nongrantor SNTs. Worked examples and a fourth-quarter planning protocol follow. Because trusts generally use the calendar year, the first Forms 1041 reflecting the new rule will generally be prepared in spring 2027, and decisions made in the fourth quarter of 2026 will determine what they show.[2]

> **Note on scope.** The examples in this paper are illustrative, simplified, and based on federal law and 2026 inflation-adjusted figures as understood at the time of writing (September 2026). They ignore state income tax unless stated otherwise.

[2] I.R.C. § 644(a) (the taxable year of any trust shall be the calendar year, subject to exceptions for tax-exempt and charitable trusts); see also Treas. Reg. § 1.645-1 (the § 645 election for qualified revocable trusts, the principal route by which a trust may use an estate's fiscal year), https://www.law.cornell.edu/uscode/text/26/644

Several OBBBA provisions are still being implemented through interim final rules and state plan changes, and the application of § 68 to trusts and estates is unsettled. Readers should confirm subsequent guidance before relying on any computation.

II. OBBBA and Medicaid: The Headline Versus Our Clients

A. The Scale of the Medicaid Changes

Chapter 1 of Title VII, Subtitle B of OBBBA contains the law's Medicaid provisions, and their purpose is plainly fiscal. The Congressional Budget Office (CBO) estimates that the Medicaid chapter reduces the federal deficit by about $887 billion over 2025–2034 and increases the number of people without health insurance by 7.5 million in 2034. Across all of the health provisions, CBO projects federal outlay reductions of about $1.1 trillion and 10.0 million more uninsured people in 2034.[3] KFF estimates that the law reduces federal Medicaid spending by roughly 14% over a decade.[4] Supporters describe these provisions as restoring program integrity, re-establishing work expectations for able-bodied adults, and ending state financing arrangements they regard as abusive. Critics describe them as coverage cuts. Both descriptions are consistent with CBO's numbers. What matters for this audience is which people and which programs will bear the reductions, and when.

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[3]Cong. Budget Office, Supplemental Cost Estimate: Public Law 119-21, Title VII, Subtitle B, Chapter 1 (Medicaid) (Oct. 2025) (deficit reduction of $886.8 billion over 2025-2034; 7.5 million more uninsured in 2034; provision-level estimates, including $317.0 billion and 5.3 million for § 71119, $182.7 billion and 1.1 million for § 71115, $58.0 billion and 0.7 million for § 71107, and about 800,000 fewer dual-eligible enrollees from the § 71101 moratorium), https://www.cbo.gov/system/files/2025-10/PL-119-21-Medicaid%20_0.pdf Cong. Research Serv., R48633, Health Provisions in P.L. 119-21, the FY2025 Reconciliation Law (2025) (health provisions reduce federal outlays by $1.1 trillion; 10.0 million more uninsured in FY2034; § 71119 covered population, mandatory exemptions, and specified excluded individuals, including those who are blind or disabled under SSA § 1614 and parents or caretakers of a disabled individual; effective dates), https://www.congress.gov/crs-product/R48633

[4]KFF, Medicaid Home Care (HCBS) in 2025 (2025) (law reduces federal Medicaid spending by $911 billion, about 14%, over a decade; most home care is optional for states; new 1915(c) waiver take-up expected to be low), https://www.kff.org/medicaid/medicaid-home-care-hcbs-in-2025/

B. Where the Coverage Losses Actually Fall

The provisions responsible for most of CBO's projected coverage loss are directed at the ACA expansion population—nonelderly adults with incomes up to 138% of the federal poverty level who qualify on the basis of income alone:

Provision	Principal population affected	Effective date	CBO estimate, FY2025–FY2034 (measure shown)
§ 71119 community engagement (work) requirement: 80 hours/month of work, training, education, or service	Expansion adults ages 19–64	Jan. 1, 2027 (states may seek good-faith extensions to Dec. 31, 2028)	$317.0 billion deficit reduction; 5.3 million more uninsured in 2034
§ 71107 six-month eligibility redeterminations	Expansion adults	Jan. 1, 2027	$58.0 billion deficit reduction; 0.7 million more uninsured in 2034
§ 71120 cost sharing up to $35 per service	Expansion adults with incomes 100–138% FPL	Oct. 1, 2028	$7.4 billion lower outlays
§ 71109 immigrant eligibility limits	Certain lawfully present noncitizens	Oct. 1, 2026	$6.2 billion lower outlays
§ 71115 provider-tax limits	States (hold-harmless threshold phase-down applies to expansion states)	Oct. 1, 2026; phase-down from FY 2028 to 3.5% in FY 2032	$182.7 billion deficit reduction; 1.1 million more uninsured in 2034
§ 71116 state-directed-payment limits	States and providers	New limits for rating periods beginning on or after enactment; grandfathered payments step down beginning Jan. 1, 2028	$149.4 billion lower outlays

The source for the table is CBO's supplemental cost estimate and the Congressional Research Service summary.[5] The work requirement alone accounts for more than a third of the Medicaid chapter's deficit reduction and about 70% of Chapter 1's projected increase in uninsured people in 2034. CBO projects that, in 2034, roughly 2.9 million people will lose Medicaid coverage because they do not meet the requirement or qualify for an exception, and roughly 2.8 million more because of the additional application and verification steps. Most, but not all, of them are expected to become uninsured.

C. Why Most of Our Clients Are Outside Those Provisions

This is the single most overlooked point in the mainstream coverage of OBBBA. The people this audience serves—individuals who are disabled under the Social Security Act definitions—generally qualify for Medicaid through non-MAGI pathways based on age, blindness, or disability, most often through SSI-related eligibility, and not through the ACA expansion group. The work requirement applies only to expansion adults and expressly excludes people eligible through Medicaid's other mandatory pathways and people entitled to Medicare Part A or enrolled in Part B. Even within the expansion group, the statute exempts individuals who are medically frail or have special medical needs, which the statute defines to include individuals who are blind or disabled under § 1614 of the Social Security Act, individuals with a physical, intellectual, or developmental disability that significantly impairs one or more activities of daily living, and individuals with disabling mental disorders or serious or complex medical conditions. It also exempts parents, guardians, and caretaker relatives of a disabled

[5]See supra note 3.

individual.[6] The same is broadly true of the six-month redeterminations and the new cost-sharing, which are limited to the expansion population.

The practical translation: when a client's family asks whether OBBBA means their adult child with an intellectual disability will lose Medicaid in 2027, the answer is, in most cases, not directly. The child's eligibility pathway is not the one the work requirement targets, and the parent who cares for the child is also exempt if the parent is an expansion enrollee.

D. Where Our Clients Are Directly Affected

Candor requires noting the provisions that do reach the aged, blind, and disabled population now or soon:

- **Retroactive coverage (§ 71112).** For applications submitted on or after January 1, 2027, retroactive coverage falls from three months to two months for non-expansion (including aged, blind, and disabled) applicants and to one month for expansion adults.[7] For elder law and disability practitioners this is the most immediate change, because the three-month look-back often covered the gap between a hospital or rehabilitation admission and a completed long-term-care application. Applications must now be filed faster.

[6]See supra note 3. Ctrs. for Medicare & Medicaid Servs., Medicaid Community Engagement Requirement for Certain Individuals: Interim Final Rule (fact sheet, June 1, 2026) (states must generally implement by Jan. 1, 2027; exemptions), https://www.cms.gov/newsroom/fact-sheets/medicaid-community-engagement-requirement-certain-individuals-interim-final-rule-comment-period-cms

[7]Nat'l Health Law Program, New Fixed Home Equity Caps and Retroactive Coverage Limitations (Feb. 2026) (§ 71108 cap of $1,000,000 effective Jan. 1, 2028, not indexed, applicable to nursing facility and HCBS; 12 jurisdictions including New Jersey above the cap; spouse, minor child, and blind or disabled child exceptions and hardship waivers; § 71112 retroactive coverage of two months for non-MAGI and one month for expansion applicants for applications on or after Jan. 1, 2027), https://healthlaw.org/wp-content/uploads/2026/02/Retroactive-Coverage-and-Home-Equity-2122026.pdf See supra note 3.

- **Home-equity cap (§ 71108).** Beginning January 1, 2028, the home-equity limit for long-term-care eligibility (nursing facility and HCBS) is capped at $1,000,000, not indexed, for non-agricultural homes. Twelve jurisdictions, including New Jersey, currently use higher limits. The existing exceptions remain where a spouse, a child under 21, or a blind or disabled child of any age lives in the home, and a hardship-waiver process is required.[8]
- **Eligibility and enrollment rule moratoria (§§ 71101–71102).** OBBBA blocks, through fiscal year 2034, implementation of the 2023 Medicare Savings Program streamlining rule and parts of the 2024 Medicaid eligibility and enrollment rule, several of which were designed to simplify enrollment for aged, blind, and disabled individuals and dual eligibles. CBO projects about 800,000 fewer Medicaid enrollees who are also enrolled in Medicare in 2034 from the MSP moratorium alone, although it did not project that this provision increases the number of uninsured.[9]
- **The SSDI waiting-period gray zone.** A person who receives Social Security Disability Insurance but is still in the 24-month waiting period for Medicare, with income too high for SSI, may be covered as an expansion adult. That person should be exempt as disabled under the statute, but the exemption must be identified and documented. The risk for this group is procedural—termination for failure to establish the exemption—rather than substantive ineligibility. Advocates and care managers should flag these clients now.[10]

[8]See supra note 7.

[9]See supra note 3.

[10]See supra note 6.

E. The Longer-Term Threat: Financing and Home- and Community-Based Services

The more consequential effect on people with disabilities is indirect and delayed. The savings in the table are heavily back-loaded: CBO's annual estimates of Chapter 1 deficit reduction rise from about $45 billion in FY2027 to $90 billion in FY2029, $135 billion in FY2032, and $160 billion in FY2034.[11] Much of that comes from restrictions on the financing tools states use to fund their share of Medicaid. Section 71115 freezes new provider taxes and, for expansion states, reduces the hold-harmless threshold for most existing provider taxes by one-half percentage point per year from 6% until it reaches 3.5% in fiscal year 2032. Nursing-facility and ICF/IID provider taxes are excluded from the phase-down. Section 71116 caps new state-directed payments at 100% of Medicare rates in expansion states (110% in non-expansion states) for rating periods beginning on or after enactment, and requires grandfathered payments to step down by 10 percentage points per year beginning January 1, 2028.[12]

When states lose financing, they must raise revenue or cut spending, and the first place they look is optional coverage. Nursing-facility care and home health are mandatory Medicaid benefits. Almost all other HCBS—personal care, habilitation, supported employment, respite, day services, and most waiver services—are optional, and states can cap waiver enrollment.[13] Medicaid pays for more than two-thirds of home- and community-based long-term care in the United States, and about 5.1 million

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[11] See supra note 3.

[12] See supra note 3. Pub. L. No. 119-21, § 71116; Ctrs. for Medicare & Medicaid Servs., Letter to State Medicaid Directors on State Directed Payments (Sept. 9, 2025), https://www.medicaid.gov/medicaid/managed-care/downloads/sdp-ltr-09092025.pdf

[13] See supra note 4.

people use Medicaid home care.[14] Even before OBBBA takes full effect, 41 states reported waiting or interest lists for HCBS waivers in 2025, with about 607,000 people listed. People with intellectual or developmental disabilities account for 74% of the waiting-list population, and the average wait for services was 32 months.[15]

OBBBA does contain one expansion of HCBS authority: beginning July 1, 2028, § 71121 permits a new type of 1915(c) waiver for people who do not meet an institutional level of care.[16] KFF expects take-up to be low, however, given the federal spending reductions and the requirement that new waivers not lengthen waits for existing waiver services.[17]

The honest forecast for our clients is therefore not that they will lose Medicaid eligibility in 2027. It is that, as the financing reductions accumulate between 2028 and 2034, the services Medicaid pays for—particularly the optional HCBS that allow people with disabilities to live in the community—are likely to be curtailed in many states, frozen in others, and in some circumstances eliminated for particular populations or service categories. Waiting lists may lengthen, provider rates may stagnate, and workforce shortages may deepen. It is a slower harm than the headlines suggest, but it will ultimately reach the people this audience serves.

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[14]KFF, A Look at Waiting Lists for Medicaid Home and Community-Based Services from 2016 to 2025 (2025) (41 states with waiting or interest lists; about 607,000 people; 74% with intellectual or developmental disabilities; average wait of 32 months; Medicaid pays for more than two-thirds of home- and community-based long-term care), https://www.kff.org/medicaid/a-look-at-waiting-lists-for-medicaid-home-and-community-based-services-from-2016-to-2025/

[15]See supra note 14.

[16]Ctrs. for Medicare & Medicaid Servs., CMCS Informational Bulletin (Nov. 18, 2025) (implementation of § 71121, new 1915(c) waiver option for individuals who do not meet an institutional level of care, beginning July 1, 2028), https://www.medicaid.gov/federal-policy-guidance/downloads/cib11182025.pdf

[17]See supra note 4.

F. Implementation Timeline

Date	Provision
July 4, 2025	Enactment; eligibility-rule moratoria (§§ 71101–71102); state-directed-payment limits (§ 71116) begin for new payments
June 1, 2026	CMS interim final rule on community engagement issued
Oct. 1, 2026	Immigrant eligibility limits (§ 71109); provider-tax provisions (§ 71115) take effect
Jan. 1, 2027	Work requirement for expansion adults (§ 71119); six-month redeterminations (§ 71107); retroactive coverage cut to two months (non-expansion) or one month (expansion) (§ 71112)
Jan. 1, 2028	$1,000,000 home-equity cap for long-term care (§ 71108)
FY 2028–2032	Provider-tax hold-harmless phase-down to 3.5% in expansion states; reductions in state-directed payments above Medicare rates
July 1, 2028	New 1915(c) HCBS waiver option without institutional level of care (§ 71121)
Oct. 1, 2028	Cost sharing for expansion adults with incomes 100–138% FPL (§ 71120)
Dec. 31, 2028	Latest date for good-faith extensions of the work requirement

G. What This Means for SNT Planning

If public HCBS becomes scarcer, private resources set aside for a person with a disability become more important—and so does using them efficiently. SNT instruments should give trustees clear authority to purchase care, supports, and services privately while a beneficiary waits for, or in place of, waiver services, and to coordinate with Medicaid rather than duplicate it. ABLE accounts, now permanently enhanced, become more valuable as flexible, disregarded resources. And the largest single pool of money many families will leave a child with a disability is often not the house or the brokerage account but the parents' retirement plans. OBBBA left untouched the rules that allow those savings to be paid out over the disabled beneficiary's lifetime. Making the most of that opportunity, and paying as little tax as possible along the way, is the subject of the rest of this paper.

III. The Tax Side of OBBBA: What Changed for SNT Practice

OBBBA's tax title is vast, and most of it is outside the scope of this paper. The provisions below are the ones that most directly affect special needs planning.

Provision	Relevance to SNT practice
Permanent rate schedules (§ 1(j) as amended)	The compressed four-bracket trust schedule is now permanent. For 2026 the 37% bracket begins at $16,000 of trust taxable income, versus $640,600 for a single individual.[18]
Permanent $15 million basic exclusion amount (§ 2010(c)(3))	Few SNT families face federal estate tax, which makes revocable third-party SNTs the natural default and shifts attention from estate exclusion to basis and income-tax planning.[19]
Rewritten § 68 (2/37 limitation on itemized deductions); repeal of former § 68(e)	May reach nongrantor trusts, including (under the Joint Committee staff's reading) distribution deductions. The subject of Part XI.
ABLE provisions made permanent	ABLE-to-work contributions, 529-to-ABLE rollovers, and Saver's Credit eligibility for ABLE contributions are permanent. Separately, under SECURE 2.0, the age-of-onset limit rose from 26 to 46 on January 1, 2026.[20]
Temporary senior deduction, 2025–2028	An additional $6,000 deduction per individual age 65 or older, phased out above $75,000 of MAGI ($150,000 joint). Relevant to aging parents' income-tax planning, including the Roth-conversion analysis in Part IV.[21]
Higher standard deduction, made permanent	$16,100 for single filers in 2026. For a beneficiary who receives trust income through a K-1, much or all of it may be sheltered.[22]

[18]Rev. Proc. 2025-32, § 4.01 & § 4.03 (2026 inflation adjustments, including the estate and trust rate schedule and capital-gain breakpoints), https://www.irs.gov/pub/irs-drop/rp-25-32.pdf

[19]I.R.C. § 2010(c)(3), as amended by Pub. L. No. 119-21 (basic exclusion amount of $15,000,000 for 2026, indexed for inflation thereafter; applies for estate, gift, and generation-skipping transfer tax purposes).

[20]I.R.C. § 529A(b)(2)(B) (annual contribution limit tied to the § 2503(b) exclusion, $19,000 for 2026); § 529A(e)(1), as amended by SECURE 2.0 Act of 2022, Pub. L. No. 117-328, div. T, § 124 (age of disability onset raised from 26 to 46 for taxable years beginning after December 31, 2025); see ABLE Today, One Big Beautiful Bill (summary of OBBBA's permanent extension of ABLE-to-work contributions, 529-to-ABLE rollovers, and Saver's Credit eligibility), https://www.abletoday.org/obbba

[21]Pub. L. No. 119-21 (new I.R.C. § 151(d)(5)(C) senior deduction); IRS, Working Families Tax Cuts: Tax Deductions for Working Americans and Seniors ($6,000 per eligible individual age 65 or older for 2025-2028; phase-out above $75,000 of MAGI, $150,000 joint), https://www.irs.gov/newsroom/working-families-tax-cuts-tax-deductions-for-working-americans-and-seniors

[22]IRS, IRS Releases Tax Inflation Adjustments for Tax Year 2026, Including Amendments from the One Big Beautiful Bill (Oct. 2025) (2026 standard deduction of $16,100 for single filers); Rev. Proc. 2025-32, https://www.irs.gov/newsroom/irs-releases-tax-inflation-adjustments-for-tax-year-2026-including-amendments-from-the-one-big-beautiful-bill

Two features of the 2026 environment carry through the rest of this paper. First, the trust rate schedule is now permanently compressed, so any income an SNT keeps is expensive. Second, the beneficiary's own rate schedule is permanently generous at low incomes. The planning opportunity lies in the gap between the two.

IV. What Did Not Change: The Lifetime Stretch for Disabled and Chronically Ill Beneficiaries

A. The Eligible Designated Beneficiary Exception

The SECURE Act of 2019 replaced the old lifetime stretch for most non-spouse beneficiaries of inherited retirement accounts with a ten-year payout rule. It carved out a small group of eligible designated beneficiaries (EDBs) who may still take distributions over their life expectancy. That group includes a beneficiary who is disabled (generally, unable to engage in substantial gainful activity because of a medically determinable impairment expected to be of long-continued and indefinite duration, with a special functional-limitation test for beneficiaries under 18) and one who is chronically ill (certified by a licensed health care practitioner under the § 7702B(c)(2) standard).[23] OBBBA did not change these rules. In an era of tightening public benefits, they are among the most valuable provisions in the Code for families of people with disabilities.

[23]I.R.C. § 401(a)(9)(E)(ii)(III)-(IV), (H)(iv)-(v) (eligible designated beneficiaries who are disabled or chronically ill; applicable multi-beneficiary trusts); Required Minimum Distributions, T.D. 10001, 89 Fed. Reg. 58,886 (July 19, 2024); Internal Revenue Bulletin 2024-33 (Aug. 12, 2024), https://www.irs.gov/irb/2024-33_IRB Treas. Reg. §§ 1.401(a)(9)-4(e)(4)-(5), (e)(7), (h) (definitions of disabled and chronically ill eligible designated beneficiaries; documentation to the plan administrator by October 31 of the year following death, or October 31, 2025, if later; trust documentation), 1.408-8(b)(4)(i) (documentation need not be provided to the IRA trustee, custodian, or issuer), as finalized by T.D. 10001; see Thomson Reuters, IRS Issues Final and Proposed Required Minimum Distribution Regulations (July 2024), https://tax.thomsonreuters.com/news/irs-issues-final-and-proposed-required-minimum-distribution-regulations-reflecting-secure-and-secure-2-0-act-changes/

Under the 2024 final regulations, for a qualified employer plan, documentation of the beneficiary's disability or chronic illness must be provided to the plan administrator by October 31 of the calendar year following the calendar year of the participant's death (or October 31, 2025, if later). Separate trust-documentation requirements apply when a trust is the beneficiary. Neither submission rule requires delivery to an IRA trustee, custodian, or issuer, and § 403(b) contracts generally follow the IRA rule, although a provider or plan may require information under its own documents.[24] A Social Security Commissioner determination that the beneficiary was disabled as of the date of death supplies the regulation's disability safe harbor, but it does not eliminate a qualified plan's timely-submission requirement; chronic-illness treatment requires the applicable licensed-health-care-practitioner certification. For a covered employer plan, failing to meet the documentation requirement can prevent reliance on disabled- or chronically-ill EDB life-expectancy treatment and lead instead to the applicable ten-year regime. The safe course is to assemble the documentation promptly whatever the account type.

B. The Applicable Multi-Beneficiary Trust

A disabled or chronically ill beneficiary almost never should inherit a retirement account outright. An inherited IRA held in the beneficiary's own name is a countable resource, and its required distributions are unearned income for SSI purposes. The solution is the applicable multi-beneficiary trust (AMBT) under § 401(a)(9)(H)(iv)–(v): a see-through trust for the benefit of a disabled or chronically ill beneficiary under which no individual other than that beneficiary has any right to the benefits during the beneficiary's life. An AMBT may accumulate distributions rather than pass them

[24]See supra note 23.

through. The payout period is the disabled or chronically ill beneficiary's life expectancy, even though other beneficiaries take the remainder.[25] SECURE 2.0 added that a qualified charity may be a remainder beneficiary of an AMBT without destroying the stretch.[26] A properly drafted third-party accumulation SNT is the paradigm AMBT.

The distinction between conduit and accumulation trusts is critical here. A conduit trust must pass every retirement distribution through to the beneficiary. For an SSI or Medicaid recipient, that converts a protected asset into countable income each year. An accumulation-style AMBT allows the trustee to retain distributions inside the SNT and to spend them for the beneficiary's supplemental needs, which is the benefits-protective result. The cost of that protection is income-tax exposure: every retirement distribution the trust retains is ordinary income taxed at the compressed trust rates discussed in Parts X and XI.

C. The Tax Administration of an Accumulation AMBT

A distribution from an inherited IRA to an accumulation SNT is ordinary income to the trust (income in respect of a decedent). It is excluded from net investment income, so the 3.8% NIIT does not apply, but it is fully exposed to the compressed ordinary brackets.[27] If the trust retains a $30,000 distribution in 2026, the federal tax is about $8,994. If the trustee instead uses the same $30,000 for the beneficiary's benefit—paying providers, funding an ABLE account, purchasing equipment or services—the

[25]See supra note 23.

[26]SECURE 2.0 Act of 2022, Pub. L. No. 117-328, div. T, § 337 (qualified charity may be a remainder beneficiary of an applicable multi-beneficiary trust); I.R.C. § 401(a)(9)(H)(iv)-(v).

[27]I.R.C. § 1411(a)(2), (c); Treas. Reg. § 1.1411-3(a), (e); I.R.C. § 1411(c)(5) (distributions from qualified plans and IRAs described in §§ 401(a), 403(a), 403(b), 408, 408A, and 457(b) are excluded from net investment income).

trust's distribution deduction carries the income out to the beneficiary through DNI. The beneficiary's standard deduction and low brackets may absorb much or all of it.[28] Retirement distributions also add to the § 68 base in the same way as capital gains (Part XI). The fourth-quarter protocol in Part XIII therefore applies with special force to AMBTs: project the required distribution and any discretionary withdrawals, decide in advance how much will be used for the beneficiary's benefit, and avoid bunching withdrawals into a single year.

D. Rethinking Inheritance Among Siblings

Because the disabled child can stretch and the non-disabled siblings generally cannot, the traditional instinct to divide every asset equally among the children is often the wrong answer. A non-disabled adult child who inherits a traditional IRA must generally empty it within ten years, with annual required distributions in years one through nine if the parent died on or after the required beginning date. Those distributions are taxed at that child's marginal rate, often during peak earning years. The same account left to the disabled child's AMBT can be paid out over the child's life expectancy. Conversely, a brokerage account or a house receives a basis step-up at death and carries little embedded income tax.

Consider parents who die in 2026 leaving a $1,000,000 traditional IRA and a $1,000,000 brokerage account to two children. Sam, 35, is disabled and receives SSI and Medicaid. Kate, 38, is in the 32% federal bracket.

[28]See supra note 22.

	Option A: each asset split 50/50	Option B: IRA to Sam's AMBT; brokerage to Kate
Kate receives	$500,000 brokerage + $500,000 IRA (10-year rule)	$1,000,000 brokerage (stepped-up basis)
Embedded federal income tax on Kate's share (32% on the IRA, ignoring growth)	About $160,000, payable within 10 years	None
Sam's AMBT receives	$500,000 brokerage + $500,000 IRA	$1,000,000 IRA
Sam's first-year required distribution (single life factor 50.5 at age 35 in the first distribution year)	About $9,900	About $19,800
Tax on Sam's distributions if used for his benefit	Largely sheltered by his standard deduction	Largely sheltered by his standard deduction

Under Option B, the family avoids roughly $160,000 of accelerated federal income tax at Kate's rate, while the tax on Sam's share is deferred over roughly five decades and, to the extent distributions are used for his benefit, paid at his low individual rates.[29] Families may reasonably decide that Sam's share should be adjusted for the deferred tax embedded in the IRA, or that equality should be measured after tax. The point is that the retirement account—yet-untaxed savings—is the asset best suited to the disabled child's trust, and the stepped-up assets are best suited to the siblings. Beneficiary designations, not the will, control this result, and they must be coordinated with the estate plan.

[29]Treas. Reg. § 1.401(a)(9)-9(b) (Single Life Table; factor of 50.5 at age 35 for distribution calendar years beginning on or after January 1, 2022); I.R.C. § 401(a)(9)(H)(i) (ten-year rule); Treas. Reg. § 1.401(a)(9)-5(d) (annual distributions within the ten-year period where the employee died on or after the required beginning date).

E. Parent-Level Planning: Roth Conversions and the Senior Deduction

Where parents are in moderate brackets, converting part of a traditional IRA to a Roth IRA during life can be especially efficient when the ultimate beneficiary is an accumulation SNT. The parents pay tax at their individual rates, which are almost always lower than the trust's rates on retained income. The AMBT then inherits a Roth account that it can stretch over the disabled child's life expectancy, with qualified distributions free of income tax, so there is no compressed-bracket or § 68 exposure to manage. The temporary OBBBA senior deduction for 2025–2028 can make conversion years more attractive for parents over 65, although conversion income raises MAGI and can phase out the deduction. It can also affect Medicare IRMAA premiums and the taxation of Social Security benefits, so each conversion should be modeled.[30]

F. Drafting and Administration Checklist for Retirement Benefits Payable to an SNT

- Draft the SNT as an accumulation trust that qualifies as an AMBT, with no individual other than the disabled or chronically ill beneficiary entitled to benefits during that beneficiary's life.
- Name the SNT (or its separate share) directly on the beneficiary designation; avoid routing retirement benefits through the probate estate.
- For a qualified employer plan, provide the plan administrator with the trust documentation and, if disabled- or chronically-ill EDB treatment is claimed, the condition evidence by October 31 of the calendar year following the calendar year of death (or October 31, 2025, if later). The same federal submission rule

[30] See supra note 21.

does not require delivery to an IRA trustee, custodian, or issuer; § 403(b) contracts generally follow the IRA rule, although the provider or plan may require information under its own documents.

- Give the trustee express authority to distribute for the beneficiary's benefit in ways that carry out DNI without creating countable income, including third-party payments and ABLE contributions.
- Coordinate the designations for all children with the overall plan, including after-tax equalization if the family wants it.
- Include retirement distributions in the fourth-quarter tax huddle every year.

V. The Two Questions That Come Before "SNT Taxation"

The retirement-plan strategy in Part IV, like every other SNT funding strategy, eventually runs into one question: once money is inside an SNT, who pays the income tax on it? That question has to be answered before the new § 68 rule makes sense, and it is the subject of Parts V through VIII.

The public-benefits classification of an SNT and its income-tax classification are related but distinct. The public-benefits label follows the source of funds and the statutory exception relied upon. The income-tax result follows the grantor-trust rules of I.R.C. §§ 671 through 679, which ask who is treated as the owner of the trust for income-tax purposes. When a person is treated as the owner of all or a portion of a trust, the income, deductions, and credits attributable to that portion are reported on that

person's own return, not the trust's.[31] The following matrix is the organizing framework for the balance of this paper.

SNT type and stage	Typical income-tax status	Who reports the income	Compressed rates / NIIT / § 68 at trust level?	Key teaching point
First-party (d)(4)(A) or pooled (d)(4)(C) subaccount, beneficiary living	Grantor trust (beneficiary is the grantor)	Beneficiary, on Form 1040	Generally no	The trust holds the beneficiary's own money; it does not create a separate income-tax taxpayer
Third-party SNT during the settlor's life (usually revocable; occasionally irrevocable with a §§ 673-677 trigger)	Grantor trust: revocable under § 676; irrevocable only if a §§ 673-677 power applies	Settlor, on the settlor's Form 1040	Generally no	Revocable: still the parent's money for tax purposes. Irrevocable grantor trust: the parent's tax payment is a non-gift benefit
Third-party SNT after the settlor's death (or, for an irrevocable trust, after grantor powers are released)	Nongrantor (usually complex) trust	Trust on Form 1041; beneficiary on Schedule K-1 to the extent of DNI carried out	Yes	Same trust, same trustee, same portfolio—different taxpayer
Testamentary third-party SNT (created under a will or funded at death)	Nongrantor trust from inception	Trust and, through DNI, the beneficiary	Yes, from day one	There is no lifetime grantor phase; the tax protocol must exist from the first year

The shorthand for the audience is simple: **first party or third party tells us the public-benefits rules; whose money—and whether that person is still alive—tells us who pays the income tax.**

[31] I.R.C. §§ 671, 677(a); Treas. Reg. § 1.671-2(e)(1) (a grantor is any person to the extent that person creates a trust or makes a gratuitous transfer of property to a trust); see 42 U.S.C. § 1396p(d)(4)(A) (trust containing the assets of an individual under 65 who is disabled, established for that individual's benefit by a parent, grandparent, legal guardian, the individual, or a court, with state Medicaid payback).

VI. First-Party SNTs: Grantor Trusts by Definition

A. Why the Beneficiary Is the Grantor

A first-party SNT under 42 U.S.C. § 1396p(d)(4)(A) holds the assets of a disabled individual under age 65 and may be established by the individual, a parent, grandparent, guardian, or court. For income-tax purposes, the identity of the person who signs the trust instrument is not controlling. The Treasury regulations define the grantor as the person who makes a gratuitous transfer of property to the trust. Because the property belongs to the beneficiary—a personal-injury recovery, an inheritance redirected into the trust, accumulated savings, or retroactive benefits—the beneficiary is the grantor. And because trust income may be distributed to or applied for the beneficiary without the consent of an adverse party, § 677(a) treats the beneficiary as the owner of the trust.[32] Pooled-trust subaccounts under § 1396p(d)(4)(C) are commonly reported on the same grantor-trust basis as to each beneficiary's subaccount, although practitioners should confirm the reporting practice of the specific pooled trust.[33]

B. Reporting Mechanics

A grantor trust may file a Form 1041 as an information return with a grantor statement, or may use one of the optional reporting methods under Treas. Reg. § 1.671-4, including reporting under the grantor's own taxpayer identification number or

[32] See supra note 31.

[33] 42 U.S.C. § 1396p(d)(4)(C) (pooled trust accounts established by a nonprofit association). Practitioners should confirm each pooled trust's actual reporting practice for subaccounts.

filing Forms 1099 that direct the income to the grantor.[34] Many trustees obtain a separate EIN for administrative reasons. Whatever method is used, the trust's interest, dividends, and capital gains end up on the beneficiary's individual return.

C. Practical Consequences

- **Individual rates, not trust rates.** The beneficiary's individual bracket structure applies. For a beneficiary whose only other income is SSI or modest Social Security Disability Insurance, most or all of the trust's investment income is likely to fall within the standard deduction or the lowest brackets. A 2026 single filer's 0% rate on net capital gain and qualified dividends applies up to $49,450 of taxable income.[35]
- **Deductions the trust pays can reduce the beneficiary's tax.** Because the trust is ignored for income-tax purposes, medical and care expenses the trustee pays for the beneficiary may support an itemized medical-expense deduction on the beneficiary's return, subject to the 7.5%-of-AGI floor.[36] For a first-party SNT paying substantial care, therapy, or equipment costs, this can offset much or all of the trust's income.
- **NIIT at individual thresholds.** The 3.8% net investment income tax applies to the beneficiary only above the individual thresholds of $200,000 (single) or

[34]Treas. Reg. § 1.671-4(a), (b) (grantor-trust reporting, including optional methods that dispense with a Form 1041 and use the grantor's taxpayer identification number or the filing of Forms 1099); see Instructions for Form 1041 (grantor-type trusts).

[35]Rev. Proc. 2025-32, § 4.03 (for 2026, the 0% rate on net capital gain and qualified dividends applies to single filers with taxable income up to $49,450), https://www.irs.gov/pub/irs-drop/rp-25-32.pdf

[36]I.R.C. § 213(a) (medical expenses in excess of 7.5% of adjusted gross income); I.R.C. § 671 (items of the grantor-owned portion are taken into account in computing the grantor's own tax).

$250,000 (joint), which are not indexed. For nearly every first-party SNT beneficiary, NIIT is irrelevant.[37]

- **§ 68 is practically irrelevant.** The new § 68 limitation reaches only taxpayers in the 37% bracket, which for a single individual in 2026 begins at $640,600 of taxable income.[38] A first-party SNT beneficiary will rarely, if ever, be there.
- **Taxable income is not SSI income.** The beneficiary's Form 1040 reflects the trust's income; the SSI analysis looks to what the beneficiary actually receives. Cash paid to the beneficiary is generally unearned income for SSI. Payments to third parties for items other than food or shelter are generally not income, and since September 30, 2024, food is no longer counted as in-kind support and maintenance.[39] The tax return and the SSI budget are separate ledgers.

A caution about the trust instrument: first-party SNT drafting occasionally includes language designed to make the trust a nongrantor trust or to obtain some other tax result. Such provisions rarely succeed with self-settled funds and can create benefits problems. The better course is to accept grantor-trust status and plan around it.

[37]I.R.C. § 1411(a)(1), (b) (individual threshold amounts of $250,000 for joint filers and $200,000 for other individuals, which are not indexed); § 1411(a)(2) (estates and trusts: 3.8% of the lesser of undistributed net investment income or the excess of adjusted gross income over the dollar amount at which the highest bracket begins); Treas. Reg. § 1.1411-3.

[38]See supra note 18.

[39]20 C.F.R. §§ 416.1102, 416.1103(g), 416.1120-416.1124; Omitting Food From In-Kind Support and Maintenance Calculations, 89 Fed. Reg. 21,199 (Mar. 27, 2024) (effective Sept. 30, 2024); SSA, Program Operations Manual System (POMS) SI 01120.200 (information on trusts, including trust disbursements).

VII. Third-Party SNTs During the Settlor's Lifetime

A. The Typical Case: The Revocable Third-Party SNT

Most lifetime third-party SNTs—those funded by someone other than the beneficiary—are revocable. Because the majority of states impose no estate tax and few families approach the $15 million federal basic exclusion amount, there is ordinarily no transfer-tax reason to make a parent's SNT irrevocable during the parent's life. The typical structure is a standalone revocable SNT, or an SNT share within the parent's revocable living trust, that is named as the beneficiary of life insurance, retirement accounts, and pour-over assets and receives most of its funding at the parent's death. Revocability alone makes the trust a grantor trust: under § 676, the grantor is treated as the owner of any portion of a trust that the grantor can revest in himself or herself.[40] No substitution power or other special grantor-trust power is needed. For the balance of the parent's life, the trust's income is simply the parent's income, reported on the parent's Form 1040 at the parent's individual rates. The trust converts to a nongrantor trust only at the parent's death, when it becomes irrevocable.

This point is worth stating plainly because the literature so often obscures it. Section 676 sits squarely within the grantor-trust rules, yet summaries of SNT taxation routinely omit it. Part of the reason is the order of presentation: first-party SNTs are almost always discussed first, and a (d)(4)(A) trust must be irrevocable. When the discussion then turns to third-party SNTs, much of the writing continues to focus on irrevocable structures and grantor-trust "powers," and the reader draws the natural but

[40] I.R.C. § 676(a) (grantor treated as owner of any portion of a trust where the power to revest title in the grantor is exercisable by the grantor or a nonadverse party, or both); see 42 U.S.C. § 1396p(d)(3)(A) (the corpus of a revocable trust is considered a resource available to the individual for Medicaid purposes).

mistaken conclusion that a third-party SNT is ordinarily an irrevocable nongrantor trust. For most families it is not. With the estate-exclusion techniques of earlier decades now largely unnecessary, the default third-party SNT should be revocable, which gives the parent full flexibility to amend the trust as the child's needs, the benefits rules, and the family's circumstances change. It is a grantor trust for the rest of the parent's life simply because it is revocable.

The lifetime phase of a revocable SNT is therefore largely tax-neutral. The parent pays the tax on the trust's income just as the parent would on any other account the parent owns. For the same reason, assets in a parent's revocable trust remain the parent's own resources for the parent's Medicaid eligibility, a point that belongs in the parent's own long-term-care plan rather than the child's.[41] The planning significance of the revocable form lies in what happens at death: the assets are included in the parent's gross estate and receive a basis adjustment under § 1014 (Part VII.D), and the trust then becomes a separate, compressed-bracket taxpayer (Part VIII).

B. The Less Common Case: Irrevocable Lifetime Third-Party SNTs

An irrevocable lifetime third-party SNT is used chiefly where the parent has a taxable estate (federal or state), where the parent wants to fund the trust with completed gifts for other reasons, or where an insurance trust is designed to keep a policy out of the parent's estate. An irrevocable trust is a grantor trust only if one or more of the income-tax grantor-trust rules of §§ 673 through 677 applies, whether by deliberate drafting or otherwise. Common deliberately drafted examples include a nonfiduciary power of substitution under § 675(4)(C), powers over beneficial enjoyment under § 674

[41] See supra note 40.

that fall outside the independent-trustee exceptions, and § 677(a)(3), which applies where trust income may be used to pay premiums on insurance on the life of the grantor or the grantor's spouse.[42] An irrevocable lifetime SNT that avoids every §§ 673-677 trigger, deliberate or inadvertent, is a nongrantor trust from inception, whether or not it is included in the parent's estate, and the post-death analysis in Part VIII applies to it immediately. For these trusts, the first practice point is to read the instrument and determine whether grantor status was intended and actually achieved—or triggered inadvertently.

Two cautions. First, grantor status does not require a deliberately drafted "grantor power." The rules are broad enough to catch an irrevocable SNT by accident. The general rule of § 674(a) makes the grantor the owner where the grantor or a nonadverse party can control beneficial enjoyment. A discretionary supplemental-needs standard is rarely a reasonably definite standard, so the § 674(c) and (d) exceptions may be unavailable if the parent, the parent's spouse, or related or subordinate parties serve as trustee. Section 677(a) applies where income may be distributed to or accumulated for the grantor's spouse, and § 672(e) attributes the spouse's powers and interests to the grantor.[43]

Second, income-tax grantor status and estate-tax inclusion are separate inquiries under separate rules and should not be conflated. Grantor status is governed by §§ 671

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[42]I.R.C. §§ 673-677; see, e.g., § 674 (power to control beneficial enjoyment), § 675(4)(C) (power, exercisable in a nonfiduciary capacity without the approval or consent of a fiduciary, to reacquire trust corpus by substituting property of equivalent value), and § 677(a)(3) (income that may be applied to pay premiums on insurance on the life of the grantor or the grantor's spouse).

[43]See supra note 42. I.R.C. §§ 672(a)-(c), (e), 674(a)-(d), 677(a); compare I.R.C. §§ 2036(a)(2), 2037, 2038(a)(1), 2042 (estate inclusion). See Rev. Rul. 2008-22, 2008-1 C.B. 796 (a nonfiduciary substitution power held by the grantor does not by itself cause inclusion under § 2036 or § 2038 if the trustee has a fiduciary obligation to ensure that the substituted properties are of equivalent value).

through 679. Estate inclusion is governed by §§ 2036, 2037, 2038, and 2042, and it controls the § 1014 basis result at death. The two regimes often overlap because they were designed in parallel. For example, a parent serving as trustee with discretion over distributions may trigger both § 674(a) and §§ 2036(a)(2) and 2038, and a retained reversion above 5% implicates both § 673 and § 2037. But they can also diverge. A swap power under § 675(4)(C) creates grantor status without estate inclusion, which is the classic intentionally defective grantor trust. The following matrix separates the two questions:[44]

	Excluded from parent's estate (no § 1014 step-up)	**Included in parent's estate (§ 1014 step-up)**
Grantor trust during parent's life	Irrevocable SNT with a § 675(4)(C) swap power or a § 677(a)(3) insurance-premium power; parent pays the tax; Rev. Rul. 2023-2 applies	Revocable SNT (§§ 676 and 2038)—the typical case; also an irrevocable SNT with a parent-trustee holding discretionary distribution powers (§ 674(a); §§ 2036(a)(2), 2038)
Nongrantor trust during parent's life	Irrevocable SNT with an independent trustee and no retained powers or interests; the trust files its own Form 1041 during the parent's life	Uncommon, but possible where an estate-tax power is held in a manner that does not trigger §§ 673-677 (for example, a power exercisable only with the consent of an adverse party)

C. The Irrevocable Grantor Trust: The Parent's Payment of Tax as a Planning Benefit

When an irrevocable lifetime third-party SNT is a grantor trust, the parent reports the trust's income on the parent's own return, at the parent's individual rates. The parent's payment of that tax is not a taxable gift to the trust beneficiaries.[45] Economically, every dollar of tax the parent pays is a dollar that stays in the SNT for the

[44]See supra note 43.

[45]Rev. Rul. 2004-64, 2004-2 C.B. 7 (a grantor's payment of income tax on grantor-trust income is not a gift to the trust beneficiaries; a discretionary reimbursement power held by an independent trustee does not, by itself, cause estate inclusion, absent an understanding or applicable creditor-rights law).

child. For a family intending to leave the parent's wealth to the child's trust in any event, this "tax burn" is an efficient, benefits-neutral way to add value to the SNT without additional gifts. The trust may include a discretionary power in an independent trustee to reimburse the grantor for the tax; Revenue Ruling 2004-64 indicates that such a power, absent an understanding or applicable creditor-rights law, does not by itself cause estate inclusion. Reimbursement provisions should be used thoughtfully in the SNT setting, where the trust's principal purpose is the beneficiary's supplemental needs.

D. Basis at the Parent's Death: The Link to Recognition Events

The revocable/irrevocable distinction controls the trust's basis at the parent's death. Assets in a revocable SNT are included in the parent's gross estate under § 2038 and receive a basis adjustment to fair market value at death under § 1014.[46] The post-death nongrantor trust therefore starts with a fresh basis (adjusted to the value at the date of death), and its early recognition events reflect only appreciation after the parent's death. By contrast, a completed gift to an irrevocable grantor trust that is not included in the grantor's gross estate does not receive a basis adjustment at the grantor's death, as the IRS concluded in Revenue Ruling 2023-2 on its completed-gift, estate-excluded facts. Respected commentators have advanced a contrary § 1014(b)(1) theory that the Service has not accepted.[47] That trust will hold assets with the parent's

[46]I.R.C. §§ 2038(a), 1014(a), (b)(2) (property transferred during life to a trust with the income payable to or on the order of the decedent and with the right reserved to revoke the trust is treated as acquired from the decedent), (b)(9).

[47]Rev. Rul. 2023-2, 2023-16 I.R.B. 658 (no § 1014 basis adjustment at the grantor's death for assets of an irrevocable grantor trust that are not included in the grantor's gross estate); see KPMG, Rev. Rul. 2023-2: No Basis Step-Up for Assets of Irrevocable Grantor Trust Not Included in Grantor's Estate (Mar. 2023), https://assets.kpmg.com/content/dam/kpmg/us/pdf/2023/03/23113.pdf. NOTE, however, that cogent arguments have been made that the Service is wrong in this interpretation, and I for one find those arguments convincing. The thrust of the argument is that IRC Section 1014 provides an additional benefit in the form of a step-up in basis on assets of the trust at the grantor's death: because Rev. Rul. 85-13

historic (called “carry-over”) basis, and the first sale of a long-held position after the parent dies may realize a large gain in the trust’s compressed-bracket environment. Note that you still need to pay attention to what happens in the years after the parent’s passing, however. Even with a stepped-up basis on the parent’s death, a revocable SNT that thereafter holds a concentrated or appreciating portfolio for several years following the parent’s death will build gain that will be recognized when that asset is eventually sold. Hence the recognition-event discipline outlined in Part XIII below.

OBBBA was frequently reported as “permanently” setting the basic exclusion amount at $15 million per person for 2026, indexed thereafter.[48] Do not be confused by the rhetoric, however. A new Congress of like-minded folks aligning with a new like-minded President could modify the Code fully and bring the threshold back down to, say, about $7 million (which equates to a rough time-value-of-money adjustment of the old $5 million threshold brought forward to 2026 dollars). When the pundits say it is “permanent,” what they are really saying is that, unlike the 2017 Tax Cuts and Jobs Act, OBBBA contains no required sunset after ten years for the rules to revert back. Both laws were enacted through budget reconciliation and were subject to the Senate’s Byrd Rule. The 2017 law’s individual and transfer-tax provisions sunset to satisfy that rule, while OBBBA’s were scored against a “current policy” baseline that treated their

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treats the grantor as the owner of the trust assets for income-tax purposes, an asset remaining in the grantor trust at death may be treated as acquired by “bequest” under § 1014(b)(1), even if it is excluded from the gross estate. Jonathan G. Blattmachr, Mitchell M. Gans & Hugh H. Jacobson, Income Tax Effects of Termination of Grantor Trust Status by Reason of the Grantor’s Death, 97 J. Tax’n 149 (Sept. 2002). Rev. Rul. 2023-2 rejects that characterization on its stated facts. Because the positions taken by Blattmachr, Gans & Jacobson (while genuinely persuasive to this author) have not been accepted by the Service or by most practitioners, I raise this as an academic point more than one for you to rely upon, though it would be nice to see someone challenge Rev. Rul. 2023-2 to see what the correct answer truly is.

[48]See supra note 19.

extension as costless, so no sunset was required.[49] So, to be truly tax-savvy, be sure to know that "permanent" does not necessarily mean this threshold (which adjusts for inflation) will remain the law permanently. It means only that no automatic reversion is built in. That being said, for the large majority of families who fund SNTs, federal estate tax is no longer the binding constraint, which reinforces the advice that a revocable SNT should be the preferred default. Where an irrevocable trust is nevertheless used for non-tax reasons, many families are better served by provisions that cause estate inclusion—and therefore a § 1014 basis adjustment—at the parent's death, such as retained interests or powers under §§ 2036 or 2038 or carefully limited general powers of appointment.[50] These are estate-tax provisions. Whether the same provision also makes the trust a grantor trust for income-tax purposes is a separate question under §§ 671 through 679 (see the matrix in Part VII.B). This must be balanced against state estate or inheritance taxes, creditor exposure (most notably estate recovery provisions), and, where the parent may need long-term care, the parent's own Medicaid planning.

VIII. The Parent Dies: Same SNT, New Taxpayer

A. The Conversion

At the grantor's death, grantor-trust status ends; a revocable SNT also becomes irrevocable. As I usually explain it to clients, "When you're dead, it's a bit hard to revoke your trust." The trust does not change its name, trustee, beneficiary, investment

[49]See Tax Policy Center, The One Big Beautiful Bill Act: A Preliminary Assessment (Mar. 23, 2026) (Senate adopted a "current policy" baseline assigning zero fiscal cost to extending the expiring provisions, subject to the Byrd Rule), https://taxpolicycenter.org/sites/default/files/2026-03/OBBBA_Preliminary_Assessment_2026-03-23.pdf

[50]See I.R.C. §§ 1014(a), (b)(9), 2036, 2038, 2041. Estate inclusion techniques must be weighed against creditor exposure, state estate or inheritance tax, and, where the settlor is or may become a Medicaid applicant, the settlor's own eligibility.

account, or public-benefits character. It remains a third-party SNT for Medicaid and SSI purposes. Legally, it is not treated as a separate entity, as the trustees are the legal owners of the assets for the equitable benefit of the beneficiaries. Yet, with the parent's passing, it is now a separate income-tax taxpayer: i.e., a nongrantor trust—usually a complex accumulation trust, because distributions are discretionary—that needs its own EIN, a calendar taxable year (subject to a § 645 election for a qualified revocable trust, which allows it to be treated as part of the estate and to use the estate's fiscal year for a limited period),[51] its own Form 1041 each year thereafter, and beneficiary Schedules K-1 to the extent it distributes DNI. The same is true, from the first day, of a testamentary SNT created under a parent's will or funded by a revocable trust at death.

While the parent is alive (grantor phase)	**After the parent dies (nongrantor phase)**
Third-party SNT for Medicaid and SSI purposes	Still a third-party SNT for Medicaid and SSI purposes
Parent is the income-tax owner	Trust is its own taxpayer; beneficiary taxed only on DNI carried out
Income reported on the parent's Form 1040 at individual rates	Income reported on Form 1041; 37% bracket begins at $16,000 of taxable income
NIIT only above the parent's $200,000/$250,000 threshold	NIIT on undistributed net investment income above $16,000 of AGI (that's a radical shift)
§ 68 applies only if the parent is in the 37% bracket	§ 68 may reduce the trust's deductions, including distribution deductions
Parent pays the tax from the parent's own funds; trust assets are not depleted	Tax is now paid from trust assets unless carried out to the beneficiary as reported on a K-1
Revocable SNT: assets included in the parent's estate and stepped up at death under § 1014. Irrevocable completed-gift SNT: no step-up (Rev. Rul. 2023-2)	Revocable: fresh basis, so gains reflect post-death appreciation. Irrevocable: low-basis assets, so early sales can realize large gains

[51]See supra note 2. I.R.C. § 645; Treas. Reg. § 1.645-1 (election to treat a qualified revocable trust as part of the decedent's estate; election period ends two years after death if no estate tax return is required, or later if one is required).

This is the “aha” moment for most SNT practitioners. The trust has two life cycles. In the first, the parent’s return absorbs the income. In the second, the same investment return may be taxed at the highest federal rate after only a mere $16,000 of retained taxable income. Nothing about the trust looks different to the beneficiary, the care manager, or the benefits caseworker. The change is entirely on the income-tax side, and it is easy to miss.

B. The Qualified Disability Trust Exemption

A nongrantor SNT that qualifies as a qualified disability trust (QDisT) under § 642(b)(2)(C) receives an exemption equal to the personal exemption amount under § 151(d)—$5,300 for 2026, not subject to phaseout—instead of the $100 exemption otherwise available to a complex trust.[52] To qualify, the trust must be described in 42 U.S.C. § 1396p(c)(2)(B)(iv), be established solely for the benefit of a disabled individual under age 65, and have only beneficiaries determined by the Commissioner of Social Security to be disabled for some portion of the year; a remainder to a non-disabled person after the disabled beneficiary’s interest ends does not disqualify the trust. Many third-party SNTs qualify. The QDisT exemption is routinely missed by preparers who do not know the beneficiary’s disability status, and it is worth roughly $1,000 to $1,900 of federal tax in a year when the trust retains income at the 20% to 37% rates. Confirming QDisT status belongs on every post-death SNT checklist. As discussed in Part XI,

[52] I.R.C. § 642(b)(2)(C) (qualified disability trust exemption equal to the § 151(d) exemption amount; trust must be described in 42 U.S.C. § 1396p(c)(2)(B)(iv), established solely for the benefit of an individual under 65 who is disabled, and all beneficiaries must be determined by the Commissioner of Social Security to be disabled for some portion of the year; a remainder to a non-disabled person after the disabled beneficiary’s interest ends does not disqualify the trust); 2026 Form 1041-ES (exemption of $5,300, not subject to phaseout), https://www.irs.gov/pub/irs-pdf/f1041es.pdf

however, the Joint Committee's reading of § 68 treats § 642(b) exemptions as itemized deductions potentially subject to the administratively annoying 2/37 reduction.

IX. "Which Income Do You Mean?" The Four Ledgers

The phrase "a trust with more than $16,000 of income" is too imprecise to be useful. The $16,000 figure is a tax-computation threshold driven by taxable income—and, for NIIT, by adjusted gross income and undistributed net investment income. A trustee can distribute all of what the trust instrument calls "income" and still have substantial taxable income. To understand the new rule and plan around it, trustees and their advisers must keep four ledgers distinct.

1. **Fiduciary accounting income (FAI).** What the governing instrument and the applicable principal-and-income statute treat as income rather than principal. Under the Uniform Principal and Income Act and its successors, proceeds from the sale of principal assets—and therefore realized capital gains—are ordinarily allocated to principal, subject to any power to adjust or unitrust regime.[53]
2. **Distributable net income (DNI).** The tax concept that caps the trust's distribution deduction and the amount the beneficiary must include, and that preserves the character of the income carried out (interest, ordinary dividends, qualified dividends, tax-exempt interest). Capital gains are generally excluded

[53]See Unif. Principal & Income Act §§ 104 (power to adjust), 404 (receipts from sale of principal assets allocated to principal) (1997); Unif. Fiduciary Income & Principal Act (2018) (unitrust and adjustment provisions); e.g., N.J. Stat. Ann. §§ 3B:19B-1 et seq. Practitioners must consult the version enacted in the governing jurisdiction.

from DNI unless one of the regulatory pathways in Treas. Reg. § 1.643(a)-3(b) applies.[54]

3. **Taxable income.** The figure to which the trust's rate schedule applies and which drives the new § 68 computation. It can include retained capital gain even where that gain was never part of FAI or DNI.
4. **Net investment income (NII).** The base for the 3.8% tax under § 1411. For a trust, the tax applies to the lesser of undistributed NII or the excess of adjusted gross income over the dollar amount at which the top bracket begins. Distributions from qualified plans and IRAs are excluded from NII, although they are ordinary income.[55]

Character matters because each type of receipt moves through these ledgers differently:

Item	Effect on trust taxable income	Typical effect of a distribution	SNT planning note
Interest, nonqualified dividends, rents	Ordinary income	Carried out through DNI; retains ordinary character on the K-1	Retained amounts reach 37% quickly
Qualified dividends	Included; preferential rate	Carried out through DNI as qualified dividends	Beneficiary may be in the 0% bracket
Net long-term capital gain	Included; 0/15/20% rates plus NIIT	Generally stays in the trust (allocated to principal, excluded from DNI) unless a § 1.643(a)-3 pathway applies	Most common cause of an unexpected high-tax year

[54]I.R.C. §§ 643(a) (distributable net income), 651-652 (simple trusts), 661-663 (complex trusts); Treas. Reg. §§ 1.652(b)-2, 1.652(b)-3 (character of amounts and allocation of deductions), 1.661(a)-2, 1.662(b)-1. Treas. Reg. § 1.643(a)-3(a), (b), (e) (capital gains generally excluded from DNI unless, pursuant to the governing instrument and applicable local law, or a reasonable and impartial exercise of discretion by the fiduciary under a power granted by local law or the instrument, they are (1) allocated to income, (2) allocated to corpus but treated consistently by the fiduciary on the trust's books, records, and tax returns as part of a distribution, or (3) allocated to corpus but actually distributed or used by the fiduciary in determining the amount distributed or required to be distributed); see also Treas. Reg. § 1.643(b)-1.

[55]See supra note 27.

Item	Effect on trust taxable income	Typical effect of a distribution	SNT planning note
Tax-exempt interest	Excluded from taxable income	Carried out through DNI as tax-exempt, with expense allocation	Does not create taxable income for the thresholds
IRA / qualified-plan distributions	Ordinary income (income in respect of a decedent)	Carried out through DNI if distributed	Not NII, but fully exposed to compressed ordinary rates
Principal distributions	Not income in themselves	Carry out DNI under the tier rules, up to DNI	Cash out does not equal income out

Consider a nongrantor SNT with $20,000 of interest and dividends, $6,000 of trustee and administration fees, and a $40,000 long-term capital gain from the sale of an inherited stock position. If the trustee distributes (or pays for the beneficiary's benefit) the $14,000 of net income, the trust has distributed its "income" in every sense a non-tax professional would recognize. Yet the $40,000 gain, allocated to principal and excluded from DNI, remains taxable to the trust, and the trust is well past every compressed threshold. That fact pattern is the running example in Part XII, specifically because it is so often misunderstood and thus worthy of specific illustration.

X. The 2026 Rate Environment for Nongrantor SNTs

OBBBA made permanent the four-bracket rate structure for estates and trusts. For 2026, the rate schedule and capital-gain breakpoints are as follows:[56]

Taxable income (estates and trusts, 2026)	Ordinary rate	Net capital gain / qualified dividend rate
$0 – $3,300	10%	0% (up to $3,300)
$3,300 – $11,700	24%	15%
$11,700 – $16,000	35%	15%

[56]See supra note 18. IRS, 2026 Form 1041-ES, Estimated Income Tax for Estates and Trusts (2026 rate schedule; 0% capital-gain rate up to $3,300, 20% rate above $16,250; qualified disability trust exemption of $5,300), https://www.irs.gov/pub/irs-pdf/f1041es.pdf

Taxable income (estates and trusts, 2026)	Ordinary rate	Net capital gain / qualified dividend rate
$16,000 – $16,250	37%	15%
Over $16,250	37%	20%

By comparison, the 37% bracket for a single individual begins at $640,600 of taxable income in 2026, and a single filer's 0% rate on net capital gain extends to $49,450.[57] It is because of that drastic difference between the progression of rates an individual experiences and how quickly the rates escalate for a trust that we typically refer to "compressed" trust rates. The 3.8% NIIT applies to a trust's undistributed net investment income once its adjusted gross income exceeds $16,000.[58] The practical federal rate stack on retained income is therefore:

- **Retained net long-term capital gain:** 20% + 3.8% NIIT = **23.8%**.
- **Retained ordinary investment income:** 37% + 3.8% NIIT = **40.8%**.
- **Retained IRA or qualified-plan distributions:** 37% (no NIIT), plus state tax.

State fiduciary income tax is then layered on top, depending on trust situs, trustee residence, the beneficiary's residence, and source rules.[59] The key insight for this audience is that the exposure is driven by annual recognition events, not by the size of the corpus. A $750,000 SNT is not large by estate-planning standards, but a single year with a $40,000 realized gain, a year-end mutual-fund capital-gain distribution, the sale of the family home held in the trust, or a portfolio "clean-up" after the parent's death

[57] See supra notes 18, 35.

[58] See supra note 27.

[59] See North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust, 588 U.S. 262 (2019), for the nexus analysis of when and how a state may constitutionally tax a trust, a trustee, or a trust beneficiary, applying traditional minimum-contacts rules to the validity of the state imposing tax on the applicable party in relation to that party's or the assets' nexus to the state.

can produce $9,500 or more of federal tax on the gain alone ($40,000 × 23.8% = $9,520 before the effect of the lower brackets). Those recognition events are often initiated by an investment adviser in a directed-trust arrangement, or by a trust company's investment function, without the trust officer or SNT attorney ever seeing a tax projection.

XI. The New Section 68 Limitation – Not Necessarily a Big Number, but an Administrative Pain in the You Know What

A. The Statutory Text

Before 2018, § 68 contained the "Pease" limitation on itemized deductions, and former § 68(e) provided expressly that the section did not apply to any estate or trust. The Tax Cuts and Jobs Act suspended Pease for 2018 through 2025. OBBBA § 70111 rewrote § 68 in its entirety for taxable years beginning after December 31, 2025. New § 68(a) provides that, "[i]n the case of an individual," itemized deductions otherwise allowable are reduced by 2/37 of the lesser of (1) the amount of itemized deductions, or (2) so much of the taxable income for the year (determined without regard to § 68 and increased by the itemized deductions) as exceeds the dollar amount at which the 37% bracket begins for the taxpayer. New § 68(b) directs that the limitation be applied after any other limitation on itemized deductions. The former estate-and-trust exception was not carried forward.[60]

[60] I.R.C. § 68(a)-(b), as amended by Pub. L. No. 119-21, § 70111 (effective for taxable years beginning after December 31, 2025), https://www.law.cornell.edu/uscode/text/26/68 Trust Distributions: Timing, Tax, and Practical Considerations, The Tax Adviser (May 2026) (repeal of former § 68(e); debate over §§ 642, 651, and 661; planning with §§ 663(b), 643(g), 643(e)(3), and 642(c)(1)), https://www.thetaxadviser.com/issues/2026/may/trust-distributions-timing-tax-and-practical-considerations/

The policy objective for individuals is to cap the tax value of each dollar of itemized deductions at 35 cents for taxpayers in the 37% bracket. For trusts and estates, whose 37% bracket begins at $16,000, the question is whether—and to what extent—the rule applies at all.

B. The Joint Committee's Reading: Footnote 102

On May 28, 2026, the staff of the Joint Committee on Taxation released its General Explanation of Public Law 119-21 (JCS-1-26), commonly called the Blue Book.[61] In footnote 102, the staff states that the new limitation applies to estates and trusts. Its reasoning runs as follows: § 641(b) provides that the taxable income of an estate or trust is computed in the same manner as for an individual; § 63(d) defines itemized deductions as all allowable deductions other than those allowable in arriving at adjusted gross income and the deductions listed in § 63(b); and accordingly an estate's or trust's itemized deductions include, "without limitation," the § 642(b) exemption and the distribution deductions under §§ 651 and 661.[62]

The staff acknowledged Treas. Reg. § 1.67-4(a)(1)(ii), which states that the §§ 642(b), 651, and 661 deductions are not itemized deductions under § 63(d), but dismissed it on the ground that the regulation interprets § 67(e), and § 67(e) operates only "[f]or purposes of this section"—that is, for purposes of § 67 alone.[63]

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[61]Staff of the Joint Comm. on Taxation, General Explanation of the Tax Provisions of Public Law 119-21, JCS-1-26, at 26 & n.102 (May 28, 2026), https://www.jct.gov/publications/2026/jcs-1-26/; see also Staff of the Joint Comm. on Taxation, Errata for JCS-1-26, JCS-1R-26 (Sept. 18, 2026), https://www.jct.gov/publications/2026/jcs-1r-26/.

[62]Proskauer Rose LLP, Wealth Management Update (August 2026) (discussing JCT Blue Book footnote 102, its treatment of §§ 642(b), 651, and 661 as itemized deductions, and its dismissal of Treas. Reg. § 1.67-4(a)(1)(ii)), https://www.proskauer.com/newsletter/wealth-management-update-august-2026

[63]Treas. Reg. § 1.67-4(a)(1)(ii) (deductions under §§ 642(b), 651, and 661 are not itemized deductions under § 63(d)); I.R.C. §§ 63(d), 67(e), 641(b). See supra note 62.

C. The Counterarguments

Commentators have criticized the footnote. The principal arguments are that (1) new § 68(a) by its terms applies "[i]n the case of an individual," and § 641(b) incorporates individual computation rules only "except as otherwise provided in this part," which arguably includes Subchapter J's own conduit deductions; (2) the distribution deduction is not an expense but the mechanism that allocates income between the trust and its beneficiaries, so limiting it produces double taxation of the same income, a result that is contrary to the structure of Subchapter J; and (3) a Treasury regulation expressly treats these deductions as non-itemized.[64] ACTEC has asked Treasury to address the issue in the 2026-2027 Priority Guidance Plan, recommending that §§ 651 and 661 distribution deductions and administration expenses unique to estates and trusts not be subject to § 68, and separately noting that § 68(a) as written applies the 2/37 reduction even when the taxpayer's income is taxed at the 20% capital-gain rate rather than at 37%.[65]

A Blue Book is a post-enactment staff explanation. It is not statute, regulation, or binding Treasury guidance, and it cannot override statutory text.[66] Treasury regulations and JCT Blue Books are both among the materials listed in Treas. Reg. § 1.6662-4(d)(3)(iii) for the substantial-authority analysis. That listing alone does not establish

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[64]See supra note 62. American College of Trust and Estate Counsel, Recommendations for 2026-2027 Priority Guidance Plan (Notice 2026-23) (May 29, 2026) (recommending relief for §§ 651 and 661 and administration expenses, and a correction so the 2/37 reduction does not apply to income taxed under § 1(h)), https://www.actec.org/wp-content/uploads/2026/06/26.05.29_ACTEC-Recs.-re-2026-2027-Priority-Guidance-Plan.pdf

[65]See supra note 64.

[66]Hidden Tax Trap: Does OBBBA Affect Trusts and Estate Deductions?, Nat'l L. Rev. (2026) (worked example of a $20,000 reduction on $386,000 of distributed DNI; Blue Book is persuasive, not binding), https://natlawreview.com/article/hidden-tax-trap-does-obbba-affect-trusts-and-estate-deductions

substantial authority, however; the weight of an authority depends on its relevance and persuasiveness.[67] Preparers of 2026 Forms 1041 will need to evaluate the competing positions on the particular facts, choose one, document it, and consider whether disclosure is warranted. As of this writing, Treasury has not issued guidance on the question. The IRS has posted 2026 drafts of Form 1041, Schedule D, Schedule K-1, the Schedule K-1 instructions, and Schedule I, but final 2026 instructions addressing the computation had not been released.[68]

D. How the Computation Works for a Trust

If the JCT reading is followed, the computation for a nongrantor trust is:

1. Identify the trust's "itemized deductions." Under footnote 102, these include at least the § 642(b) exemption (including a QDisT exemption) and the §§ 651/661 distribution deduction. Whether § 67(e) administration expenses, the § 642(c) charitable deduction, and the § 691(c) deduction are also included is unresolved; the footnote's "without limitation" language suggests a broad reading, while ACTEC urges that administration expenses be excluded.[69] Footnote 102's final sentence is broader than its three examples: the staff says that the § 67(e) regulation does not exclude those deductions "or any other deductions" from itemized-deduction status for § 68. That is the staff's expansive interpretive position, not a rule adopted in regulations or Form 1041 instructions, and the

[67]Treas. Reg. § 1.6662-4(d)(3)(iii) (listing, among the authorities considered in determining substantial authority, regulations and "General Explanations of tax legislation prepared by the Joint Committee on Taxation (the Blue Book)").

[68]IRS, Draft Tax Forms (listing 2026 drafts of Form 1041 (posted May 22, 2026), Schedule D (May 27, 2026), Schedule K-1 (June 1, 2026), Schedule K-1 instructions (Aug. 25, 2026), and Schedule I (Sept. 22, 2026)), https://www.irs.gov/draft-tax-forms

[69]See supra notes 62, 64.

treatment of administration expenses, § 642(c), and § 691(c) remains unsettled for return-reporting purposes.

2. Compute taxable income without regard to § 68, add back those itemized deductions, and subtract $16,000 (the 2026 37%-bracket threshold for trusts).
3. Multiply the lesser of step 1 and step 2 by 2/37.
4. Reduce the itemized-deduction pool by that amount. The reduction increases trust taxable income by reducing a deduction; neither § 68 nor footnote 102 specifies its character for rate purposes or its effect, if any, on NIIT. The beneficiary's inclusion under §§ 652 and 662 is measured by DNI and the amounts distributed, and nothing in new § 68 reduces it.

A published illustration captures the double-tax problem. A trust with $386,000 of DNI distributes it all to a surviving spouse. Step 2 produces $370,000 ($386,000 − $16,000); the reduction is $20,000 ($370,000 × 2/37); the trust deducts $366,000; the spouse still reports $386,000; and the trust pays tax on $20,000 of income it has already distributed—$7,400 at 37%.[70]

E. The "Two Percent Toll": A Rule of Thumb

For planners, the most useful way to size the problem is that the reduction can never exceed 2/37 of the itemized deductions. If the disallowed amount is effectively taxed at 37%, the cost is 2/37 × 37%, or **up to approximately 2% of the relevant itemized-deduction pool**. Under the JCT premise, that pool includes the § 642(b) exemption as well as the distribution deduction. Where the trust has distributed everything and the phantom income falls into the trust's 10% or 24% brackets, the cost

[70]See supra notes 66, 62.

is lower. Where the trust also retains income or gains that push the phantom income into the top bracket, the cost approaches the full 2%.

That calibration matters for an honest presentation. For a modest SNT, the direct § 68 cost will usually be measured in hundreds of dollars, not thousands. The large dollars remain where they have always been: compressed brackets and NIIT on retained income and gains. But § 68 is new, it is triggered by exactly the recognition events that already cause the larger problem, it creates a true double tax on distributed income, and it complicates the Form 1041, the fiduciary accounting (which account bears the tax on phantom income?), and beneficiary communications. It also scales with the size of distributions, so it is not trivial for larger third-party SNTs funded with life-insurance proceeds or substantial inheritances.

F. Why Capital Gains Aggravate § 68

The second prong of the "lesser of" test—taxable income plus itemized deductions in excess of $16,000—is inflated by any retained capital gain. In an ordinary year, a small SNT that distributes its net income may never exceed $16,000 on that prong and will owe nothing under § 68. In a gain year, the retained gain pushes the second prong far above the itemized-deduction amount, so the full 2/37 reduction applies to the entire distribution deduction. As ACTEC has pointed out, § 68(a) does not exclude income taxed at the preferential § 1(h) rates from that computation.[71] A recognition event therefore does double duty: it creates trust-level capital-gain tax and NIIT directly, and it turns on the § 68 haircut for the distributions the trustee was going to make anyway.

[71] See supra note 64.

G. Open Questions for 2026 Returns

- Whether Treasury will adopt, reject, or modify the Blue Book position, and whether Congress will enact a technical correction.
- Which deductions are "itemized" for a trust—particularly § 67(e) administration expenses, § 642(c) charitable deductions, and § 691(c).
- The character of the phantom income created by the reduction (ordinary, or pro rata across the classes of income that were distributed), which affects the rate applied.
- Whether the reduction affects the NIIT computation, which uses adjusted gross income and undistributed net investment income rather than taxable income.
- Whether the tax on phantom income is charged to income or principal under the governing instrument and state law, a question with fiduciary consequences between current and remainder beneficiaries.
- State conformity: states that begin with federal taxable income for fiduciary returns may import the reduction; others may not.

XII. Worked Examples

What is settled, and what is not. Settled: OBBBA rewrote § 68 effective for 2026, and trusts reach the 37% threshold at $16,000. JCT position: § 68 applies to trusts and reaches the §§ 642(b), 651, and 661 deductions. Unsettled: whether that position will govern returns, which other deductions enter the pool, and the character, NIIT, and DNI mechanics of any reduction. The examples below illustrate the JCT position under disclosed modeling assumptions; they are not return computations.

The following examples use a single hypothetical third-party SNT for "Daniel," age 34, who receives SSI and Medicaid. His parents are deceased; the trust is a nongrantor complex trust with a $900,000 diversified portfolio. Unless otherwise stated,

each year the trust earns $8,000 of taxable interest and nonqualified dividends and $12,000 of qualified dividends, pays $6,000 of trustee and administration fees (deductible under § 67(e) and allocated against ordinary income), and uses a $100 exemption. The trustee pays $14,000 each year to third-party vendors for Daniel's supplemental needs. Figures are federal only, rounded, and computed under the Joint Committee reading of § 68 with the § 642(b) exemption and the distribution deduction treated as itemized deductions and administration expenses excluded. Solely for these illustrations, any § 68 reduction is modeled as an increase in ordinary taxable income and as not changing § 67(e) adjusted gross income or undistributed net investment income, and distributions carry out each class of income pro rata after fees are allocated against ordinary income. Neither § 68 nor footnote 102 resolves those mechanics, and actual reporting may change with Treasury or IRS guidance. NIIT is computed as 3.8% of the lesser of undistributed net investment income or § 67(e) adjusted gross income in excess of $16,000.

Example 1: The Routine Year

DNI is $14,000 ($20,000 − $6,000). The $14,000 distribution carries out all of it. Taxable income before § 68 is negative ($20,000 − $6,000 − $14,000 − $100). The § 68 second prong (−$100 + $14,100 − $16,000) is a negative number, so there is no reduction. The trust owes no federal income tax or NIIT. Daniel receives a K-1 for $2,000 of ordinary income and $12,000 of qualified dividends; with a 2026 single standard deduction of $16,100, he owes no federal income tax.[72] This is the "income is taxed once, and lightly" result most SNT professionals expect.

[72]See supra note 22.

Example 2: The Surprise Capital-Gain Year

Same facts, but the investment adviser sells a concentrated stock position that has appreciated substantially since the parent's death and realizes a $40,000 long-term capital gain, allocated to principal and excluded from DNI. The trustee makes the usual $14,000 of distributions. Taxable income before § 68 is $39,900. The § 68 second prong is $38,000 ($39,900 + $14,100 − $16,000); the first prong is $14,100; the reduction is $14,100 × 2/37 = $762. The trust's taxable income becomes $40,662.

Example 2 (illustrative; federal, 2026)	**Without § 68**	**With § 68 (JCT reading)**
Trust taxable income	$39,900	$40,662
Regular income tax (capital-gain worksheet; § 68 reduction assumed to increase ordinary taxable income)	$6,673	$6,891
NIIT (3.8% × lesser of $40,000 undistributed NII or $39,900 AGI − $16,000)	$908	$908
Total trust-level federal tax	$7,581	$7,799
Daniel's K-1 inclusion	$14,000	$14,000

Three points emerge. First, the trust has gone from zero tax to roughly $7,600 of federal tax because of one routine investment decision. Second, § 68 adds about $220, which is modest but is a tax on income that Daniel also reports. Third, if administration expenses are also treated as itemized deductions, the reduction grows to about $1,086 and the total to about $7,897. If the trust qualifies as a QDisT, its $5,300 exemption reduces the total to approximately $6,552—more than offsetting the § 68 cost—although under the JCT reading the larger exemption itself enlarges the base subject to the 2/37 reduction.

Example 3: Harvesting a Loss

Same as Example 2, but before year-end the adviser also sells a position with a $15,000 unrealized loss for independent investment reasons (and does not repurchase a substantially identical security within the wash-sale window).[73] Net long-term gain falls to $25,000. Total federal trust tax falls to about $4,229, a savings of roughly $3,570. The § 68 reduction is unchanged at $762, because the second prong still exceeds the first. The mundane step of reviewing the portfolio's unrealized losses before December 31 is worth more than every § 68 argument combined.

Example 4: Carrying Out the Gain—Properly

Same as Example 2, but Daniel needs a wheelchair-accessible vehicle. The trust instrument authorizes principal distributions for Daniel's benefit, and the trustee, exercising a discretionary power under the instrument and state law, decides contemporaneously to treat the gain as part of the distribution and records that decision in its books and minutes. The trust purchases a $40,000 vehicle titled to Daniel, in addition to the usual $14,000 of payments. Under Treas. Reg. § 1.643(a)-3(b), the gain is included in DNI because it is actually distributed or used to determine the amount distributed.[74] DNI becomes $54,000.

Trust taxable income before § 68 is again negative. The § 68 second prong is $38,000 ($54,100 − $100 − $16,000) and the first prong is $54,100, so the reduction is $38,000 × 2/37 = $2,054, leaving $1,954 of trust taxable income taxed at 10%—about

[73] I.R.C. §§ 1211(b), 1212(b) (net capital loss deduction limited to $3,000 against ordinary income, with carryover); § 1091 (wash sales); § 642(h) (unused capital-loss carryovers and excess deductions on termination pass to beneficiaries succeeding to the property).

[74] See supra note 54.

$195. That figure is expressly assumption-dependent: if the retained amount were instead treated as a pro rata share of the preferential income carried out, a standard capital-gain worksheet would produce no tax. There is no NIIT at the trust level. Daniel's K-1 shows $2,000 of ordinary income, $12,000 of qualified dividends, and $40,000 of net long-term capital gain.[75] After his $16,100 standard deduction, his remaining $37,900 of taxable income consists entirely of qualified dividends and capital gain within the 0% bracket, so his federal income tax is zero.[76]

The combined federal tax falls from about $7,800 (Example 2) to about $195. For SSI purposes, a vehicle is an in-kind item that is neither food nor shelter, and one automobile used for transportation is generally an excluded resource; the trustee should nonetheless confirm the benefit analysis before acting.[77] The critical constraint is that the distribution must be real, authorized, and justified by Daniel's needs. The tax result follows the administration; it cannot be created by a year-end reporting entry.

Example 5: A Larger Trust That Distributes Everything

A $3 million third-party SNT funded with life-insurance proceeds earns $90,000 of interest and dividends, pays $20,000 of fees, and distributes $70,000 for the beneficiary's supported-living costs. There is no retained income. Under the JCT reading, the reduction is $54,000 × 2/37 = $2,919 (the second prong being $70,000 − $16,000), and the trust owes about $282 of federal tax on income that the beneficiary also reports in full. This is the pure double-tax case: small dollars, but a result that

[75]See Instructions for Schedule K-1 (Form 1041) (box 1, interest; box 2a, ordinary dividends; box 2b, qualified dividends; box 3, net short-term capital gain; box 4a, net long-term capital gain), with the 2026 draft posted August 25, 2026, https://www.irs.gov/draft-tax-forms

[76]See supra note 35.

[77]See supra note 39.

surprises everyone who has been told that a trust distributing all of its DNI owes nothing.

Example 6: A Larger Trust That Retains Income and Gains

The same type of trust retains a substantial part of its income and realizes a $100,000 gain: $60,000 of ordinary income, $90,000 of qualified dividends, $100,000 of long-term gain (allocated to principal and excluded from DNI), $25,000 of fees (allocated against ordinary income and fully allocable to net investment income), and $60,000 of distributions, which carry out ordinary income and qualified dividends pro rata. All income is assumed to be net investment income. The § 68 reduction is $60,100 × 2/37 = $3,249, taxed at 37%, adding about $1,202—almost exactly 2% of the distribution deduction—to a federal trust-level tax of about $40,800. The toll is small relative to the underlying tax, but it lands at the top rate.

Scenario (illustrative; federal, 2026)	§ 68 reduction	Trust tax without § 68	Trust tax with § 68	Beneficiary K-1
1. Routine year	$0	$0	$0	$14,000
2. $40,000 gain retained	$762	$7,581	$7,799	$14,000
3. Gain reduced by $15,000 loss	$762	$4,011	$4,229	$14,000
4. Gain carried out via DNI	$2,054	$0	$195	$54,000
5. Larger trust, all distributed	$2,919	$0	$282	$70,000
6. Larger trust, income and gain retained	$3,249	$39,646	$40,848	$60,000

The lesson of the table is not that § 68 is the largest number. It is that the same trust, with the same beneficiary and the same portfolio, can owe nothing, $195, or nearly $7,800 depending on decisions made by December 31—and that the new § 68 overlay turns on precisely when those decisions go badly.

XIII. The Planning Architecture: "If You Want to Be Cute"

The strategies below are not requests for the CPA's permission. They are the substantive planning and reporting architecture that the SNT lawyer, trustee, or trust officer should bring to the table—implemented with lawful authority, contemporaneous documentation, fiduciary analysis, and specialist coordination. None of them should be used in a way that compromises the beneficiary's benefits or the trust's protective purpose.

A. The Fourth-Quarter SNT Tax Huddle

A directed trustee or trust officer does not need to manage the portfolio to recognize that portfolio activity will change the tax result. Every nongrantor SNT should have a documented tax review no later than early November, before discretionary gains, fund distributions, and year-end distributions become irreversible. The huddle should produce a projection covering:

1. Year-to-date and projected interest, ordinary dividends, qualified dividends, and short- and long-term capital gains.
2. Unrealized gains and losses in the portfolio, with harvesting candidates identified.
3. Projected mutual-fund capital-gain distributions and their record dates.
4. Proposed sales, rebalancing, diversification of inherited or concentrated positions, real-property dispositions, and in-kind distributions.
5. Capital-loss carryforwards from prior years.
6. Planned beneficiary distributions and the resulting DNI, by character.
7. Projected trust taxable income, NIIT, and the § 68 computation under the JCT reading and under the contrary reading.

8. QDisT status and the estimated-tax position for the January 15, 2027 installment.[78]
9. The benefits consequences of any proposed distribution (SSI, Medicaid, housing, ABLE).

The meeting language is simple and portable: “Before we approve the distribution plan and the proposed year-end trades, we need a trust-level tax projection—realized and unrealized gains and losses, loss carryforwards, projected fund distributions, DNI, retained taxable income, NIIT, and the § 68 effect. If there are sensible losses to harvest, or gains we can defer or stage, we need to know that before December 31.”

B. Control When Gains Are Recognized

- **Harvest losses deliberately.** Realized losses offset realized gains without limit; net capital losses offset only $3,000 of ordinary income per year, with the excess carried forward. Avoid wash sales under § 1091 when repositioning. A loss recognized in January is too late for the prior year’s gain.[79]
- **Stage or defer discretionary gains.** Spreading a diversification program over two or more tax years, or using an installment sale for real property, can keep each year’s taxable income lower and reduce both the rate cost and the § 68 exposure.
- **Watch mutual-fund distributions.** A fund’s year-end capital-gain distribution is taxable whether paid in cash or reinvested. Buying a fund shortly before its

[78] I.R.C. § 6654(l) (estimated tax requirements applicable to estates and trusts); 2026 Form 1041-ES, https://www.irs.gov/pub/irs-pdf/f1041es.pdf

[79] See supra note 73.

record date imports someone else's gain. Tax-managed funds, ETFs, and direct indexing can reduce involuntary recognition, consistent with prudent-investor obligations.

- **Coordinate post-death portfolio transitions.** A revocable SNT receives a basis step-up at the parent's death, which often makes the months after death the cheapest time to diversify. An irrevocable lifetime SNT may hold assets with the parent's carryover basis (see Rev. Rul. 2023-2). Either way, the post-death portfolio transition should be planned, not reflexive.

C. Make Capital Gain Distributable—Properly

Capital gain is excluded from DNI unless the regulation's conditions are met. Treas. Reg. § 1.643(a)-3(b) permits inclusion where, pursuant to the governing instrument and applicable local law, or a reasonable and impartial exercise of the fiduciary's discretion under a power granted by local law or the instrument, the gain is (1) allocated to income; (2) allocated to corpus but treated consistently by the fiduciary on the trust's books, records, and tax returns as part of a distribution; or (3) allocated to corpus but actually distributed or used by the fiduciary in determining the amount distributed.[80] State principal-and-income law, including a power to adjust or a unitrust election, may supply the necessary authority.[81]

The word "consistently" carries real weight. This is not a one-year election made after the numbers are known. The trustee should identify the authority, make the decision before or contemporaneously with the distribution, record the tax and non-tax

[80]See supra note 54.

[81]See supra note 53.

rationale, and reflect it identically in the fiduciary accounting, trust books, Form 1041, and Schedule K-1. For new trusts, drafters should include an express power permitting the trustee to allocate capital gains to income or to treat them as part of distributions, exercisable in the trustee's discretion and consistent with the SNT's protective provisions.

D. Distribute by Character, Not by Cash

The question is not "how much cash did we send?" It is "which character of income did the distribution carry out, what remained in the trust, and what does that do to the trust's taxable income, NIIT, and § 68 computation?" Payments to third parties for the beneficiary's benefit—housing-related costs where appropriate, therapies, equipment, travel, education, a vehicle titled to the beneficiary—are distributions that carry out DNI under §§ 661 and 662 even though no cash reaches the beneficiary.[82] A trustee contribution to the beneficiary's ABLE account (up to the $19,000 annual limit for 2026, and now available to individuals whose disability began before age 46) is likewise a distribution that carries out DNI, while moving funds to an account that is disregarded for most means-tested purposes up to the applicable limits.[83] Deductions should be allocated, where the regulations permit, against the income classes that would otherwise bear the highest rate.[84]

[82]See supra note 54.

[83]See supra note 20.

[84]See supra note 54.

E. Timing and Election Tools

- **The 65-day rule.** Under § 663(b), the trustee may elect to treat distributions made within the first 65 days of 2027 (through March 6, 2027) as made in 2026, up to the greater of FAI or DNI for 2026, reduced by distributions already made. This is a valuable tool when year-end figures crystallize late. It does not retroactively create authority to include capital gain in DNI or cure an inconsistent administrative record.[85]
- **In-kind distributions and § 643(e).** An in-kind distribution carries out DNI only to the extent of the lesser of basis or fair market value unless the trustee elects under § 643(e)(3) to recognize gain. The election can be useful to absorb capital-loss carryforwards at the trust level and give the beneficiary a fair-market-value basis; without the election, the beneficiary takes a carryover basis.[86]
- **Estimated taxes and § 643(g).** A gain year can create an estimated-tax obligation for the trust. The trustee may elect to allocate trust estimated payments to a beneficiary under § 643(g), which is useful where DNI is carried out after payments were made.[87]

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[85] I.R.C. § 663(b); Treas. Reg. §§ 1.663(b)-1, 1.663(b)-2 (election to treat amounts properly paid or credited within the first 65 days of the following taxable year as paid on the last day of the preceding year; limited to the greater of fiduciary accounting income or DNI for the year, reduced by amounts otherwise distributed).

[86] I.R.C. § 643(e) (in-kind distributions; basis carryover and DNI carryout limited to the lesser of basis or fair market value unless the fiduciary elects under § 643(e)(3) to recognize gain or loss as if the property had been sold). See supra note 60.

[87] I.R.C. § 643(g); Form 1041-T (election to treat estimated tax payments as paid by a beneficiary), https://www.irs.gov/draft-tax-forms See supra note 78.

- **Termination.** On the trust's termination, unused capital-loss carryovers and excess deductions pass to the beneficiaries succeeding to the property under § 642(h).[88]

F. Structural Options for Persistent High-Income Trusts

Where a nongrantor SNT routinely has income beyond the compressed thresholds, the trustee and counsel should revisit the investment policy (including the mix of income-producing and growth assets), the distribution standard and pattern, capital-gain allocation provisions, trust situs and state-tax exposure, and whether the instrument should be modified or decanted if legally available and consistent with the settlor's purposes.[89] For the typical revocable SNT, drafters should build the post-death tax architecture—capital-gain allocation authority, distribution standards that permit tax-aware timing, and trustee power to make ABLE contributions and third-party payments—into the instrument now, because the trust will become a nongrantor taxpayer the moment it becomes irrevocable. For the less common irrevocable lifetime SNT, the choice between grantor and nongrantor status, and any substitution power or trust-protector authority to toggle grantor status, should be made deliberately.

G. Guardrails: Cute Is Not Clever If It Hurts the Beneficiary

- Do not distribute simply to chase a tax result; the distribution must meet an independently valid SNT purpose.

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[88] See supra note 73.

[89] See, e.g., Unif. Trust Decanting Act (2015); Unif. Trust Code §§ 410-417 (modification and termination); N.J. Stat. Ann. § 3B:31-1 et seq. (New Jersey Uniform Trust Code). Any modification of an SNT must be evaluated for its effect on public-benefit status and, for third-party trusts, for any risk that a beneficiary's participation could be characterized as a transfer.

- Do not alter capital-gain treatment for one favorable year without confirming authority and committing to consistent administration.
- Do not make an in-kind or cash distribution without considering fiduciary duty, valuation, the beneficiary's capacity, and the SSI, Medicaid, and housing consequences.
- Do not assume that the beneficiary's low tax bracket is the decisive factor; consider the beneficiary's whole tax, benefits, and care-plan picture.
- Document the decision and involve the return preparer before the transaction is irrevocable.

XIV. Reporting It Correctly

The planning above only works if the return reflects the administration that actually occurred. For a nongrantor SNT, the 2026 Form 1041 should show the income distribution deduction computed on Schedule B, limited to DNI; capital gains on Schedule D, with any gain included in DNI identified and supported by the trustee's contemporaneous record; the § 642(b) exemption, including the $5,300 QDisT exemption where applicable; NIIT on Form 8960; and Schedules K-1 that report the beneficiary's share by character—interest in box 1, ordinary dividends in box 2a, qualified dividends in box 2b, and net short- and long-term capital gain in boxes 3 and 4a when gain is carried out.[90]

For § 68, the preparer should compute the result under the Joint Committee reading and under the contrary reading grounded in Treas. Reg. § 1.67-4(a)(1)(ii) and

[90]See supra note 75.

the text of § 68(a); choose and document a position; consider whether disclosure is appropriate given that each position is supported by listed authority; and communicate the choice to the trustee, who must decide whether the resulting tax is charged to income or principal. If final Form 1041 instructions or other applicable Treasury or IRS guidance specify a reporting method, the preparer should follow that official guidance while assessing its interaction with the statute and regulations. Beneficiaries' preparers should be told if the trust has taken a position that creates phantom income at the trust level, because it will not change the beneficiary's K-1.

XV. Who Owns the Problem

No single participant—particularly in a directed-trust arrangement or a trust company that separates investment, administration, distribution, and tax functions—will necessarily see the whole problem. Someone must call the huddle.

Participant	Must flag or decide
Investment adviser	Projected gains and losses, fund distributions, proposed sales, harvesting candidates, post-death basis inventory
Trustee or trust officer	Authorized distribution strategy, fiduciary justification, accounting treatment, contemporaneous records, the calendar for the huddle
SNT attorney	Grantor or nongrantor status, instrument authority, state principal-and-income law, capital-gain/DNI architecture, QDisT qualification, benefits and fiduciary consequences, drafting and modification
Return preparer	Form 1041 projection, DNI and character carryout, § 68 computation and position, NIIT, estimated tax, federal and state reporting
Care manager / benefits planner	Whether the proposed distribution meets a real need and how it affects SSI, Medicaid, housing, and ABLE

XVI. Conclusion

OBBBA's Medicaid provisions will be remembered for the coverage losses in the expansion population, and the public debate has largely stopped there. For people who

are disabled under Social Security definitions, the direct eligibility effects are modest: two months of retroactive coverage instead of three, a fixed home-equity cap, and delayed enrollment simplifications. The larger effect is the gradual financing squeeze that will fall, over the next decade, on the optional home- and community-based services our clients rely on most. That makes private resources, and their efficient use, more important than ever.

The tax side of the same law, together with what it left alone, supplies part of the answer. The SECURE Act lifetime stretch still allows a parent's yet-untaxed retirement savings to become a benefits-protective, tax-deferred resource for a disabled child through an accumulation AMBT. That should reshape how parents divide their estates among their children. But once that money is inside a nongrantor SNT, the trust is a compressed-bracket taxpayer. From 2026 it also faces a new § 68 limitation that, under the Joint Committee's reading, trims the very deductions that make distributing income tax-efficient. The Medicaid label on a third-party SNT does not change when Mom or Dad dies; the taxpayer does.

The remedy is not to turn trust officers and SNT lawyers into return preparers. It is to institutionalize one habit: **for every nongrantor SNT, call the tax huddle before December 31**. Review gains, losses, and retirement distributions; harvest losses where sensible; stage what can be staged; decide deliberately whether gain will be carried out under a proper § 1.643(a)-3 pathway; distribute by character for real beneficiary needs; confirm QDisT status; and document everything, so that the 2026 Form 1041 reports a result that was planned rather than discovered.

Appendix A: Fourth-Quarter SNT Tax Huddle Checklist

1. Confirm the trust's income-tax status: revocable or irrevocable; grantor (whose?) or nongrantor; date of any conversion; any § 645 election.
2. Confirm QDisT eligibility and the beneficiary's SSA disability determination.
3. Obtain year-to-date realized income and gains by character, and projected year-end fund distributions.
4. Obtain the unrealized gain/loss report and capital-loss carryforwards.
5. Identify proposed trades, sales, and in-kind distributions before year-end.
6. Identify the instrument's capital-gain allocation provisions and applicable state principal-and-income law.
7. Decide, and document, whether any gain will be treated as part of distributions under Treas. Reg. § 1.643(a)-3(b).
8. Plan distributions for real beneficiary needs; model DNI carryout by character.
9. Run the § 68 computation under both readings; estimate NIIT and state tax.
10. Confirm benefits consequences (SSI, Medicaid, housing, ABLE) for each proposed distribution.
11. Calendar the January 15 estimated payment and the 65-day election deadline (March 6, 2027 for 2026).
12. Memorialize decisions in trustee minutes; send the file to the return preparer.

Appendix B: Assumptions for the Worked Examples

All examples apply the 2026 estate and trust rate schedule and capital-gain breakpoints from Rev. Proc. 2025-32; a $100 complex-trust exemption unless a QDisT is assumed ($5,300); NIIT at 3.8% of the lesser of undistributed net investment income

or AGI in excess of $16,000; and the Joint Committee reading of § 68, treating the § 642(b) exemption and distribution deductions (but not § 67(e) administration expenses, except where noted) as itemized deductions. Solely for illustration, the § 68 reduction is modeled as ordinary taxable income that does not change § 67(e) adjusted gross income or undistributed net investment income; neither § 68 nor JCS-1-26 footnote 102 resolves those mechanics, and actual reporting may change with guidance. Administration expenses are allocated against ordinary income, and distributions carry out each class of income pro rata. The beneficiary is a single filer with no other taxable income, using the 2026 standard deduction of $16,100. State taxes, AMT, and estimated-tax penalties are ignored. The examples are designed to illustrate relationships and magnitudes, not to serve as return computations.

2026 National Conference on Special Needs Planning and Special Needs Trusts

Stetson University College of Law Special Needs Conference 2026

First-Party Special Needs Trusts

Drafting When Federal Compliance Is Not Enough:

State-Level D4A Anomalies, Administrative Friction, and

Practical Drafting Implications

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Overview

A first-party special needs trust under 42 U.S.C. § 1396p(d)(4)(A) is often taught as though the drafting exercise begins and ends with the federal statute: disabled beneficiary, under age sixty-five, trust established by the proper person, sole-benefit administration, and Medicaid payback. That federal baseline remains indispensable, but it is not the whole story. In a meaningful group of jurisdictions, a trust that appears facially compliant under federal law may still encounter delay, rejection, additional reporting obligations, funding obstacles, lien-clearance issues, property restrictions, or termination complications because the governing state has added its own statutory, regulatory, manual-based, or operational overlay.

That gap between federal sufficiency and state implementation matters most when the practitioner, court, or fiduciary is handling a settlement-funded trust, moving a beneficiary across state lines, or administering trusts nationally through a corporate platform. A local lawyer may know intuitively how one state behaves. A trust company officer with a 51-jurisdiction book of business cannot safely rely on intuition or on one state's habits. The relevant question is not merely whether the trust is federally compliant in the abstract, but where it will be reviewed, funded, administered, distributed from, and eventually terminated.

This paper therefore takes a deliberately blended approach. It begins with the core drafting and administration principles that still govern first-party trusts as a matter of federal law and sound practice. It then turns to the more interesting and, for many fiduciaries, more consequential subject: the jurisdictions in which compliance with the federal statute alone may be insufficient as an operational matter. The result is intended to be useful both to lawyers drafting these instruments and to trustees and trust officers who must administer them in real files rather than in the clean hypotheticals of federal statutory text.

What a First-Party Trust Is

At its most basic, a first-party trust is a trust funded with assets that belonged to, were vested in, or became legally payable to the beneficiary whose needs the trust is designed to serve. Traditional trust law would describe the arrangement as self-settled. In the special-needs setting, that source-of-funds inquiry is often the first and most important threshold question. If the assets were the beneficiary's by right, whether because of a personal-injury recovery, an inheritance payable outright, a beneficiary designation, accumulated back benefits, or some other vested entitlement, the practitioner is in first-party trust territory rather than third-party planning.

Congress authorized self-settled special needs trusts in 1993 through the Omnibus Budget Reconciliation Act of 1993. The point was not to create a general asset-protection device for a beneficiary's own funds. The point was narrower and more humane: to permit a disabled individual to preserve eligibility for means-tested public benefits, principally Medicaid and SSI, while still using his or her own property in a structured way for supplemental benefit. If the same funds are paid directly to the disabled individual and held outright, those assets generally become countable resources. If they are transferred into a properly established and administered first-party special needs trust, they may be disregarded for eligibility purposes, subject always to the governing federal and state rules. See 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203.

For SSI purposes, distribution mechanics remain critical. Payments made directly to third-party vendors for goods and services may avoid treatment as income to the beneficiary, while payments for food or shelter implicate the in-kind support and maintenance rules and may reduce, though not necessarily eliminate, SSI. Medicaid treatment is different; the central concern is usually whether the trust corpus remains a countable resource and whether trust administration is consistent with the governing exception. For practitioners and trustees alike, that distinction between benefit systems should be kept conceptually separate from the drafting question itself.

The Federal D4A Baseline

The classic stand-alone first-party trust is the trust described in 42 U.S.C. § 1396p(d)(4)(A), usually shortened to a “D4A” trust. The trust holds the assets of a disabled individual. The beneficiary must meet the Social Security disability standard. The trust must be established by the disabled individual if competent, or by a parent, grandparent, guardian, or court. It must be for the sole benefit of the disabled beneficiary, and the beneficiary must be under age sixty-five when the trust is established and funded.

The trust must also contain a Medicaid payback provision. In broad terms, the state or states that furnished medical assistance are repaid at the beneficiary's death, up to the amount properly recoverable under governing law, before any remainder passes to other beneficiaries. That single sentence, however, conceals a great deal of complexity. States differ meaningfully over the exact formulation of payback, over whether and how they treat early termination, over whether they insist on all-state reimbursement language, over the order of allowable expenses at death, and over whether they impose reporting or approval conditions while the beneficiary is still alive. Those differences are part of the central thesis of this paper.

Federal law supplies the floor. It does not guarantee a frictionless path in every jurisdiction. A drafter who stops at the federal elements may produce an instrument that looks fine on first read yet performs badly

in administration because a particular state has layered on requirements concerning notice, asset forms, annual accounts, court procedures, liens, death reporting, or termination mechanics.

Flexibility in Drafting

D4A drafting is unusually vulnerable to legal drift. The federal statutory framework has remained relatively stable in outline since the enactment of the Special Needs Trust Fairness Act—enacted as § 5007, "Fairness in Medicaid Supplemental Needs Trusts," of the 21st Century Cures Act, Pub. L. No. 114-255, § 5007, 130 Stat. 1033, 1209 (2016)—which amended 42 U.S.C. § 1396p(d)(4)(A) to permit a legally competent disabled individual to establish his or her own first-party special needs trust.[^9] But the interpretive ecosystem around the statute has not remained static. State regulations change. Agencies shift procedures. POMS guidance evolves. Institutional custodians change their willingness to hold certain assets. Courts differ on the effect of remainder structures, sole-benefit questions, or procedural defects. The instrument therefore should be drafted with as much lawful flexibility as possible.

Not Every State Is a New Jersey

Before turning to the friction states, it is worth saying plainly that not every jurisdiction behaves that way. Christopher Smith has observed that Michigan is, in practice, comparatively hands-off with respect to D4A trusts, while still presenting issues concerning funding of pooled trusts after age sixty-five.[^1]

The practical lesson is therefore not that every state is burdensome. It is that no fiduciary should assume uniformity. A national trustee must be facile across jurisdictions, not merely comfortable in one state.

: The author gratefully acknowledges Christopher Smith, Esq., a member of the Special Needs Alliance, for practical observations concerning Michigan's comparatively hands-off treatment of D4A trusts and its continuing post-age-sixty-five pooled-trust issues. These observations reflect practitioner experience and should be independently confirmed for a current matter. Any remaining errors are the author's alone.

: The Special Needs Trust Fairness Act was enacted as § 5007, "Fairness in Medicaid Supplemental Needs Trusts," of the 21st Century Cures Act, Pub. L. No. 114-255, § 5007, 130 Stat. 1033, 1209 (2016). It amended 42 U.S.C. § 1396p(d)(4)(A) by inserting "the individual" among the persons permitted to establish a first-party special needs trust. Federal guidance states that the amendment applies to trusts established on or after December 13, 2016. See State Medicaid Director Letter #17-001, Implications of Section 5007 of the Cures Act for Special Needs Trusts (Aug. 1, 2017).

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Tax Law Update

What OBBBA Changed, and What It Did Not: Medicaid Financing, the Lifetime Retirement Stretch, and the New § 68 Trap for Nongrantor Special Needs Trusts

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Educational materials only; not legal advice for any particular matter. Figures are federal, 2026, simplified, and illustrative. The written materials contain far more than these slides. Materials prepared with extensive use of Perplexity and Manus AI.

1

ROADMAP

One law, one story: what changed, what did not, who pays

1 **Medicaid: headline vs. our clients** Coverage losses fall mainly on expansion adults; our clients face a slower HCBS financing squeeze.	2 **Tax changes that matter** Permanent compressed brackets, $15M exclusion, ABLE, senior deduction, rewritten § 68.	3 **What did not change** The SECURE Act lifetime stretch, accumulation AMBTs, and rethinking sibling inheritances.
4 **Who pays the tax** First- vs. third-party; revocable SNTs as grantor trusts; the conversion at the parent's death.	5 **The new § 68 trap** Four ledgers, 2026 rates, the Joint Committee reading, and six worked examples.	6 **Planning and reporting** The Q4 tax huddle, carrying out gain properly, guardrails, and Form 1041.

Why now: trusts use the calendar year, so the first Forms 1041 under the new § 68 will generally be prepared in spring 2027. Q4 2026 decisions determine what they show.

2

PART 1

Medicaid: The Headline vs. Our Clients

The projected coverage losses fall mainly on adults in the ACA expansion group. Our clients face something slower: financing cuts that will squeeze optional HCBS.

3

MEDICAID | SCALE

The Medicaid chapter is fiscal by design

$887B
Federal deficit reduction, 2025–2034, from the Medicaid chapter (Title VII, Subtitle B, Ch. 1)

7.5M
More uninsured in 2034 from the Medicaid chapter; 10.0M across all health provisions

~14%
Reduction in federal Medicaid spending over a decade (KFF estimate)

- **Supporters:** program integrity, work expectations for able-bodied adults, ending state financing arrangements they regard as abusive.
- **Critics:** coverage cuts. Both descriptions are consistent with CBO's numbers.

The question for this audience: which people and which programs bear the reductions, and when?

Source: CBO Supplemental Cost Estimate (Oct. 2025), KFF

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MEDICAID | WHO BEARS THE COVERAGE LOSSES

Most projected coverage losses target ACA expansion adults

Provision	Principal population	Effective	CBO estimate, FY2025–2034
§ 71119 work requirement (80 hrs/month)	Expansion adults 19–64	Jan. 1, 2027 (extensions to Dec. 31, 2028)	$317.0B deficit reduction; 5.3M more uninsured
§ 71107 six-month redeterminations	Expansion adults	Jan. 1, 2027	$58.0B; 0.7M more uninsured
§ 71120 cost sharing up to $35/service	Expansion adults, 100–138% FPL	Oct. 1, 2028	$7.4B lower outlays
§ 71109 immigrant eligibility limits	Certain lawfully present noncitizens	Oct. 1, 2026	$6.2B lower outlays
§ 71115 provider-tax limits	States (phase-down in expansion states)	Oct. 1, 2026; to 3.5% by FY2032	$182.7B; 1.1M more uninsured
§ 71116 state-directed payments	States and providers	At enactment; step-down from Jan. 1, 2028	$149.4B lower outlays

The work requirement alone: more than one-third of the chapter's deficit reduction and about 70% of its projected increase in uninsured.

Source: CBO, Congressional Research Service

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MEDICAID | OUR CLIENTS

"Will my child lose Medicaid in 2027?" Usually, not directly.

Why our clients are outside the headline provisions

- Disabled-under-SSA clients generally qualify through non-MAGI aged, blind, or disabled pathways (often SSI-related), not the expansion group.
- The work requirement excludes people eligible through Medicaid's other mandatory pathways and people entitled to Medicare Part A or enrolled in Part B.
- Six-month redeterminations and new cost sharing are likewise limited to expansion adults.

Even inside the expansion group, the statute exempts

- The medically frail or those with special medical needs, including individuals blind or disabled under SSA § 1614
- Physical, intellectual, or developmental disability that significantly impairs one or more ADLs
- Disabling mental disorders; serious or complex medical conditions
- Parents, guardians, and caretaker relatives of a disabled individual

The child's eligibility pathway is not the one the work requirement targets, and an expansion-enrollee caregiver parent is exempt.

Source: CMS interim final rule fact sheet

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MEDICAID | DIRECT EFFECTS

Where the aged, blind, and disabled population is directly affected

Retroactive coverage (§ 71112)

Applications on or after Jan. 1, 2027: three months falls to two (non-expansion, incl. ABD) and to one month for expansion adults. The most immediate change: file LTC applications faster.

Home-equity cap (§ 71108)

From Jan. 1, 2028: $1,000,000, not indexed, for nursing-facility and HCBS eligibility. Twelve jurisdictions, including NJ, now use higher limits. Spouse and child exceptions remain; hardship waiver required.

Eligibility-rule moratoria (§§ 71101–71102)

Blocks the 2023 MSP streamlining rule and parts of the 2024 eligibility and enrollment rule through FY2034. CBO: about 800,000 fewer dual-eligible Medicaid enrollees in 2034 from the MSP moratorium alone.

The SSDI waiting-period gray zone

SSDI recipient in the 24-month Medicare wait, with income too high for SSI, may be an expansion adult. Exempt as disabled, but the exemption must be identified and documented. The risk is procedural.

Source: National Health Law Program, CBO

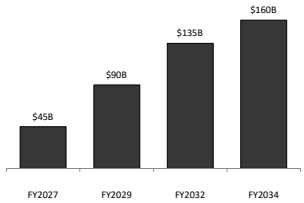
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MEDICAID | THE LONGER-TERM THREAT

The real threat is back-loaded: financing cuts that will squeeze optional HCBS

CBO annual Chapter 1 deficit reduction ($ billions)



§ 71115 provider taxes

- Freezes new provider taxes
- Expansion states: hold-harmless threshold falls 0.5 point a year, 6% to 3.5% by FY2032
- Nursing-facility and ICF/IID taxes excluded from the phase-down

§ 71116 state-directed payments

- New SDPs capped at 100% of Medicare (expansion) or 110% (non-expansion)
- Grandfathered payments step down 10 points a year from Jan. 1, 2028

Source: CBO, CMS state-directed-payment letter

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MEDICAID | HCBS

When states lose financing, they cut optional services first, and most HCBS is optional

607,000
people on HCBS waiver waiting or interest lists (41 states, 2025)

74%
of the waiting-list population has intellectual or developmental disabilities

32 mo.
average wait for services

> 2/3
of U.S. home- and community-based LTC is paid by Medicaid

Mandatory vs. optional

- **Mandatory:** nursing-facility care and home health
- **Optional:** personal care, habilitation, supported employment, respite, day services, most waiver services; states can cap waiver enrollment

The one HCBS expansion

- § 71121: a new 1915(c) waiver for people who do not meet an institutional level of care, from July 1, 2028
- KFF expects low take-up given federal spending cuts and the bar on lengthening existing waits

The forecast is a slower harm than the headlines suggest, but it will reach the people this audience serves.

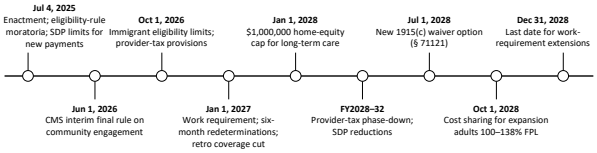
Source: KFF waiting lists 2016–2025, KFF home care, CMS CIB (Nov. 2025)

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MEDICAID | TIMELINE

Implementation runs through 2028; the financing pressure runs through 2034



Client-facing priorities: retroactive coverage (Jan. 2027) and the home-equity cap (Jan. 2028).

10

MEDICAID | PLANNING RESPONSE

If public HCBS gets scarcer, private resources and their efficient use matter more

SNT instruments

Give trustees clear authority to purchase care, supports, and services privately while a beneficiary waits for, or in place of, waiver services, and to coordinate with Medicaid rather than duplicate it.

ABLE accounts

Now permanently enhanced, and more valuable as flexible, disregarded resources.

Retirement plans

Often the largest single pool a family leaves a child with a disability. OBBBA left the lifetime-stretch rules untouched.

Making the most of that opportunity, and paying as little tax as possible along the way, is the rest of this talk.

11

PART 2

The Tax Side of OBBBA: What Changed for SNT Practice

Most of the tax title is outside our scope. Six provisions matter most.

12

TAX CHANGES

Six OBBBA tax provisions that matter to SNT practice

Permanent trust brackets (§ 1(j))

37% begins at $16,000 of trust taxable income vs. $640,600 for a single individual.

$15M exclusion, indexed (§ 2010(c)(3))

Few SNT families face estate tax, so the revocable third-party SNT is the natural default.

Rewritten § 68 (2/37 limitation)

Former § 68(e) trust exception gone; JCT staff says it reaches trusts, including distribution deductions.

ABLE made permanent

ABLE-to-work, 529-to-ABLE rollovers, Saver's Credit. SECURE 2.0: age of onset 26 to 46 from Jan. 1, 2026.

Senior deduction, 2025–2028

Extra $6,000 per person 65+, phased out above $75,000 MAGI ($150,000 joint).

Higher standard deduction

$16,100 single for 2026. A beneficiary's K-1 income may be largely or wholly sheltered.

Source: IRS Rev. Proc. 2025-32, IRS, ABLE Today

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TAX CHANGES | THE CORE INSIGHT

The planning opportunity lies in the gap between two rate schedules

$16,000

Trust or estate: taxable income at which the 37% bracket begins (2026)

$640,600

Single individual: taxable income at which the 37% bracket begins (2026). The 0% capital-gain rate runs to $49,450.

- **Income an SNT keeps is expensive.** The compressed schedule is now permanent.
- **Income properly carried out to a low-bracket beneficiary is cheap, and often free.** The beneficiary's schedule is permanently generous at low incomes.

Source: IRS Rev. Proc. 2025-32

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TAX CHANGES | ESTATE EXCLUSION

"Permanent" means no built-in sunset, not forever

What "permanent" really means

- OBBBA set the basic exclusion at $15 million per person for 2026, indexed thereafter.
- TCJA (2017) sunset to satisfy the Byrd Rule; OBBBA was scored against a "current policy" baseline, so no sunset was required.
- A future Congress could still change it, for example to about $7 million (the old $5 million in 2026 dollars).

Practice implications

- For most SNT families, federal estate tax is not the binding constraint, so the revocable SNT is the preferred default.
- If irrevocable for non-tax reasons, consider provisions that cause inclusion (§§ 2036/2038, limited general powers) to obtain a § 1014 basis adjustment.
- Balance state estate or inheritance tax, estate recovery and creditor exposure, and the parent's own Medicaid plan.

Source: Tax Policy Center OBBBA assessment

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PART 3

What Did Not Change: The Lifetime Stretch

SECURE Act rules still let a disabled or chronically ill beneficiary, including through an accumulation SNT, receive inherited retirement benefits over a lifetime.

16

LIFETIME STRETCH | ELIGIBLE DESIGNATED BENEFICIARIES

The EDB exception survives, but documentation deadlines bite

Who qualifies

- **Disabled:** unable to engage in substantial gainful activity because of a medically determinable impairment of long-continued and indefinite duration (special functional test under age 18).
- **Chronically ill:** certified by a licensed health care practitioner under the § 7702B(c)(2) standard.
- OBBBA did not change these rules.

Documentation (2024 final regulations)

- **Qualified employer plan:** condition evidence to the plan administrator by Oct. 31 of the year after the participant's death (or Oct. 31, 2025, if later); separate trust-documentation rules apply.
- **IRAs, and generally § 403(b):** no federal requirement to deliver to the custodian, but plan or provider documents may require it.
- **SSA determination:** a disability safe harbor, but it does not excuse a plan's timely-submission rule.
- **Miss it:** the applicable ten-year regime may apply instead.

The safe course: assemble the documentation promptly, whatever the account type.

Source: IRB 2024-33 (final RMD regulations)

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LIFETIME STRETCH | AMBT DESIGN

The accumulation AMBT, not a conduit trust, is the benefits-protective design

Never outright: an inherited IRA in the beneficiary's name is a countable resource, and its distributions are unearned income for SSI.

- **AMBT, § 401(a)(9)(H)(iv)–(v):** a see-through trust under which no individual other than the disabled or chronically ill beneficiary has any right to the benefits during that beneficiary's life.
- **Payout period:** that beneficiary's life expectancy, even though others take the remainder. SECURE 2.0: a qualified charity may be a remainder beneficiary.

Conduit trust

- Must pass every retirement distribution through to the beneficiary.
- For an SSI or Medicaid recipient, that converts a protected asset into countable income every year.

Accumulation AMBT

- Trustee may retain distributions and spend them for supplemental needs: the benefits-protective result.
- The cost: every retained distribution is ordinary income at compressed trust rates.

A properly drafted third-party accumulation SNT is the paradigm AMBT.

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LIFETIME STRETCH | ADMINISTERING THE AMBT

Retained IRA dollars are expensive; dollars used for the beneficiary are not

$8,994

Approximate 2026 federal tax if an accumulation SNT retains a $30,000 inherited-IRA distribution

Used for the beneficiary instead: carried out through DNI, often sheltered by the beneficiary's $16,100 standard deduction.

- **Character:** income in respect of a decedent, ordinary income to the trust.
- **NIIT:** excluded from net investment income, so no 3.8%, but fully exposed to compressed ordinary brackets.
- **Use it for the beneficiary:** paying providers, funding an ABLE account, buying equipment or services carries the income out through the distribution deduction.
- **§ 68:** retirement distributions add to the § 68 base just as capital gains do.
- **Q4 discipline:** project the RMD and any discretionary withdrawals, decide in advance how much will be used for the beneficiary, and avoid bunching withdrawals in one year.

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LIFETIME STRETCH | SIBLINGS

Rethink "equal" inheritances among siblings with very different payout rules

Parents die in 2026 leaving a $1M traditional IRA and a $1M brokerage account. Sam, 35, is disabled and on SSI and Medicaid. Kate, 38, is in the 32% bracket.

	Option A: each asset split 50/50	Option B: IRA to Sam's AMBT; brokerage to Kate
Kate receives	$500,000 brokerage + $500,000 IRA (10-year rule)	$1,000,000 brokerage (stepped-up basis)
Embedded tax on Kate's share	About $160,000, payable within 10 years (32%)	None
Sam's AMBT receives	$500,000 brokerage + $500,000 IRA	$1,000,000 IRA
Sam's first-year RMD (factor 50.5)	About $9,900	About $19,800
Tax if used for Sam's benefit	Largely sheltered by his standard deduction	Largely sheltered by his standard deduction

Yet-untaxed retirement savings belong in the disabled child's trust; stepped-up assets belong with the siblings. Beneficiary designations, not the will, control the result.

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LIFETIME STRETCH | PARENT-LEVEL PLANNING AND DRAFTING

Roth conversions and a drafting checklist for retirement benefits payable to an SNT

Parent-level: Roth conversions

- Parents pay tax at individual rates, usually below trust rates on retained income.
- The AMBT inherits a Roth, stretched over the child's life expectancy; qualified distributions are tax-free, with no compressed-bracket or § 68 exposure.
- Senior deduction (2025–2028) can make conversion years attractive at 65+, but conversion income raises MAGI, IRMAA, and Social Security taxation. Model each one.

Drafting and administration checklist

- Draft as an accumulation trust that qualifies as an AMBT.
- Name the SNT (or its separate share) directly on the designation; avoid routing benefits through probate.
- Qualified employer plans: deliver trust documentation and condition evidence by Oct. 31 of the year after death.
- Authorize third-party payments and ABLE contributions that carry out DNI without creating countable income.
- Coordinate every child's designations, including after-tax equalization if wanted.
- Put retirement distributions on the Q4 tax huddle agenda every year.

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PART 4

Who Pays the Tax?

First party or third party tells us the public-benefits rules. Whose money, and whether that person is still alive, tells us who pays the income tax.

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WHO PAYS | TWO QUESTIONS

Two questions come before "SNT taxation"

Public-benefits label

Follows the source of funds and the statutory exception relied on: first-party (d)(4)(A), pooled (d)(4)(C), or third-party.

Income-tax status

Follows the grantor-trust rules of §§ 671–679: who is treated as owner? The owner's portion is reported on the owner's own return.

"First party or third party tells us the public-benefits rules; whose money, and whether that person is still alive, tells us who pays the income tax."

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WHO PAYS | THE ORGANIZING MATRIX

The organizing matrix for the rest of the talk

SNT type and stage	Typical status	Who reports	Trust-level compressed rates, NIIT, § 68?	Key point
First-party (d)(4)(A) or pooled (d)(4)(C) subaccount, beneficiary living	Grantor (beneficiary is grantor)	Beneficiary, Form 1040	Generally no	The trust holds the beneficiary's own money; no separate income-tax taxpayer
Third-party SNT during the settlor's life	Grantor: revocable under § 676; irrevocable only if a §§ 673–677 power applies	Settlor, Form 1040	Generally no	Revocable: still the parent's money for tax. Irrevocable grantor: parent's tax payment is a non-gift benefit
Third-party SNT after the settlor's death	Nongrantor (usually complex)	Trust on Form 1041; beneficiary on K-1 to extent of DNI	Yes	Same trust, same trustee, same portfolio: different taxpayer
Testamentary third-party SNT	Nongrantor from inception	Trust and, through DNI, the beneficiary	Yes, from day one	No lifetime grantor phase; the tax protocol must exist from year one

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WHO PAYS | FIRST-PARTY SNTS

First-party SNTs are grantor trusts by definition

Why the beneficiary is the grantor

- Grantor = the person who makes a gratuitous transfer (Treas. Reg.), not the person who signs.
- The funds are the beneficiary's: PI recovery, redirected inheritance, savings, retroactive benefits.
- § 677(a): income may go to or for the beneficiary without adverse-party consent, so the beneficiary is the owner.
- Pooled (d)(4)(C) subaccounts are commonly reported the same way; confirm the pooled trust's practice.
- Report via Form 1041 grantor statement or a Treas. Reg. § 1.671-4 optional method.

Practical consequences

- **Individual rates:** 0% on capital gain and qualified dividends up to $49,450 of taxable income.
- **Trust-paid care costs** may support a medical deduction on the beneficiary's return (7.5%-of-AGI floor).
- **NIIT** only above $200,000 / $250,000: irrelevant for nearly every beneficiary.
- **§ 68** practically irrelevant: individual 37% starts at $640,600.
- **Taxable income is not SSI income:** separate ledgers; food no longer counts as ISM since Sept. 30, 2024.

Do not draft first-party SNTs for nongrantor status. Accept grantor status and plan around it.

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WHO PAYS | THIRD-PARTY SNTS DURING LIFE

The default third-party SNT is revocable, and § 676 alone makes it a grantor trust

The typical case

- A standalone revocable SNT or an SNT share of the parent's revocable trust, named on life insurance, retirement accounts, and pour-over assets; funded mostly at death.
- § 676: the grantor owns any portion the grantor can revest. No substitution power or special grantor power is needed.
- Parent's income, parent's Form 1040, parent's rates. Converts to nongrantor at death.
- The assets remain the parent's resources for the parent's own Medicaid eligibility.

Why the literature obscures it

- First-party SNTs are taught first, and a (d)(4)(A) trust must be irrevocable.
- Third-party discussions then dwell on irrevocable structures and grantor "powers."
- Readers infer, wrongly, that a third-party SNT is ordinarily an irrevocable nongrantor trust. For most families it is not.

The lifetime phase is largely tax-neutral. The planning significance comes at death: § 2038 inclusion, § 1014 basis, and a new compressed-bracket taxpayer.

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WHO PAYS | IRREVOCABLE LIFETIME SNTS

Irrevocable lifetime SNTs: grantor status and estate inclusion are separate questions

- Used chiefly for taxable estates, completed gifts for other reasons, or insurance trusts.
- Grantor only if a §§ 673–677 trigger applies, deliberately or by accident: § 675(4)(C) swap power; § 674 powers outside the independent-trustee exceptions; § 677(a)(3) premiums; § 677(a) spouse benefit with § 672(e) attribution.
- A discretionary supplemental-needs standard is rarely "reasonably definite," so § 674(c)/(d) may fail with family trustees.
- **First step:** read the instrument. Was grantor status intended, achieved, or triggered by accident?

	Excluded from estate (no § 1014 step-up)	**Included in estate (§ 1014 step-up)**
Grantor during parent's life	Irrevocable SNT with § 675(4)(C) swap power or § 677(a)(3) premium power; parent pays tax; Rev. Rul. 2023-2 applies	Revocable SNT (§§ 676, 2038): the typical case; also a parent-trustee with discretionary distribution powers (§ 674(a); §§ 2036(a)(2), 2038)
Nongrantor during parent's life	Independent trustee, no retained powers or interests; files its own Form 1041 during the parent's life	Uncommon: an estate-tax power held so as not to trigger §§ 673–677 (e.g., exercisable only with an adverse party)

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WHO PAYS | TAX BURN AND BASIS

The grantor's tax burn helps the SNT; basis follows inclusion

Irrevocable grantor SNT: the "tax burn"

- The parent reports the trust's income at individual rates; paying that tax is not a taxable gift.
- Every dollar of tax the parent pays is a dollar that stays in the SNT for the child.
- Rev. Rul. 2004-64: an independent trustee's discretionary reimbursement power does not by itself cause inclusion. Use it thoughtfully in an SNT.

Basis at the parent's death

- **Revocable SNT:** § 2038 inclusion, § 1014 step-up; early gains reflect only post-death appreciation.
- **Completed-gift, estate-excluded trust:** no step-up (Rev. Rul. 2023-2). Carryover basis means the first sale of a long-held position may realize a large gain at compressed rates.
- **Even with a step-up,** a concentrated or appreciating post-death portfolio builds gain.

Basis is why recognition-event discipline (Part 6) matters from the first post-death year.

Source: KPMG on Rev. Rul. 2023-2

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WHO PAYS | THE CONVERSION

The parent dies: same SNT, new taxpayer

"When you're dead, it's a bit hard to revoke your trust."

	While the parent is alive (grantor phase)	After the parent dies (nongrantor phase)
Benefits character	Third-party SNT for Medicaid and SSI	Still a third-party SNT for Medicaid and SSI
Who is taxed	Parent, on Form 1040 at individual rates	Trust, on Form 1041; 37% begins at $16,000; beneficiary taxed only on DNI carried out
NIIT	Only above the parent's $200,000 / $250,000	On undistributed NII once AGI exceeds $16,000
§ 68	Only if the parent is in the 37% bracket	May reduce trust deductions, including distribution deductions
Who bears the tax	Parent's own funds; trust not depleted	Trust assets, unless carried out on a K-1
Basis	Revocable: § 1014 step-up at death. Completed-gift: none	Revocable: fresh basis. Irrevocable: low basis, so early sales realize large gains

Now a nongrantor complex trust: own EIN, calendar year (subject to a § 645 election), annual Form 1041, K-1s to the extent of DNI. A testamentary SNT is in this posture from day one.

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WHO PAYS | QUALIFIED DISABILITY TRUST

Do not miss the qualified disability trust exemption

$5,300

QDisT exemption for 2026 under § 642(b)(2)(C), not subject to phaseout, versus $100 for a complex trust

Worth about $1,000–$1,900 of federal tax in a year the trust retains income at 20%–37%

- **Requirements:** described in 42 U.S.C. § 1396p(c)(2)(B)(iv); established solely for a disabled individual under 65; all beneficiaries determined disabled by SSA for some portion of the year.
- **A remainder** to a non-disabled person after the disabled beneficiary's interest ends does not disqualify the trust.
- **Many third-party SNTs qualify,** yet preparers who do not know the beneficiary's disability status routinely miss it.
- **Wrinkle:** under the JCT reading of § 68, the § 642(b) exemption is itself an itemized deduction subject to the 2/37 reduction.

Source: IRS Form 1041-ES (2026)

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PART 5

The New § 68 Trap

Not necessarily a big number, but an administrative pain, and it turns on precisely the recognition events that already cause the larger problem.

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§ 68 | FOUR LEDGERS

"Which income do you mean?" Keep four ledgers distinct

1. Fiduciary accounting income

What the instrument and principal-and-income law treat as income. Realized gains ordinarily go to principal (subject to a power to adjust or unitrust).

2. Distributable net income

Caps the distribution deduction and beneficiary inclusion; preserves character. Gains generally excluded unless a § 1.643(a)-3(b) pathway applies.

3. Taxable income

The base for the rate schedule and the new § 68 computation. Can include retained gain never in FAI or DNI.

4. Net investment income

The § 1411 base: lesser of undistributed NII or AGI over $16,000. IRA and plan distributions are excluded.

The running example: $20,000 of interest and dividends, $6,000 of fees, and a $40,000 long-term gain on an inherited stock position. Distribute the $14,000 of net income and the trust has distributed its "income" in every non-tax sense. Yet the $40,000 gain, allocated to principal and excluded from DNI, remains taxable to the trust, well past every compressed threshold.

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§ 68 | 2026 RATE ENVIRONMENT

Exposure is driven by annual recognition events, not by the size of the corpus

Trust taxable income (2026)	Ordinary	Net cap. gain / QD
$0 – $3,300	10%	0%
$3,300 – $11,700	24%	15%
$11,700 – $16,000	35%	15%
$16,000 – $16,250	37%	15%
Over $16,250	37%	20%

23.8% Retained net long-term capital gain (20% + 3.8% NIIT)

40.8% Retained ordinary investment income (37% + 3.8%)

37% Retained IRA or plan distributions (no NIIT), plus state tax

A $750,000 SNT with one $40,000 realized gain: about $9,520 of federal tax on the gain alone (before lower brackets), often triggered by an investment adviser without a tax projection.

Source: IRS Rev. Proc. 2025-32, IRS Form 1041-ES.

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§ 68 | THE STATUTE

New § 68: a 2/37 deduction haircut, with no trust exception

Reduction = 2/37 × the lesser of
(1) itemized deductions, or
(2) taxable income (before § 68) + itemized deductions – the 37%-bracket threshold ($16,000 for a 2026 trust)

- **Before 2018:** the Pease limitation; former § 68(e) said it did not apply to any estate or trust.
- **2018–2025:** Pease suspended by TCJA.
- **OBBBA § 70111:** rewrote § 68 for tax years beginning after Dec. 31, 2025. § 68(a) reads "in the case of an individual." § 68(b): applied after other limitations. The trust exception was not carried forward.
- **Policy aim:** cap each itemized-deduction dollar at 35 cents for 37%-bracket individuals.

For trusts, whose 37% bracket begins at $16,000, the question is whether, and how far, the rule applies at all.

Source: 26 U.S.C. § 68 (Cornell LII)

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§ 68 | COMPETING READINGS

Joint Committee footnote 102 and its critics

JCT Blue Book (JCS-1-26), footnote 102

- § 641(b): trust taxable income computed as for an individual.
- § 63(d): itemized = all deductions other than above-the-line and § 63(b).
- So trust itemized deductions include, "without limitation," the § 642(b) exemption and §§ 651/661 distribution deductions.
- Treas. Reg. § 1.67-4(a)(1)(ii) dismissed as limited to § 67.

The counterarguments

- § 68(a) applies "in the case of an individual"; § 641(b) yields "except as otherwise provided in this part."
- The distribution deduction allocates income; limiting it double-taxes the same income.
- A Treasury regulation treats these deductions as non-itemized.
- ACTEC asked Treasury to exclude §§ 651/661 and trust-unique administration expenses, and notes 2/37 applies even to 20%-rate income.

A Blue Book is not statute, regulation, or binding guidance. No Treasury guidance yet; final 2026 Form 1041 instructions not released as of writing. Choose a position, document it, and consider disclosure.

Source: JCT JCS-1-26, ACTEC recommendations, National Law Review, IRS draft forms

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§ 68 | MECHANICS

How the computation works under the JCT reading

1. Identify the trust's "itemized deductions." At least the § 642(b) exemption (including QDisT) and the §§ 651/661 distribution deduction. § 67(e) administration expenses, § 642(c), and § 691(c): unresolved.

2. Compute prong (2): taxable income without § 68, plus those itemized deductions, minus $16,000.

3. Multiply the lesser of prong (1) and prong (2) by 2/37.

4. Reduce the deduction pool. Trust taxable income rises; character and NIIT effect are unspecified; the beneficiary's §§ 652/662 inclusion is unchanged.

The double tax, illustrated

- Trust distributes all $386,000 of DNI to a surviving spouse
- Prong (2): $386,000 − $16,000 = $370,000
- Reduction: $370,000 × 2/37 = $20,000
- Trust deducts $366,000; spouse still reports $386,000
- Trust pays about $7,400 at 37% on income it already distributed

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§ 68 | SIZING IT HONESTLY

The "two percent toll," and why capital gains switch it on

≈ 2%

Maximum cost: 2/37 × 37% of the itemized-deduction pool, which under JCT includes the § 642(b) exemption and the distribution deduction

Calibrate the message

- Modest SNT: usually hundreds of dollars, not thousands.
- The large dollars remain compressed brackets and NIIT on retained income and gains.
- But it is a true double tax, complicates Form 1041 and fiduciary accounting, and scales with distributions.

Why gains aggravate it

- Routine year: prong (2) may never exceed $16,000, so no reduction.
- Gain year: retained gain inflates prong (2), so the full 2/37 hits the entire distribution deduction.
- § 68(a) does not exclude income taxed at § 1(h) rates.

Source: ACTEC recommendations

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§ 68 | OPEN QUESTIONS

Open questions for 2026 Forms 1041

Guidance

Will Treasury adopt, reject, or modify the Blue Book position? Will Congress pass a technical correction?

The pool

Which deductions are "itemized" for a trust: § 67(e) administration expenses, § 642(c), § 691(c)?

Character

Is the phantom income ordinary, or pro rata across the classes distributed? It affects the rate.

NIIT

Does the reduction affect NIIT, which uses AGI and undistributed NII rather than taxable income?

Income or principal

Which account bears the tax on phantom income under the instrument and state law? A fiduciary question.

State conformity

States starting from federal taxable income may import the reduction; others may not.

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WORKED EXAMPLES | SETUP

Worked examples: one trust, one beneficiary, six outcomes

Daniel's third-party SNT (base facts)

- Daniel, 34, receives SSI and Medicaid; parents deceased
- Nongrantor complex trust; $900,000 diversified portfolio
- $8,000 taxable interest and nonqualified dividends; $12,000 qualified dividends
- $6,000 trustee and administration fees (§ 67(e)), allocated against ordinary income
- $100 exemption; $14,000 paid each year to vendors for supplemental needs

Settled	OBBBA rewrote § 68 for 2026; trusts reach 37% at $16,000.
JCT position	§ 68 applies to trusts and reaches the §§ 642(b), 651, and 661 deductions.
Unsettled	Whether that governs returns; what else enters the pool; character, NIIT, and DNI mechanics of the reduction.

Federal only, rounded, 2026. The § 68 reduction is modeled as ordinary taxable income not changing § 67(e) AGI or undistributed NII. See Appendix B.

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WORKED EXAMPLES | EXAMPLES 1 AND 2

One routine investment decision takes the trust from $0 to about $7,800

Example 1: the routine year

- DNI $14,000; the $14,000 distribution carries out all of it.
- Taxable income before § 68 is negative; prong (2) is negative, so no reduction.
- No trust income tax or NIIT.
- Daniel's K-1: $2,000 ordinary + $12,000 qualified dividends, under his $16,100 standard deduction: $0 tax.

Example 2: adviser realizes a $40,000 long-term gain (principal; excluded from DNI)

Example 2 (federal, 2026)	Without § 68	With § 68 (JCT)
Trust taxable income	$39,900	$40,662
Regular income tax	$6,673	$6,891
NIIT	$908	$908
Total trust-level tax	**$7,581**	**$7,799**
Daniel's K-1 inclusion	$14,000	$14,000

Reduction: $14,100 × 2/37 = $762. § 68 adds about $220. With admin expenses in the pool: about $7,897. With a QDisT: about $6,552.

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WORKED EXAMPLES | EXAMPLES 3 AND 4

Harvested losses and carried-out gain matter more than § 68

Example 3: harvest a $15,000 loss

- Sold for independent investment reasons; no wash sale.
- Net long-term gain falls to $25,000.
- Trust tax falls to about $4,229, a savings of about $3,570.
- The § 68 reduction is unchanged at $762: prong (2) still exceeds prong (1).

Example 4: carry the gain out, properly

- Trust buys a $40,000 wheelchair-accessible vehicle titled to Daniel; instrument authorizes principal distributions; trustee decides contemporaneously and records it.
- § 1.643(a)-3(b): gain is in DNI because actually distributed. DNI = $54,000.
- § 68 reduction $2,054; trust tax about $195 at 10% (assumption-dependent).
- Daniel: $37,900 taxable, all qualified dividends and gain in the 0% bracket: $0.

The tax result follows the administration; it cannot be created by a year-end reporting entry. Trustee practice point: confirm SSI treatment before distributing (a vehicle is in-kind, not shelter).

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WORKED EXAMPLES | SUMMARY

Same trust, same beneficiary: $0, $195, or about $7,800, decided by December 31

Scenario (federal, 2026)	§ 68 reduction	Trust tax, no § 68	Trust tax, with § 68	Beneficiary K-1
1. Routine year	$0	$0	$0	$14,000
2. $40,000 gain retained	$762	$7,581	$7,799	$14,000
3. Gain reduced by $15,000 loss	$762	$4,011	$4,229	$14,000
4. Gain carried out via DNI	$2,054	$0	$195	$54,000
5. $3M trust: $90K income, no gain, $70K distributed	$2,919	$0	$282	$70,000
6. $3M trust: $250K income incl. $100K gain, $60K paid	$3,249	$39,646	$40,848	$60,000

Example 5: the pure double tax

Distributes all DNI, yet owes about $282 on income the beneficiary also reports in full.

Example 6: the top-rate toll

Different facts from Example 5. Of the $40,848, § 68 is only about $1,202; the rest is compressed rates and NIIT.

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PART 6

Year-End Planning: Your Judgment, Before the CPA

Planning decisions for the SNT lawyer, trustee, or trust officer to make before December 31, then carry out with the return preparer, within the trust's authority and without compromising benefits.

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PLANNING | THE Q4 HUDDLE

Every nongrantor SNT needs a tax review by early November

1. Year-to-date and projected interest, dividends (ordinary and qualified), and short- and long-term gains
2. Unrealized gains and losses, with harvesting candidates
3. Projected mutual-fund capital-gain distributions and record dates
4. Proposed sales, rebalancing, diversification, real-property dispositions, in-kind distributions
5. Capital-loss carryforwards
6. Planned beneficiary distributions and the resulting DNI, by character
7. Projected taxable income, NIIT, and § 68 under both readings
8. QDisT status and the January 15, 2027 estimated-tax installment
9. Benefits consequences of each proposed distribution (SSI, Medicaid, housing, ABLE)

The meeting language

"Before we approve the distribution plan and the proposed year-end trades, we need a trust-level tax projection: realized and unrealized gains and losses, loss carryforwards, projected fund distributions, DNI, retained taxable income, NIIT, and the § 68 effect. If there are sensible losses to harvest, or gains we can defer or stage, we need to know that before December 31."

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PLANNING | RECOGNITION AND ALLOCATION

Control when gains are recognized, and make gain distributable properly

Control when gains are recognized

- **Harvest losses deliberately:** net losses offset only $3,000 of ordinary income; avoid § 1091 wash sales; January is too late.
- **Stage or defer:** spread diversification over tax years; installment sales for real property.
- **Watch fund distributions:** taxable even if reinvested; don't buy before the record date.
- **Plan post-death transitions:** the step-up often makes the months after death the cheapest time to diversify.

Treas. Reg. § 1.643(a)-3(b) pathways

- Gain (1) allocated to income; (2) allocated to corpus but treated consistently as part of a distribution; or (3) allocated to corpus but actually distributed or used to determine the amount distributed.
- Authority: the instrument and local law, or a reasonable and impartial exercise of discretion (power to adjust, unitrust).
- "Consistently" carries weight: decide before or with the distribution; record the rationale; match books, accounting, Form 1041, and K-1.
- New trusts: draft an express gain-allocation power.

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PLANNING | CHARACTER AND TIMING

Distribute by character, then use the timing and election tools

Distribute by character, not by cash

- Ask which character of income the distribution carried out, what stayed in the trust, and the effect on taxable income, NIIT, and § 68.
- Third-party payments (therapies, equipment, travel, a vehicle titled to the beneficiary) carry out DNI under §§ 661/662 with no cash to the beneficiary.
- ABLE contributions (up to $19,000 for 2026; onset before 46) carry out DNI into a disregarded account.
- Allocate deductions against the highest-rate income where permitted.

Timing and election tools

- **65-day rule, § 663(b):** distributions through March 6, 2027 can count for 2026; it cannot retroactively create gain-in-DNI authority.
- **In-kind, § 643(e):** DNI = lesser of basis or FMV unless the (e)(3) election recognizes gain (absorbs carryforwards; FMV basis to beneficiary).
- **Estimates, § 643(g):** allocate trust payments to a beneficiary when DNI is carried out later.
- **Termination, § 642(h):** unused carryovers pass to the beneficiaries.

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PLANNING | GUARDRAILS

Cute is not clever if it hurts the beneficiary

Guardrails

- Do not distribute just to chase a tax result; the distribution must serve an independently valid SNT purpose.
- Do not change capital-gain treatment for one favorable year without authority and a commitment to consistency.
- Weigh fiduciary duty, valuation, capacity, and SSI, Medicaid, and housing effects before any distribution.
- The beneficiary's low bracket is not decisive; consider the whole tax, benefits, and care-plan picture.
- Document the decision and involve the preparer before the transaction is irrevocable.

Structural options

- **Persistent high-income trusts:** revisit investment policy, distribution standard, gain-allocation provisions, situs and state tax, and modification or decanting where available.
- **Typical revocable SNT:** draft the post-death tax architecture now: gain-allocation authority, tax-aware distribution standards, ABLE and third-party payment powers.
- **Irrevocable lifetime SNT:** choose grantor or nongrantor status, and any toggle, deliberately.

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REPORTING

Report the administration that actually occurred

2026 Form 1041 for a nongrantor SNT

- Schedule B: income distribution deduction, limited to DNI
- Schedule D: gains, with any gain in DNI supported by the trustee's contemporaneous record
- § 642(b) exemption, including the $5,300 QDisT exemption
- Form 8960: NIIT
- K-1 by character: interest (box 1), ordinary dividends (2a), qualified dividends (2b), net short- and long-term gain (3, 4a) when carried out

The § 68 position

- Compute under the JCT reading and the contrary reading (Treas. Reg. § 1.67-4(a)(1)(ii) and the text of § 68(a)).
- Choose and document a position; consider disclosure.
- Tell the trustee, who must decide whether the tax is charged to income or principal.
- If final instructions or guidance specify a method, follow it.
- Tell the beneficiary's preparer: phantom income at the trust level does not change the K-1.

Source: IRS draft tax forms

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REPORTING | RESPONSIBILITY

Who owns the problem? Someone must call the huddle.

Participant	Must flag or decide
Investment adviser	Projected gains and losses, fund distributions, proposed sales, harvesting candidates, post-death basis inventory
Trustee or trust officer	Authorized distribution strategy, fiduciary justification, accounting treatment, contemporaneous records, the huddle calendar
SNT attorney	Grantor or nongrantor status, instrument authority, principal-and-income law, gain/DNI architecture, QDisT, benefits and fiduciary consequences, drafting and modification
Return preparer	Form 1041 projection, DNI and character carryout, § 68 computation and position, NIIT, estimated tax, federal and state reporting
Care manager / benefits planner	Whether the distribution meets a real need, and its effect on SSI, Medicaid, housing, and ABLE

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CONCLUSION

The Medicaid label on a third-party SNT does not change when Mom or Dad dies. The taxpayer does.

One habit: for every nongrantor SNT, call the tax huddle before December 31.

- Review gains, losses, and retirement distributions
- Harvest losses where sensible; stage what can be staged
- Decide deliberately whether gain is carried out under a proper § 1.643(a)-3 pathway
- Distribute by character, for real beneficiary needs
- Confirm QDisT status, and document everything

So that the 2026 Form 1041 reports a result that was planned rather than discovered.

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Questions

The written materials go much further: full citations, the Medicaid implementation timeline, the irrevocable-trust matrices, Appendix A (Q4 SNT tax huddle checklist), and Appendix B (worked-example assumptions).

Robert F. Brogan, Esq., C.E.L.A., LL.M. (Taxation)
President, Brogan Law Group
President, Special Needs Alliance (2025–2026 Term)

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APPENDIX A

Fourth-quarter SNT tax huddle checklist



1. Confirm income-tax status: revocable or irrevocable; grantor (whose?) or nongrantor; date of any conversion; any § 645 election.
2. Confirm QDisT eligibility and the beneficiary's SSA disability determination.
3. Obtain year-to-date realized income and gains by character, and projected year-end fund distributions.
4. Obtain the unrealized gain/loss report and capital-loss carryforwards.
5. Identify proposed trades, sales, and in-kind distributions before year-end.
6. Identify the instrument's capital-gain allocation provisions and state principal-and-income law.
7. Decide, and document, whether any gain will be treated as part of distributions under Treas. Reg. § 1.643(a)-3(b).
8. Plan distributions for real beneficiary needs; model DNI carryout by character.
9. Run the § 68 computation under both readings; estimate NIIT and state tax.
10. Confirm benefits consequences (SSI, Medicaid, housing, ABLE) for each proposed distribution.
11. Calendar the January 15 estimated payment and the 65-day election deadline (March 6, 2027 for 2026).
12. Memorialize decisions in trustee minutes; send the file to the return preparer.

STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

Thursday
October 22, 2026

The Bot, the Trust, and the Benefit Threat: Responding to AI-Driven SSA Scrutiny

STETSON LAW

Center for Elder Justice

Access and Justice For All®

THE BOT, THE TRUST, AND THE BENEFIT THREAT

Responding to AI-Driven SSA Scrutiny

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2026 National Conference on Special Needs Planning and Special Needs Trusts

The case study is anonymized. The pooled trust, sponsoring organization, beneficiaries, agency personnel, and nonessential identifying details are not named.

Why this paper sounds different. Victoria is telling the story of the review she handled. Bridget is asking the trustee-side questions that follow from it: Does the requested change make legal sense? Does it match state fiduciary law? Can the trustee actually administer it? We have kept both voices because the tension between advocacy and administration is the substance of the session.

I. The Email That Started It

In early 2026, Victoria received an email from SSA concerning a long-standing pooled special needs trust. An email—not a formal letter—was unusual enough. The message was not tied to the ordinary review of a trust submitted in conjunction with an eligibility application or redetermination. SSA had pulled the master trust for review and concluded that it did not comply with pooled-trust policy. The review came from a regional office far from the trust's home state.

What followed was more surprising. The message was organized in long bullet points, packed with citations to the trust and to POMS, and difficult to follow. Sentences addressing different provisions were placed together as though the combination proved the conclusion. Several of the conclusions clearly did not take into consideration how a pooled trust is actually administered, particularly, under state fiduciary requirements.

Victoria had recently begun using ChatGPT and Claude. She would never describe herself as technologically savvy—quite the opposite. However, the email had the look of an AI answer that had found many relevant words and citations but had not understood the relationships among them. The reaction was, "[t]his reads differently from any government trust review letter I have seen. Is SSA using AI in trust reviews and if so, what consequences does that have on all special needs trusts? What can we do about it? How do we approach this?"

To be clear, we have no direct proof that AI generated the review. We do not have the prompt, the workflow, the model name, the system log, or an agency statement identifying trust review as an AI use case. Victoria searched the publicly available information and found that SSA reports AI use within the agency, but she did not find any reported formal AI use in trust reviews at the SSA. Therefore, the agency's use of AI is at this time, more of a

“what if” and “if so, where does that put all of us who handle special needs trust matters? How do we approach a review (and determination of non-compliance) that is so seemingly disconnected from the whole picture?”

For purposes of legal strategy, that is enough. A practitioner does not need to prove the internal toolchain to challenge reasoning that is unsupported, factually mistaken, or inconsistent with statute, POMS, state law, or prior agency treatment. Whatever assistance a reviewer may have used, a human official adopted and communicated the position. To what extent does the agency have to defend it as law?

II. Why Trusts Are Easy to Misread in Isolation of the Whole Picture

A special needs trust is not a bag of keywords. The reviewer must distinguish ownership from custody, control from delegated performance, discretion from availability, separate accounting from pooled investment, and a master-trust expense from an expense attributable to one beneficiary. The same word can do different work in different provisions. “Trustee,” “manager,” “advisor,” “agent,” “vendor,” “account,” and “distribution” all require context.

That context includes state law. Trust instruments do not restate every fiduciary duty imposed by statute and common law. A trustee’s power to hire an investment advisor does not eliminate the trustee’s duty to select, instruct, monitor, and, when necessary, remove the advisor. A professional who performs a specialized function does not become the manager of the entire trust merely because a clause uses a broad verb. A reviewer who reads one paragraph without the definitions, the governing law, an understanding of how the document is utilized in practice, and the operating agreements can easily reach the wrong conclusion.

Additionally, it is well known that AI is inherently biased.[1] AI is also eager to flatter and please its user. In a study in a science journal, 11 leading AI systems were tested and they were all found to show varying degrees of sycophancy.[2] The AI systems are overly agreeable and affirming, a danger cited in all disciplines, including medicine, where a sycophantic AI could lead doctors to confirm their first hunch about a diagnosis rather than encourage them to explore further.[3] If, in furtherance of, for example, a budget cut, the agency strives to render people ineligible for benefits, an AI prompt of "find any which way this trust document is not in compliance with the POMS" may create a never-ending cycle of noncompliance based on unfounded interpretations of language and bias towards a drafting preference.

This is why the AI question is relevant even when it cannot be proven. If the goal is centered around reducing the number of Supplemental Security Income beneficiaries to accommodate a sliced budget, the use of AI is merely a tool to accomplish that goal. Additionally, the use of AI may be a consequence of a budget reduction in the first place, where a lack of experienced employees may mean that use of AI is needed to generate work product. The human reviewer may or may not be experienced and may or may not have time to carefully review its work product. In practice, then, automated policy matching tends to reward surface similarity. A citation appears near a familiar phrase, and the phrase is treated as dispositive. But hurried human review can do the same thing. The

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[1] "Bias is Implicit in all AI, Even Legal AI", Los Angeles & San Francisco Daily Journal August 12, 2026 (https://www.courthousenews.com/defense-attorneys-urged-to-cautiously-adopt-ai-to-match-prosecution/).

[2] "Sycophantic AI Decreases Prosocial Intentions and Promotes Dependence," Science, Vol. 391, Issue 6792 (Mar. 26, 2026) (https://www.science.org/doi/10.1126/science.aec8352).

[3] "AI is Giving Bad Advice to Flatter its Users," The Associated Press, March 26, 2026 (https://www.ap.org/news-highlights/spotlights/2026/ai-is-giving-bad-advice-to-flatter-its-users-says-new-study-on-dangers-of-overly-agreeable-chatbots/).

agency's unspoken goals and the mechanisms in place to carry out those goals are unknown to us. Therefore, we must operate in a manner that requires careful review of the agency's analysis and careful decision making on how to proceed with a remedy.

III. The Governing Law—Without the Abstractions

A. The pooled trust statute

Section 1917(d)(4)(C) creates an exception from the usual Medicaid trust rules for a trust containing the assets of a disabled individual when: (1) the trust is established and managed by a nonprofit association; (2) a separate account is maintained for each beneficiary, although accounts may be pooled for investment and management; (3) the account is established solely for the benefit of a disabled individual through an authorized person or court; and (4) amounts not retained by the trust at death are used to reimburse the State or States for medical assistance.[4]

The statute expressly anticipates both separation and pooling. Each beneficiary has a separate account, while investment and management may occur collectively. That structure necessarily requires common systems, common policies, and common professional services. It also makes cost allocation more complicated than it is in a single-beneficiary trust.

B. What POMS says about for-profit service providers

POMS SI 01120.225 recognizes that a nonprofit may employ a for-profit entity to perform financial functions if the nonprofit retains ultimate managerial control and the for-profit entity remains subordinate. The POMS focuses on retained authority: determining

[4] 42 U.S.C. § 1396p(d)(4)(C).

beneficiary-related matters, setting or approving investment parameters, obtaining information, monitoring performance, and removing or replacing the service provider. It also instructs personnel not to routinely question the relationship absent language suggesting that the nonprofit lacks sufficient control.

That policy does not require the nonprofit's employees to execute every investment trade, process every disbursement, or personally perform every administrative task. "Managed by" cannot sensibly mean "performed only by." The nonprofit must remain the decision-maker and fiduciary manager. It may still use specialists.

C. State law is not background noise

Uniform Trust Code § 807 and many state analogues permit a trustee to delegate functions that a prudent trustee could properly delegate under the circumstances. The trustee must exercise reasonable care, skill, and caution in selecting the agent, defining the scope and terms of the delegation, and periodically reviewing the agent's actions. The agent owes a duty to comply with the terms of the delegation. Those rules are not a loophole. They are part of ordinary fiduciary administration.

Bridget's trustee-side point is simple: Delegation can be responsible or irresponsible. The answer turns on selection, instructions, oversight, information, and removal—not on whether the outside professional is paid or organized as a for-profit business. A trust instrument that pretends no one is delegated any work may be less accurate and less safe than one that describes the relationship honestly.

D. POMS matters, but it is not the statute

At the administrative level, POMS provisions often drive the result. The agency regularly cites the POMS regulations in communications with beneficiaries and Trustees, as if it is definitive governing law. In court, its status is more limited. The Supreme Court

has described SSA manuals as internal guidance without independent legal force, while recognizing that an agency interpretation may receive respect to the extent it is persuasive.[5] A court is who determines the best reading of the statute, rather than deferring merely because the agency has spoken.

None of that makes POMS optional in day-to-day practice. Rather, it means counsel should not let "POMS says" end the analysis. Ask what the cited section actually says, whether it applies to this trust type, whether the factual premise is true, and whether the agency has converted an example or internal instruction into a new substantive requirement.

IV. The First Review, Point by Point

Before turning to each point, the first-round objections can be summarized as follows:

Chart 1. SSA's First-Round Objections

Issue	SSA's stated concern
Directed trustee / nonprofit management	SSA asserted that a directed or successor directed trustee might be a for-profit entity, could be called a "Trustee," and could exercise substantial trust powers without satisfying the nonprofit-management requirement.
Investment advisor and other agents	SSA treated delegation to a potentially for-profit investment advisor or other agent as inconsistent with POMS SI 01120.225 because the trust allegedly did not make the nonprofit's ultimate managerial control sufficiently clear.
Defense costs and IBA counsel	SSA concluded that allocating legal expenses across accounts that were not directly affected violated the sole-benefit requirement.
Medicaid payback and taxes	SSA objected that the trust appeared to permit payment of a beneficiary's income-tax liability before reimbursement to the State.
MSA component and vendor	SSA questioned whether MSA funds were improperly commingled, who managed the component, whether a for-profit vendor was subordinate to the nonprofit, and whether early termination provisions applied.

[5] *See* Schweiker v. Hansen, 450 U.S. 785, 789 (1981); Washington State Department of Social & Health Services v. Keffeler, 537 U.S. 371, 385 (2003); Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

Issue	SSA's stated concern
Outdated citations	SSA identified a transfer provision that referred to POMS sections that had been renumbered or replaced.

A. Directed trustees and nonprofit management

SSA first objected that the trust allowed a directed or successor directed trustee that might not be a nonprofit and defined that actor as a "Trustee" capable of exercising substantial powers. Although the Trust document stated clearly that the Non-Profit Trustee shall retain all management powers with respect to directed trustees, the agency stated that the directed trustee must be a non-profit. It is true that, if two different actors are each called "Trustee" and the allocation of authority must be reconstructed from several articles, a noncomprehensive review or a harsh reading may cause an inference of noncompliance. Noting that, in the practice of law, particularly, when working with government benefits, sometimes the path of least resistance is the path chosen. Because the particular trustee has not appointed or utilized a directed trustee, and had no plans to do so, it was reasonable to quickly amend the section in the trust to read that any directed trustee must be a non-profit.

This was a cautious response under a deadline. It should not be read as a concession that every fiduciary or service provider associated with a pooled trust must be a nonprofit. The narrower lesson is to perhaps use one title for each role and state the hierarchy clearly.

B. Investment advisors and other agents

The agency next focused on the trust's investment-advisor provisions and general power to employ agents. Because an advisor could be a for-profit entity, SSA reasoned that the delegation might violate the requirement that the trust be managed by a nonprofit, even though the document provided standard language that the Non-Profit Trustee had full authority to remove and appoint another investment advisor (language that has previously,

for many years, been accepted by the agency as fulfillment of the duty of management). In actual administration, an investment advisor may be responsible for custody arrangements, risk assessment, asset allocation, trading, performance reporting, and cash management. Those are important functions, but they are not the same as deciding whether a beneficiary receives a distribution, setting trust-wide policy, interpreting the master agreement, or deciding whether to retain the advisor. All that could reasonably be done is a redraft of the section pertaining to investment advisors and other agents to explicitly spell out the management of those entities to be maintained by the Non-Profit Trustee. In practice, of course the investment advisor is not given management powers (that would be a violation of fiduciary duty of the trustee, to delegate management powers elsewhere). This level of scrutiny is what led to suspicion as to how the agency was reviewing the trust and language; whether the agency suddenly lacked an understanding of how trustee fiduciary duties play a role in trust administration; or the tool they used to review the trust lacked this understanding.

Regardless, to mitigate or avoid beneficiaries' loss of benefits, provisions were drafted in the amendment to explicitly state that the nonprofit retained managerial control, could remove the advisor, and retained ultimate fiduciary responsibility notwithstanding delegation.

C. Defense costs, account counsel, and sole benefit

The original trust allowed some defense costs to be allocated on a pro rata basis across accounts when a substantial number of accounts were affected. It also permitted account counsel to be paid more broadly in some circumstances. SSA treated those clauses as violating the sole-benefit requirement because an account might pay for a matter concerning another beneficiary.

Although this provision has been accepted and approved by the agency for many years, the agency pinpointed this as an issue. As known in the pooled trust world, allocations of legal fees are often allocated on a pro rata basis. If a beneficiary is not yet on benefits, but will be applying for benefits, or will likely be applying for benefits in the future, does the resolution of a benefits issue apply to their trust or not?

Again, regardless, the trustee felt it was best to revise and clarify as the trustee already has in place procedures to ensure that, to the best of trustee's ability, legal fees are appropriately allocated to applicable trusts. There is a legitimate problem at one end of the spectrum. Beneficiary A's account should not routinely pay for Beneficiary B's individual eligibility dispute. There is an equally serious problem at the other end. If SSA attacks the validity or construction of the master agreement, the outcome may affect every account. Requiring the smallest account selected for review to bear the entire cost could make a pooled trust defenseless.

An amendment to the provisions was drafted. The amendment adopted an affected-account approach. Costs may be shared when the matter affects the master trust and therefore all accounts; otherwise, they are charged only to the account or accounts affected. That is a sensible starting point. We would also document the fiduciary finding supporting the allocation: what legal issue is being defended, which accounts face a material effect, what allocation method was selected, and why the cost is reasonable for those accounts.

D. Taxes before Medicaid reimbursement

SSA objected to language permitting payment of income taxes from the beneficiary's account before reimbursement to the State at death. Unlike several of the management objections, this point tracked the payback-priority rules more directly. An

amendment was drafted to remove the ability to pay the beneficiary's income taxes (as differentiated from taxes attributable to the trust). Although the trust and these provisions have been approved for years, the path of least resistance was to draft a clarification.

The response should still be precise. Not every reference to taxes is the same. Taxes arising because of the beneficiary's death or the inclusion of trust assets may be treated differently from the beneficiary's personal income-tax liability or taxes attributable to residual beneficiaries. The clause should use current POMS terminology and applicable state law rather than the generic phrase "income taxes."

E. Medicare Set-Aside components and vendors

The MSA discussion was the most tangled part of the review. The master trust allowed an account to include Medicare Set-Aside (MSA) funds and contemplated a specialized vendor. SSA asked whether the MSA funds were improperly commingled, who managed them and if a for-profit vendor was retained, whether the vendor was subordinate to the nonprofit, and whether the early-termination provision applied to the MSA component.

A clear misunderstanding existed regarding the role of MSA vendors and the MSA component of a pooled trust. First, MSAs held in trusts are addressed in POMS SI 01120.203G.1. Specifically, the MSA component held within a trust is subject to an "undue hardship waiver" under certain circumstances. Although MSA *vendors* are not specifically addressed in the POMS, MSA vendors have been an integral part of the administration of an MSA and are in place to help ensure compliance with rules provided by the Centers for Medicare & Medicaid Services ("CMS"). Whether or not the pooled trust trustee may delegate to an MSA vendor as it pertains to the sub-account could be arguable under the POMS. An MSA vendor may make distribution decisions from the MSA component if the

vendor appropriately determines that the expense should be paid from that component. However, the Non-Profit Trustee should oversee the vendor and have the ability to retain and/or remove the MSA vendor, and, therefore, maintain overall managerial control.

Some of those questions were fair. An MSA component touches several systems at once: the pooled-trust statute, SSI resource rules, Medicare Secondary Payer compliance, account-level recordkeeping, permitted medical payments, exhaustion, death, and early termination. If the instrument adds an MSA as an afterthought, gaps are likely.

Other parts of the critique again confused specialized administration with managerial control. Reviewing medical bills for MSA compliance does not, by itself, make the vendor manager of the pooled trust. The amendment removed the defined MSA-vendor role, placed exclusive managerial control with the nonprofit, and made the early-termination clause apply to the MSA component. That reduced the facial issue. It also illustrates the hard drafting choice: removing a vendor from the trust may appease a literal reviewer, but the actual operating agreement still must describe who performs the work and under whose authority.

F. Outdated citations and cross-references

The trust included references to POMS sections that had been superseded. Those errors were easy to fix and difficult to defend. They were not the reason the trust's structure should have failed, but they gave the agency a legitimate point and may have colored the review of everything else. Version control is not clerical housekeeping in a benefits trust. It is risk management.

V. The Amendment: What It Did and What It Did Not Admit

SSA would not review a draft. It required an executed amendment before resubmission and expressly declined to guarantee that amendment would produce a favorable result. That put the nonprofit in a difficult position: Execute broad changes without knowing whether they would satisfy the agency, or risk continued resource findings for beneficiaries. If the agency were to respond with additional amendments, that would tip the scales towards reasonably believing AI rather than the agency itself is conducting the review given its bias. If an AI is asked to find fault, it will find fault. Victoria's law partner did a simple experiment with Claude recently. Claude consistently found fault in a paragraph and finally he asked Claude to draft the "perfect" paragraph. Claude did so. Then he erased Claude's memory of the paragraph, reentered it, and asked Claude whether there was any issue with it. Indeed, Claude found issue with it, scrutinizing its own "perfect" paragraph.

The nonprofit decided to prepare and execute a thorough amendment of more than fifteen pages. The principal changes—and the legal positions the amendment did not concede—are summarized below. Anonymized amendment (May 21, 2026) (on file with presenters).

Chart 2. The Amendment: What Changed and What Was Not Conceded

Issue	What changed	What was not conceded
Directed trustee	Required any directed or successor directed trustee to be an organization described in IRC § 501(c)(3). The trust had not appointed or used a directed trustee, and none was planned.	That the statute or POMS requires every fiduciary or service provider connected with a pooled trust to be a nonprofit.
Investment advisor / agents	Made the nonprofit's managerial control, removal power, oversight, and retained fiduciary responsibility express, notwithstanding delegation.	That prudent delegation to a for-profit advisor or agent is prohibited, or that performing specialized functions is the same as managing the pooled trust.

Issue	What changed	What was not conceded
Defense costs / IBA counsel	Adopted an affected-account approach: Master-trust matters may be allocated across all affected accounts; account-specific matters are charged only to the affected account or accounts.	That a pooled trust may never share the cost of defending the master instrument when the issue materially affects all accounts.
Taxes / payback	Removed authority to pay the beneficiary's personal income-tax liability before Medicaid reimbursement and retained only the categories permitted by applicable law and POMS.	That every reference to taxes was impermissible, or that the prior administration necessarily violated the payback rules.
MSA	Deleted the defined MSA-vendor role, stated that the nonprofit retained exclusive managerial control, and made the early-termination provision apply to the MSA component.	That a specialized MSA administrator necessarily "manages" the pooled trust or that using specialized vendors is itself impermissible.
Citations / savings provisions	Corrected obsolete POMS references and added broader conformity, severability, nonprofit-management, sole-benefit, and payback language.	That a savings clause can cure contradictory operative language, or that outdated citations alone made the trust a countable resource.

The response letter was courteous by design. It thanked the agency, explained the changes, and emphasized the effect on beneficiaries. It also carefully described several changes as clarifications of how the trust had always operated. That distinction should be preserved. A risk-management amendment does not necessarily concede that prior administration violated the law.

Bridget's concern here is worth making explicit. A trust amendment should match actual authority and actual procedures. If the instrument says the nonprofit exercises "exclusive" control but an operating agreement gives a vendor final authority over a class of payments, the inconsistency will return. The document, policies, contracts, and committee practice need to tell the same story.

VI. Round Two: When the Goalposts Keep Moving

After the amendment was submitted, counsel reported another agency response. The second round allegedly raised different and highly granular objections. One example concerned a tax-refund provision: The clause said the refund would be returned to "the Trust," but did not expressly say it would be credited to the beneficiary's individual subaccount. Victoria's spontaneous response was, "Where else would it go?"

That sentence captures the frustration of serial review. The trust had definitions and account provisions that answered the question when read together. Another example also demonstrates this. The amended trust stated that any directed trustee or successor directed trustee must be a nonprofit defined by the IRC regulations. The next sentence stated that the trustee may remove any directed trustee and retain another corporate trustee or private professional trustee as successor directed trustee, "if it qualifies to act as directed trustee or successor trustee." The agency stated that the clause was not in compliance with the POMS because it is not clear that the successor directed trustee must be a nonprofit. The reviewer appeared unwilling to read the two sentences together. Instead, the question seemed to be whether the second sentence, standing alone, repeated that the successor directed trustee must be a nonprofit. If that becomes the standard, every clarification creates new words to search and another opportunity to object.

Many AI document review tools do not read a document as a whole. Instead, they split it into small chunks that are each processed as an isolated unit, which researchers

describe as an inevitable loss of global context.[6] Because standard chunking ignores a legal document's hierarchy of sections, cross-references, and definitions, a retrieved passage can appear relevant while losing the meaning that depends on provisions located elsewhere, and in one test on a pool of 362 nondisclosure agreements, more than 95% of the passages a standard pipeline retrieved came from the wrong agreement.[7]

VII. This Was Not an Isolated Conversation

Practitioners in other jurisdictions reported substantially similar objections: The nonprofit did not personally make enough day-to-day or investment decisions; delegation to an advisor threatened nonprofit management; and common defense costs violated sole benefit. In one reported matter, SSA had previously accepted the master trust in a published regional precedent, the master language had not changed, and later accounts were nevertheless treated as resources.[8]

Those reports are important but limited. They do not establish that the same reviewer handled every matter, that a national directive exists, or that AI produced the analyses. They do show that the theories recur. That supports collection of comparator letters, prior precedents, amendments, and outcomes. It also supports asking whether a new policy interpretation is being applied without public guidance.

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[6] See Markus Reuter et al., Towards Reliable Retrieval in RAG Systems for Large Legal Datasets, arXiv (Oct. 8, 2025), https://arxiv.org/abs/2510.06999.

[7] *See id*.

[8] Anonymized practitioner reports (July–Aug. 2026) (on file with presenters).

VIII. How We Would Respond Now

A. Preserve the record before changing the document

Save the exact version reviewed, including the master trust, joinder, amendments, schedules, operating agreements, and policies. Save the agency email in native form with headers and attachments. Identify which beneficiary accounts are affected and which version applies to each. A later clean restatement should not erase the document that generated the dispute.

B. Calendar every deadline separately

A ninety-day pooled-trust amendment period is not the same as a beneficiary's reconsideration deadline, benefit-continuation deadline, court-approval deadline, or state Medicaid response deadline. Create a separate timeline for the master trust and each beneficiary. The master-document negotiation should not cause an individual to lose appeal rights.

C. Take the letter apart

For each agency point, create a row that states: the exact trust language, the agency's rule, the cited authority, the factual premise, the agency conclusion, our response, the proposed document change, and the status after resubmission. This is not a fancy framework. It is how counsel keeps twenty bullet points from turning into one generalized accusation that "the trust is noncompliant."

D. Decide what to fix, what to explain, and what to challenge

Some points should be fixed: obsolete citations, inconsistent cross-references, an overbroad pre-payback clause, or authority to charge clearly unrelated accounts. Some points call for clarification: overlapping role names, broad verbs, a missing hierarchy clause, or an MSA provision that does not connect to early termination. Other points

should be challenged: the claim that any for-profit provider is disqualifying, the assumption that delegation equals loss of management, or a factual assertion about authority that the governing documents contradict.

Making those distinctions helps the cover letter. Counsel can be cooperative without saying, "SSA was right about everything." Explain why a change is being made and preserve the position that prior administration was compliant where that is the case.

E. Prove how the trust operates

The agency should not be permitted to invent administration from a broad verb. Submit or preserve the governance documents that show who approves distributions, who sets investment parameters, what reports are received, how providers are monitored, who can remove them, and how conflicts are resolved. Depending on the case, that may include board resolutions, committee charters, investment policy statements, delegation agreements, service contracts, minutes, and declarations.

Operating evidence is not a substitute for a compliant instrument. It is the answer when the agency reads the instrument to assume facts that are not true. The document and the evidence should reinforce each other.

F. Protect the beneficiary while the policy dispute proceeds

A master-trust review may not itself give a beneficiary the same appeal path as an initial SSI determination. Once a beneficiary receives an adverse determination, preserve reconsideration, ALJ, Appeals Council, and judicial-review rights as applicable.[9] Seek benefit continuation when available. The organizational dispute is important, but the beneficiary is the person who loses rent, food, or medical access if the case is mishandled.

[9] *See* 20 C.F.R. §§ 416.1400–416.1499; 42 U.S.C. §§ 405(g), 1383(c)(3).

G. Use prior approval carefully

Prior approval is powerful evidence. It shows that the agency previously read the same or materially similar language as compliant; that the trust and beneficiaries relied on that treatment; and that a later contrary result calls for an explanation. It may support arguments concerning consistency, fair notice, reliance, administrative finality, reopening, or retroactivity.

Prior approval is not magic. Estoppel against the federal government is difficult, and a later account may still be reviewed. We would not lead with the claim that approval forever bars reconsideration. We would lead with the statutory text, the agency's own POMS, unchanged language, actual administration, and the absence of a reasoned explanation for the new result. Novel constitutional theories may be preserved after research, but they should not distract from stronger administrative-law and benefits arguments.

H. Ask focused transparency questions

A focused FOIA request can seek trust-review instructions, training materials, quality-control guidance, routing rules, memoranda concerning nonprofit management or delegated investment functions, and records identifying any documented AI use case relevant to trust review. "All records about AI" is likely to produce delay or an unhelpful response. Define the component, time period, subject, and decision.

Comparator materials can be equally valuable. Ask other practitioners for redacted defect letters, favorable decisions, prior precedents, amendments, and outcomes. A request for a policy witness or hearing subpoena may preserve an issue when supported by a concrete proffer. Congressional or policy-level inquiry may help obtain aggregate clarification. None of these tools replaces exhaustion of the beneficiary's claim.

IX. Drafting Changes We Would Make Before the Next Letter

1. Identify the trust type in the opening provisions and use the correct statutory subsection consistently.

2. Give each actor one stable title. Do not use “Trustee” as a shorthand for several different offices.

3. Include one global hierarchy provision. State who has final authority over policy, distributions, investments, providers, information, monitoring, removal, and conflicts.

4. Describe delegation honestly. Identify the delegated function, the instructions, the standard of performance, the reporting duty, the monitoring right, the removal right, and the fiduciary responsibility retained by the trustee or nonprofit.

5. Use the beneficiary’s separate-account name when a provision concerns a refund, expense, transfer, distribution, death, or early termination. A defined term should carry through the operative sentence.

6. Adopt an affected-account rule for legal and administrative expenses. Require a documented fiduciary basis for any allocation across more than one account.

7. Integrate every special component—MSA, structured settlement, retirement asset, real property, or other restricted fund—into accounting, distribution, death, termination, and payback provisions.

8. Use current payback language and distinguish the narrow expenses allowed before reimbursement from expenses that must wait.

9. Treat a savings clause as interpretive guidance, not a cure for contradictory operative language.

10. Run a final audit for defined terms, cross-references, citations, conflicting verbs, role overlap, and version applicability before execution.

The practical test. A reviewer should be able to answer four questions without assembling the instrument like a puzzle: Who decides? Who performs? Who monitors? Who can remove the person performing the work?

X. What This Means for (d)(4)(A) Trusts and Medicaid

The most immediate spillover risk is the application of the same review process by the agency to (d)(4)(A) trusts. An individual trust can be misread if roles are unclear, a beneficiary appears to hold removal or direction powers, an early-termination provision is incomplete, or a trustee protector or advisor is described with language suggesting beneficiary control.

State Medicaid review is separate. A provision revised for SSA may trigger a different issue under state payback law, long-term-care policy, court supervision, caregiver rules, or fiduciary statutes. Counsel should maintain a jurisdiction chart identifying the federal statute, SSA POMS, state Medicaid authority, governing trust law, any court order, and the actual administrative procedure. When an objection jumps from one column to another, ask the reviewer to identify the source of authority.

XI. Using Our Own AI Without Repeating the Problem

AI can help counsel organize a long review letter, separate propositions, compare versions, trace citations, and identify inconsistent terms. That is useful work. It can also produce confident mistakes, omit limiting language, or invent a citation. Use an approved system, anonymize or protect confidential information, understand retention and training terms, and verify every legal proposition. ABA Formal Opinion 512 (July 29, 2024) and the

Supreme Court of Arizona Steering Committee on Artificial Intelligence and the Courts, Generative AI: Ethical Best Practices for Lawyers and Judges (Nov. 14, 2024), apply the familiar duties of competence, confidentiality, communication, supervision, candor, and reasonable fees.

The lawyer should use AI to reduce clerical friction, not to outsource judgment. If our criticism is that a reviewer treated a trust as a collection of phrases instead of a legal arrangement, we should not do the same thing in our response.

XII. Final Thoughts

We still do not know whether an AI system helped produce the review that began this matter. We do know that the review threatened benefits, misunderstood important aspects of administration, and forced a nonprofit to execute a substantial amendment without draft review or assurance that the next review would end the dispute.

The right response is not reflexive defiance. Some language was vulnerable and needed correction. The right response is also not endless capitulation. A trust cannot be rewritten every time a reviewer finds a new isolated phrase while ignoring the instrument as a whole and the law that governs it.

Our recommendation is practical: Preserve the record, protect the beneficiary's appeal, separate each issue, correct what is actually wrong, clarify what is genuinely unclear, and challenge requirements that do not appear in the statute or the agency's own policy. Draft so that the hierarchy and administration are obvious to a human reader and difficult for a machine—or a hurried reviewer—to misunderstand. That is not drafting for a bot. It is good trust drafting.

Immediate Response Checklist

- Identify every document version and every affected beneficiary.
- Calendar cure, appeal, benefit-continuation, court, and Medicaid deadlines separately.
- Map each agency point to its exact rule, factual premise, and requested change.
- Preserve prior approvals, precedent opinions, comparator decisions, and evidence of reliance.
- Collect governance records, delegation agreements, policies, and monitoring evidence.
- Use the narrowest amendment that protects benefits and remains administrable.
- Ask SSA to confirm which issues are resolved before answering new objections.
- Keep the master-trust response and each beneficiary's appeal moving on parallel tracks.
- Consider targeted FOIA and policy inquiry when the same theory appears repeatedly.
- Review any SSA-driven change for state Medicaid, fiduciary, tax, and court consequences.

Selected Authorities and Materials

- 42 U.S.C. §§ 405(g), 405(h), 1382b(e)(5), 1383(c)(3), 1396p(d)(4)(A), and 1396p(d)(4)(C).
- 20 C.F.R. §§ 416.1201 and 416.1400–416.1499.
- SSA, POMS SI 01120.202, SI 01120.203, SI 01120.204, and SI 01120.225.
- Schweiker v. Hansen, 450 U.S. 785 (1981).
- Washington State Department of Social & Health Services v. Keffeler, 537 U.S. 371 (2003).
- Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).
- Lewis v. Alexander, 685 F.3d 325 (3d Cir. 2012).
- Uniform Trust Code § 807 and applicable state analogues.
- ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 512, Generative Artificial Intelligence Tools (July 29, 2024).
- Supreme Court of Arizona Steering Committee on Artificial Intelligence and the Courts, Generative AI: Ethical Best Practices for Lawyers and Judges (Nov. 14, 2024).

- Anonymized SSA review correspondence dated March 10, 2026; executed amendment and response letter dated May 21, 2026; master trust and joinder materials; and practitioner correspondence concerning related reviews and appeals (2026) (on file with presenters).

P.S. *We used generative AI as a drafting and editing aid in preparing these materials, including the summary charts. We used a platform that protects confidential information, independently reviewed and revised the work product, and remain responsible for the analysis, citations, and conclusions.*

THE BOT, THE TRUST, AND THE BENEFIT THREAT

Responding to AI-Driven SSA Scrutiny

A real trust review.
A real benefit threat.
An unanswered AI question.

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Partner, Fletcher Struse Wagner & Derksen PLC

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2026 National Conference on Special Needs Planning and Special Needs Trusts

An anonymized case study

1

Special Needs Trust Review

in the Wild Wild West

- **Pre-approval required:** Arizona's Medicaid agency (AHCCCS / ALTCS) requires that all SNT expenditures be approved prior to disbursement.
- **Heightened scrutiny:** Over the last couple of years, disbursements have been heavily scrutinized, down to individual receipts.
- **Who (or what) is reviewing?** Given agency workloads, there is a real question of whether AI is being used to conduct or assist in these reviews.
- **A case in point:** AI was used to possibly state that paying a caregiver, with the SNT as the employer, made the SNT not a "sole benefit" trust.





2

AI Infancy

VICTORIA

"In the last six months, A.I. has become, if you will, useful—the inflection point of A.I."
– Nvidia CEO Jensen Huang

Government agencies started using AI in its infancy, which triggered a requirement to learn it.

Lawyers are held to a standard. ABA Formal Opinion 512 sets out duties that apply to AI.

American Bar Association Formal Opinion 512

Lawyers must develop a reasonable understanding of how AI tools work; enough to recognize what the technology can and cannot do.

3

The email that started it

VICTORIA

> *"What followed read like nothing I had ever seen from the government before."*
>
> Victoria

The message said SSA had "initiated a review" of the master trust.

It was not tied to one beneficiary's application or review of continued eligibility. It came from a regional office far from the trust's home state. Then it announced noncompliance before moving through pages of dense, citation-heavy bullets.

4

SSA's noncompliance findings

VICTORIA

- *"The Trust does not comply with agency policy requiring nonprofit management of a pooled trust because there is no requirement that a Directed Trustee or Successor Directed Trustee, which may also be referred to as a Trustee in the Master Trust Agreement (and thus may perform the same functions), be a nonprofit association. See Master Trust Agreement §§ --, -- (Directed Trustee, Successor Directed Trustee); POMS SI 01120.203D.3. Also, the Trust allows the Non-Profit to hire and delegate all of its investment functions to an Investment Advisor. See Master Trust Agreement §§ --, --, --, --. Because the Investment Advisor could be a for-profit entity, this broad delegation of power does not comply with agency policy regarding the use of for-profit entities. See POMS SI 01120.225. Furthermore, the Trust includes a provision allowing the Trustee to employ other agents without ensuring that the nonprofit association maintains ultimate managerial control over the Trust vis-à-vis any hired for-profit entities. See Master Trust Agreement § --; POMS SI 01120.225."*

Paraphrased from SSA's email. This is not the identical wording; it was changed for confidentiality.

5

Why this one felt different

VICTORIA

1. **No obvious trigger**
   The review appeared to reach the master trust outside the ordinary review of a newly submitted account.
2. **Citation density without a clear syllogism**
   The letter cited many provisions, but the rule, text, factual premise, and conclusion did not always connect.
3. **Little connection to actual administration**
   Advisor, trustee, and vendor roles were read as though state fiduciary law and the trust's hierarchy did not exist.
4. **An executed cure before another review**
   SSA would not review draft language and did not promise that the executed amendment would solve the problem.

The question that kept coming back

Was a human reviewer using AI?

Was a policy tool driving the analysis?

Was this a new standard?

Or was it a new interpretation of the same trust language?

We still do not have that answer.

6

BOTH

What the record supports

What the record supports

- SSA has an enterprise AI strategy and a public inventory of current and planned AI uses.
- SSA released a Policy Assistant Tool enterprise-wide in May 2026 to help employees find and understand policy.
- The challenged review was unusually citation-heavy, literal, and difficult to reconcile with actual trust administration.
- Practitioners reported similar nonprofit-control, investment-delegation, and defense-cost theories in other pooled-trust matters.



7

BOTH

What the record does not establish

What the record does not establish

- A publicly disclosed trust-review AI workflow.
- The tool, prompt, knowledge base, or human verification process used in this matter.
- That the same person or system produced every reported review.
- A coordinated federal campaign to eliminate the use of SNTs.

Pattern evidence justifies inquiry. It does not substitute for proof.

8

Three Ways to Read the SSA Trust Review

Each view points to a different response to the noncompliance findings

1 Business as Usual

This review is no different than the ones we have had over the years. The reviewers are not sophisticated, have picked up random trusts, and are doing their usual "this does not comply" routine.

Implication
Make the amendments. Change only the document so it pleases the reviewer.

2 AI + Uninformed Reviewer

This appears to be AI paired with a human reviewer who does not understand special needs trusts, or trusts in general. If this is AI, it is biased, and nothing we do will produce a "perfect" document if they have no interest in our having a compliant one.

Implication
Conceding is dangerous. We could go in circles and put other SNTs at risk by continuing to amend.

3 Designed to Remove Beneficiaries

DOGE fired 7,000 people, likely many who knew what they were doing, cut SSA's budget, and implemented AI. The goal is to remove people from benefits, and this is an easy way to do it.

Implication
No trust will satisfy their AI. All trusts will be found out of compliance.

9

CASE

What SSA challenged

Nonprofit management
Could a directed or successor trustee be for-profit?

Investment delegation
Did advisor or agent language transfer "managerial control"?

Defense costs
Could common legal expenses reach accounts not actually affected?

Medicaid payback
Did tax language permit payment ahead of the State?

MSA provisions
Who controlled the component, and did early termination apply?

Old citations
Did superseded POMS references create ambiguity?

This was not a one-clause problem. The review challenged the architecture of the trust.

Anonymized SSA review email (Mar. 10, 2026).

10

CASE

The procedural bind

1 **Review**
SSA declares the master trust noncompliant.

2 **Amend**
The nonprofit must execute the cure before review.

3 **Resubmit**
The executed amendment goes back to the agency.

4 **Wait**
No draft review and no guarantee of approval.

"Change the trust first. Then find out whether the change was enough."

POMS SI 01120.225A.2; anonymized agency correspondence.

11

BRIDGET

First principles: What Congress required

1 **NONPROFIT**
Established and managed by a nonprofit association

2 **SEPARATE ACCOUNTS**
A separate account for each beneficiary

3 **POOLED FUNCTIONS**
Pooling is permitted for investment and management

4 **SOLE BENEFIT**
The account is established solely for the disabled individual

5 **RETAIN / PAYBACK**
Amounts not retained at death reimburse Medicaid

The statute does not say the nonprofit must personally perform every investment, accounting, tax, legal, or administrative task.

42 U.S.C. § 1396p(d)(4)(C).

12

BRIDGET

"Managed by" does not mean "performed only by"

CONTROL — what must remain with the nonprofit

- trust-wide policy and beneficiary decisions
- selection, instruction, monitoring, and removal
- final distribution authority
- access to information and records
- the ability to correct or terminate the relationship

EXECUTION — what may be assigned or delegated

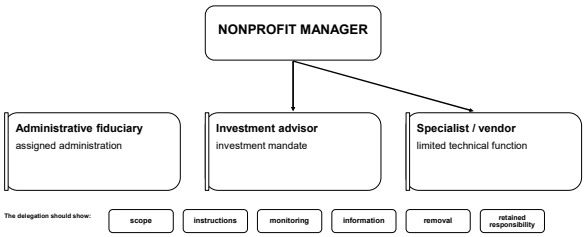
- investment selection within an approved mandate
- custody and cash-management functions
- tax preparation, accounting, and reporting
- specialized MSA administration
- legal, benefits, or care-management services

The legal question is who holds final authority—not who performs every task.

13

BRIDGET

Delegation is not abdication



A global hierarchy clause is usually more effective than repeating slightly different authority language in five articles.

14

BRIDGET

Who pays to defend the trust?

ONE ACCOUNT	A dispute unique to one beneficiary	**Charge the affected account**
A DEFINED GROUP	A provision or practice affects a known subset	**Allocate within the affected class under a reasoned method**
THE MASTER TRUST	Validity or construction of the common instrument truly affects all accounts	**A common expense may be defensible if the fiduciary finding is documented**

"If a low-balance account must finance a master-trust defense alone, the trust can be defeated one account at a time."

15

BRIDGET

Payback, MSA, and termination

PAYBACK

Use the exact categories permitted before Medicaid reimbursement. Coordinate any stricter state rule. Do not let a broad tax or expense clause outrun the priority language.

MSA COMPONENT

Identify the MSA as an accounting component of the beneficiary's separate account. State who has final authority and define any vendor role as limited and subordinate.

EARLY TERMINATION

Apply the termination provision to every component. State reimbursement priority, who receives any excess, and that the beneficiary cannot compel termination.

Deleting every vendor reference may reduce facial scrutiny—and make actual administration less transparent.

16

VICTORIA

The 15-page amendment: What changed—and what did not

ISSUE	WHAT CHANGED	WHAT WE DID NOT CONCEDE
Directed trustee	Required to be a qualifying nonprofit	Not every provider must be a nonprofit
Advisor / agents	Express control, oversight, removal, retained responsibility	Prudent delegation is not prohibited
Defense costs	Affected accounts unless the master agreement truly affects all	Common defense is not automatically impermissible
Payback	Narrowed pre-payback expenses	Not every termination criticism was correct
MSA	Clarified nonprofit control and early termination	A specialist does not necessarily manage the trust

> *"We were not trying to win a drafting contest. We were trying to protect beneficiaries while the cure period was running."*

17

VICTORIA

We amended. Then came round two.



18

VICTORIA

One of the new provisions cited for noncompliance

*"**Directed Trustee must be a non-profit organization.** The Trustee may appoint a successor Directed Trustee, including a corporate trustee or private fiduciary, if it qualifies to act."*

AGENCY RESPONSE

Not in compliance with the POMS.

A Directed Trustee **may be a for-profit organization**.

19

VICTORIA

Why a model misreads the clause

In code, a condition applies only to the block it's attached to, and the nearest clause usually controls. In your passage--**"if it qualifies to act"** sits right next to the appointment power--so a model naturally attaches it there and treats it as a self-contained test. It's less inclined to reach back to the prior sentence and treat that as a rule governing everything after it. Lawyers read a restriction as continuing unless something ends it. **Models, like code, tend to need that stated.**

— Claude



20

VICTORIA

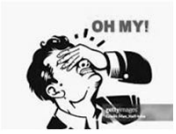
The second new provision cited for noncompliance

*"The Trustee shall **place a tax refund into the Trust**."*

AGENCY RESPONSE

Not in compliance with the POMS.

A Trustee can place the refund in **someone else's sub-account** and not in the sub-account of the person entitled to the refund.



21

BOTH

What the other cases suggest—and what they do not

RECURRING THEMES

- nonprofit control versus day-to-day trustee functions
- delegated investment authority
- common defense costs and sole benefit
- later adverse findings despite earlier favorable treatment
- similar questions reported in more than one jurisdiction

PROOF LIMITS

- no proof of a common AI tool
- no proof of a single national decision-maker
- no complete record of every case or outcome
- no basis to treat every review as identical
- no reason to abandon the beneficiary-specific appeal

The right use of comparator evidence is to demand consistency and explanation—not to overclaim causation.

22

BRIDGET

Before you amend anything

Freeze the record.

Confirm the exact master trust, amendment, joinder, account version, funding date, court order, and notice under review.

"Many dense letters become manageable once the missing link is visible."

Preserve the original email, attachments, metadata if available, and every document submitted in response.

For each agency point, answer five questions

1. What rule does SSA say applies?
2. What exact trust language is being read?
3. What factual assumption is SSA making?
4. How does the conclusion follow?
5. What change or disposition is SSA asking for?

23

BRIDGET

A practical way to sort the issues

CONCEDE	CLARIFY	CONTEST
The text is plainly wrong or out of date.	**The problem is ambiguity or overlapping roles.**	**SSA has added a requirement or assumed a fact.**
Correct it narrowly. Do not over-admit.	Make the hierarchy and actual administration visible.	Preserve the position and build the legal record.
Examples: obsolete citation; vulnerable pre-payback expense; charge to an unrelated account.	Examples: advisor scope; vendor function; affected-class defense costs; cross-references.	Examples: every provider must be nonprofit; delegation equals abdication; pooled rule imported into (d)(4)(A).

The categories keep one weak clause from dragging sound provisions into an unnecessary rewrite.

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BRIDGET

Make SSA complete the reasoning

RULE	TEXT	FACT	CONCLUSION	DISPOSITION
What authority applies?	What exact words are being read?	What is assumed about administration?	Why does the account become a resource?	What is resolved, and what remains?

> *"A citation is not a syllogism. A reviewer still has to explain how the rule reaches the result."*

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BRIDGET

Prior approval and moving goalposts

POMS SI 01120.202A.1: In posteligibility cases, do not reevaluate a previously reviewed trust absent new and material evidence—such as an amendment or a clarification or change in policy.

WHAT PRIOR APPROVAL HELPS SHOW

- the agency previously accepted the same or similar language
- the trust and beneficiaries relied on that treatment
- a later contrary result requires explanation
- unchanged language may expose a policy shift

WHAT IT DOES NOT AUTOMATICALLY SHOW

- permanent immunity from review
- equitable estoppel against the government
- that every later account must be accepted
- that an untested constitutional theory should lead

Ask the obvious question: What changed—the document, the facts, the law, policy or only the interpretation?

26

BRIDGET

Two tracks: The master trust and the individual beneficiary

MASTER-TRUST TRACK

- answer each provision separately
- execute only the narrowest necessary amendment
- preserve disputed positions in the cover response
- ask which issues are resolved and why
- preserve every version and comparator review

BENEFICIARY-APPEAL TRACK

- obtain a written initial determination with reasons
- request reconsideration and continuation when available
- proceed to ALJ, Appeals Council, and court as appropriate
- show concrete benefit harm and standing
- build the administrative record before the history disappears

A master-trust email may not itself be an appealable determination.
Do not lose the beneficiary while arguing about the document.

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BOTH

FOIA, policy witnesses, and oversight

COMPARATOR FILE	Collect defect letters, favorable decisions, precedents, amendments, and outcomes.
TARGETED FOIA	Ask for trust-review instructions, training, routing, quality control, and documented AI-use materials for a defined component and period.
POLICY WITNESS	Use a hearing request or subpoena only with a concrete proffer tying the witness to the disputed interpretation.
OVERSIGHT	Seek aggregate clarification through policy or congressional channels—but do not substitute it for exhaustion.

"All records concerning AI" is usually too broad. Define the office, date range, trust-review terms, and decision.

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BRIDGET

Spillover: (d)(4)(A) trusts and Medicaid review

INDIVIDUAL (d)(4)(A) TRUSTS

- no nonprofit-management requirement
- watch beneficiary control and resource availability
- make trustee, protector, and director roles unmistakable
- integrate early termination, payback, tax, and MSA provisions
- do not let a pooled-trust rule migrate into the analysis

STATE MEDICAID REVIEW

- a separate decision-maker and separate appeal path
- state-specific payback and long-term-care rules
- court approval, notice, and continuing jurisdiction
- caregiver, housing, vehicle, retirement, and MSA issues
- a change for SSA may create a state-law problem

Do not solve an SSA problem by creating a Medicaid problem.

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BOTH

Using AI without letting it practice law

HIGH-VALUE USES

- break the agency letter into propositions
- trace each citation to the exact proposition
- compare the trust and amendment provision by provision
- build a role-and-authority chart
- flag inconsistent terms, citations, and cross-references

NON-NEGOTIABLE GUARDRAILS

- use an approved, secure system
- redact or anonymize confidential information
- understand retention, training, and access terms
- verify every quotation, citation, and legal proposition
- never treat model output as authority

Let AI do the clerical lifting. Do not let it make the legal judgment.

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BOTH

What we would do tomorrow morning

1. Preserve every trust version, notice, email, and response.
2. Calendar amendment, appeal, continuation, court, and Medicaid deadlines separately.
3. Build a provision-by-provision response chart.
4. Collect prior approvals, comparator reviews, and evidence of actual administration.
5. Fix easy drafting points without conceding disputed legal theories.
6. Prepare beneficiary-specific appeals before the master-trust discussion consumes the file.
7. Audit the entire instrument after any amendment.
8. Keep asking: Who decided, on what authority, and how does the conclusion follow?

"The next reader may be a lawyer, a claims representative, a judge—or a machine. Draft so the lawful administration is unmistakable."

31

WHAT WE WANT YOU TO REMEMBER

1. Separate suspicion from proof.
2. Control and execution are not the same thing.
3. Concede the easy point; clarify the ambiguity; contest the overreach.
4. Build the beneficiary's appeal record before the amendment erases the history.
5. Draft for the person whose benefits depend on the document being understood correctly.

QUESTIONS

What would you change?

What would you refuse to change?

What evidence would you preserve today?

Victoria Blair Struse **Bridget O'Brien Swartz**

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National Conference on Special Needs Planning and Special Needs Trusts

Thursday
October 22, 2026

SSI Update

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National Conference on
Special Needs Trusts

2026 Social Security and Supplemental Security Income (SSI) Program Update

Presented by Kathleen Romig and
Jennifer Burdick

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Center for Excellence in Elder Law

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SSA and Tech

SSA announced that it implemented "a digital first approach" in 2026, with a goal to cut Field Office visits by 50%. In its 2026-2030 strategic plan, SSA highlighted increasing availability and use of online services and expanding the use of self-service technology tools as a supportive strategy to meet its customer service goals. Related to these goals, SSA launched pilots for Appointment Scheduling Calendar and Workload Management System. SSA has also really encouraged the public to sign up for MySSA.gov accounts to allow people to receive more service digitally, without needing to go into a Field Office.

- **Appointment Scheduling Calendar**

On April 25, 2026, SSA rolled an Appointment Scheduling Calendar and the Workload Management System as pilots in Tennessee and Nevada. An SSA Emergency Message describes the ASC as a "web-based appointment system used by customers and technicians to schedule, reschedule, modify, and cancel Initial Claims (IC) phone appointments." SSA technicians are directed to use this web-based appointment system to schedule all initial claims as phone appointments in the pilot states, thereby limiting Field Office visits. One of the major developments is that the public can also self-schedule appointments through this calendar. Notably, the process for walk-in service remains unchanged. On August 26, 2026, SSA announced via another Emergency Message that they were expanding the Appointment Scheduling Calendar to the following additional places: Arkansas, American Samoa, Arizona, California, Hawaii, Louisiana, New Jersey, New Mexico, Ohio, Oklahoma, and Texas. Some advocates have raised concerns that SSA's emphasis to schedule all initial claims appointments as phone appointments, so they can be handled by claims representatives across the country, will make it harder for people to get in-person service.

- **Workload Management System**

SSA's new Workload Management System also started as a pilot in Tennessee and Nevada, but was expanded to the same list of places (Arkansas, American Samoa, Arizona, California, Hawaii, Louisiana, New Jersey, New Mexico, Ohio, Oklahoma, and Texas) via Emergency Message on August 26, 2026.

The Workload Management System (WMC) is what supports the appointment queue to assign initial claims to be completed through the Appointment Scheduling Calendar. So basically, initial claims that come in through the ASC, will be distributed to claims representatives for assignment via the Workload Management System. Interestingly, SSA policy guidance indicates that whatever jurisdiction agrees to initiate the claim "keeps ownership and processes the case through adjudication, regardless or the claimant['s] residence and jurisdiction." That means if a person from Louisiana wants to initiate a new claim, if that claim was initially worked on by

someone from Ohio, Ohio will process the claim "through adjudication." It is not entirely clear what "through adjudication" applies to. Advocates on the ground report that even if an out-of-state Field Office is in charge of a claim, if it is an application for medical disability, the medical disability adjudication will be handled by the Disability Determination Services (DDS) from the state where the claimant resides.

- **MySSA.gov**

This last year, SSA has also been encouraging the public to sign up for and use MySSA.gov, explicitly making it easier for the public to "access [] benefits without needing to make an in-person visit to a field office." On February 9, 2026, SSA reported that 100 million Americans had set up these accounts. SSA advertises that people can take care of 19 types of transactions via their MySSA.gov accounts, ranging from updating their address and printing benefit verification letters, to responding to continuing disability review requests. SSA's 2026-2030 strategic plan (pg. 6) indicates SSA intends to make "nearly all SSA transactions" available through this portal.

To sign up for MySSA.gov accounts, a person needs to go through an identity verification process through ID.me or Login.gov: which has proven to be a significant obstacle for many. As SSA moves more service delivery to MySSA.gov accounts, it may become more of a priority for people to struggle through setting up these accounts.

SSA & CDRs

SSA has identified Program Integrity as a "central focus." SSA set a goal to process 219,000 more continuing disability reviews (CDRs) in 2026, than they did in 2024. SSA, Annual Performance Plan (APR) FY 2025-2026 at 7.

Possibly related to this goal, in March 2026, SSA announced they were moving Medical CDRs in house. This would be a big change. Currently, most CDR are conducted by disability determination staff in the state where the claimant lives. SSA explained the move by stating:

> "By centralizing medical continuing disability reviews under Social Security, we are taking another important step towards operational excellence, reducing improper payments, and providing best-in-class service to Americans in critical need of support," **said Commissioner Frank J. Bisignano**. "With complete ownership and accountability of CDRs and the proven track record of our DCR, our state disability determination service partners will be able to focus on the adjudication of initial disability claims and reconsideration cases, provide eligible individuals with expedited access to benefits, and further reduce initial disability claims backlogs, which are already reaching historic lows."

Id. This announcement was a surprise and was met with some resistance. For example, the National Association of Disability Examiners (NADE), an organization that advocates on behalf

of state disability examiners, wrote extensively about their concerned about the centralization of the CDR workload in their Newsletter. They also reported traveling to D.C. to raise issues with key stakeholders, including with the Senate Finance Committee and House Ways and means. Concerns fall into three buckets: the effect on the claimant experience, logistics, and the impact on disability examiners.

To date, CDR centralization has not been completely implemented. We know from reports that SSA has increased the staffing to the DCR, or SSA's federal DDS agency. State DDS's all over the country have drastically increased how many continuing disability review they are completing.

Revising Policy Related to Transition Age Youth

SSA rescinded its Social Security Ruling (SSR 11-2p) and replaced it with SSR 26-2p, which went into effect on October 1, 2026. This updated SSA's policy for how to document and evaluate disability claims for young adults ages 18 through 25. While the updated policy is substantially the same, there are a few updates worth noting:

- SSR 26-2p includes slightly less favorable guidance on evaluating IEP goals. SSR 26-2p states that "A young adult who does not achieve a goal ***may*** have an impairment-related limitation(s) in their ability to perform work activity" while SSR 11-2p stated that "A young adult who does not achieve a goal ***likely*** has an impairment-related limitation(s)"
- the SSR 26-2p makes clear that evidence from a prior file, including medical and education records, "will" be added the current file. Missing evidence from prior files has been a pain point in these cases, so its excellent this language has been added.
- SSR 26-2p also included an updated list of illustrative examples of relevant limitations. A claimant's interest in video games is unequally treated by ALJs: some suggest it is proof of executive functioning; others do not. This SSR makes clear that "hyperfocus (an intense focus on things that interest an individual, such as videogames)" is an example of a deficit.
- SSR 26-2p explicitly referenced Section 301 benefits. Section 301 allows a person who SSA previously found to be disabled, but whose disability ceased, can still receive benefits if they are in a vocational rehabilitation program in some circumstances. This benefit is extremely underutilized. Hopefully its inclusion in this policy will spur it to be more frequently employed.

Materials Pending: Speaker has requested that materials be distributed at or after the conference. Please check the online materials for availability, as these materials will not be included in the printed conference materials.

STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

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Analyze This: AI and Human Insights, Elder Law, and Ethical Oversight

What's AI Got to Do With It? Turns Out, A Lot.

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Center for Elder Justice

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Analyze This: AI and Human Insights, Elder Law, and Ethical Oversight
What's AI Got to Do With It? Turns Out, A Lot.
Robert Fleming and Rebecca Morgan

I. AI Ethics Opinions or Rules

a. ABA Formal Ethics Opinion # 512 (adopted June, 2024) Formal Opinion 512

Here's the conclusion:

> Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.

b. More rules that you might expect: 1.1, 1.4, 1.5, 1.6, 1.9, 1.18, 3.1, 3.3, 5.1, 5.3, and 8.4(c).
c. Which states? State Bar AI Ethics Opinions: The Free 50-State Tracker (2026).
d. Co-pilot gave us this answer when we asked for a list of state bar associations with ethics opinions on AI use:

State Bars That Have Issued AI Ethics Opinions

As of mid-2026, at least 15 U.S. state bars have issued formal ethics opinions on lawyers' use of generative AI, in addition to the ABA's Formal Opinion 512. legalaicompliance.help+1

States with Formal Ethics Opinions

According to the Legal AI Compliance Register and Law Firm Brief's comparative analysis, the following states have issued **formal, citable ethics opinions** on AI use by attorneys legalaicompliance.help+1:

- **Alabama** – Formal Opinion 2026-01 (best practices under existing professional conduct rules) legalaicompliance.help

- **Alaska** – Formal opinion on generative AI and the practice of law legalaigovernance.com
- **Connecticut** – Formal ethics opinion lawfirmbrief.com
- **District of Columbia** – Ethics Opinion 388 (2024) lawfirmbrief.com
- **Florida** – Formal Ethics Opinion 24-1 (Jan 2024) legalaigovernance.com+1
- **Illinois** – Formal ethics opinion lawfirmbrief.com
- **Kentucky** – Formal opinion on ethical use of AI in the practice of law legalaigovernance.com
- **Michigan** – Formal ethics opinion lawfirmbrief.com
- **Minnesota** – Formal ethics opinion lawfirmbrief.com
- **New Jersey** – Formal ethics opinion lawfirmbrief.com
- **New York** – Formal ethics opinion lawfirmbrief.com
- **North Carolina** – Formal ethics opinion (2024-1) ixsor.com
- **Ohio** – Formal ethics opinion lawfirmbrief.com
- **Pennsylvania** – Formal ethics opinion lawfirmbrief.com
- **Texas** – Formal ethics opinion lawfirmbrief.com
- **Virginia** – Formal ethics opinion lawfirmbrief.com

Additional Context

- **Total count:** The Legal AI Compliance Register lists **17 formal ethics opinions** from state bars plus the ABA's Formal Opinion 512 legalaicompliance.help.
- **Other jurisdictions** have issued informal guidance, court rules, or policy statements, but these are not formal ethics opinions in the same sense legalaicompliance.help+1.
- **Common themes** across opinions include duties of competence (Rule 1.1), confidentiality (Rule 1.6), candor, supervision, and client communication lawfirmbrief.com+1.
- **Florida's position** is notable for its explicit emphasis on verifying AI outputs and reviewing vendor data-handling terms before inputting client information lawfirmbrief.com+1.

Tip for practitioners: Even in states without a formal opinion, the underlying state Rules of Professional Conduct apply, and many bars cite

ABA Op. 512 as persuasive authority ixsor.com. Always check the latest state bar guidance before using AI tools in client matters.

Microsoft Co-Pilot Search (08/12/2026); state bars that have issued AI ethics opinions - Search

e. ***Something more authoritative***, See Bloomberg Law, Legal Profession, Comparison Table - State Legal Ethics Guidance on Artificial Intelligence (AI)

Infographic Creation Example 1

Prompts (I used them one after the other until I got what I intended).

1. draft a flow chart for a client whose child has special needs and have the flow chart explain the options for paying for the child's care
2. In response, ChatGPT provided this:
    - {"prompt":"Design a clean, professional one-page infographic titled 'Planning for the Lifetime Care of a Child with Special Needs.' Use a modern, easy-to-read layout with color-coded decision boxes connected by arrows on a white background.\n\nTop header (navy blue): 'Planning for the Lifetime Care of a Child with Special Needs'\nSubtitle: 'A roadmap for funding care while protecting benefits.'\n\nStart box (dark blue): 'START: What resources are available to provide for your child's future care?'\n\nFlow downward with arrows into seven color-coded sections:\n\n1. Green box: 'Family Assets'\n- Savings & Investments\n- Real Estate\n- Retirement Accounts\n- Life Insurance\nDecision diamond (gold): 'Leave assets directly to your child?'\nRed box: 'Usually NO – Direct gifts may affect SSI/Medicaid eligibility.'\nGreen box: 'Consider a Third-Party Special Needs Trust.'\n\n2. Light Blue box: 'Government Benefits'\nInclude icons and bullets:\n- SSI\n- Medicaid\n- Medicaid Waivers\n- Housing & Food Assistance\n- Vocational Services\nFooter: 'Goal: Preserve eligibility while improving quality of life.'\n\n3. Purple box: 'Life Insurance'\nDecision: 'Who is the beneficiary?'\nGreen box: 'Special Needs Trust (preferred)'\nRed box: 'Avoid naming the child directly.'\n\n4. Teal box: 'Retirement Accounts'\n- IRA\n- 401(k)\n- Pension\nCallout: 'Coordinate beneficiary designations with your estate plan.'\n\n5. Orange box: 'ABLE Account'\nDecision diamond: 'Eligible under federal rules?'\nGreen box:\n- Tax-free growth\n- Qualified disability expenses\n- Complements a Special Needs Trust\n\n6. Yellow box: 'Family Contributions'\nArrow to:\n- Contribute to Special Needs Trust\n- Contribute to ABLE Account (if eligible)\n- Update wills and beneficiary designations\n\n7. Lavender box: 'Letter of Intent'\nChecklist icon with:\n- Daily routine\n- Medical needs\n- Caregivers\n- Preferences\n- Goals\nCaption: 'Provides guidance for future caregivers.'\n\nBottom section (dark green): 'Build Your Team'\nIcons and labels:\n- Trustee\n- Successor Trustee\n- Guardian (if needed)\n- Financial Agent\n- Health Care Decision Maker\n- Care Manager\n\nFinal banner (navy): 'A coordinated plan can provide financial security, protect public benefits, and ensure lifelong care.'\n\nStyle: elegant legal/financial infographic, professional typography, rounded rectangles, subtle icons, color-blind-friendly palette, clear arrows, suitable for CLE presentation or client handout, portrait US Letter (8.5 x 11)."}
3. I then asked it this way: "make one page infographic with color-coded decision boxes and arrows that can easily be formatted and printed as handout"
4. The result follows:

PLANNING FOR THE LIFETIME CARE OF A CHILD WITH SPECIAL NEEDS

A roadmap for funding care while protecting benefits.

START: What resources are available to provide for your child's future care?

1 FAMILY ASSETS

- Savings & Investments
- Real Estate
- Retirement Accounts
- Life Insurance
- Business Interests

Leave assets directly to your child?

NO

Usually NO – Direct gifts may affect SSI/Medicaid eligibility.

YES

Instead, consider a Third-Party Special Needs Trust.

2 GOVERNMENT BENEFITS

- SSI
- Medicaid
- Medicaid Waivers
- Housing & Food Assistance
- Vocational Services
- State Disability Services

GOAL: Preserve eligibility while improving quality of life.

3 LIFE INSURANCE

Who is the beneficiary?

Special Needs Trust (preferred) ✓

Avoid naming the child directly. ✗

4 RETIREMENT ACCOUNTS

- IRA
- 401(k)
- 403(b)
- Pension

Coordinate beneficiary designations with your estate plan.

5 ABLE ACCOUNT

Eligible under federal rules?

YES

- ✓ Tax-free growth
- ✓ Qualified disability expenses
- ✓ Complements a Special Needs Trust

6 FAMILY CONTRIBUTIONS

Family and friends can help by:

- Contributing to a Special Needs Trust
- Contributing to an ABLE Account (if eligible)
- Updating wills and beneficiary designations

7 LETTER OF INTENT

Include important information such as:

- Daily routine
- Medical needs
- Medications
- Therapies
- School/Work information
- Preferences
- Goals & Dreams
- Caregivers
- Social & Religious preferences
- Behavioral supports

Provides guidance for future caregivers.

WHO WILL HELP? BUILD YOUR TEAM

TRUSTEE
Manages the Special Needs Trust.

SUCCESSOR TRUSTEE
Steps in if the original trustee cannot serve.

GUARDIAN (IF NEEDED)
Makes personal and daily living decisions for your child.

FINANCIAL AGENT
Handles financial affairs under a Durable Power of Attorney (if appropriate).

HEALTH CARE DECISION MAKER
Makes medical decisions if you are unable to.

CARE MANAGER / ADVOCATE
Helps coordinate services and supports.

A COMPREHENSIVE PLAN OFTEN INCLUDES:

- Estate Planning Documents
- Third-Party Special Needs Trust
- ABLE Account (if eligible)
- Government Benefits Planning
- Life Insurance
- Retirement Beneficiary Planning
- Letter of Intent
- Successor Caregivers
- Regular Plan Reviews

KEY TAKEAWAY: Your goal is not simply to leave assets to your child—it is to create a coordinated plan that provides financial security, preserves eligibility for important public benefits, and ensures trusted people are available to provide care and oversight throughout your child's lifetime.

This infographic is for educational purposes only and is not legal advice. Consult with an attorney who focuses on special needs and elder law planning in your state.

Date: _____

Example #2 from Robert:

Here's the prompt:

"You are an experienced financial advisor, with particular expertise in dealing with the care costs of family members with special needs. You are working with an experienced elder law/special needs attorney to give a particular family some ideas about how they should plan financially for their now 8-year-old son, who has a diagnosis of autism spectrum disorder. They do not know what kinds of support he will need, but they are quite certain that he will not be able to earn significant income given the kinds and extent of disabilities he suffers. They are both in their early 40s, and both working. She is a physician, earns about $250,000 / year in a part-time position, and can work from home on a fairly regular basis. He is a banker, earning about $400,000 / year. Can you prepare a graphic representation to share with the lawyer for comment, with the ultimate goal to be to give the parents a roadmap for funding their son's likely future care and well-being while (to the extent possible) protecting his access to public benefits?"

DRAFT FOR LEGAL REVIEW — NOT LEGAL OR TAX ADVICE

A Lifelong Security Roadmap for Your Son

A funding framework built around one goal: give an 8-year-old with an autism spectrum diagnosis every resource his parents can provide, without ever putting his eligibility for SSI or Medicaid at risk — because no one yet knows how much support he'll need, or for how long.

Family
Two working parents, physician + banker, combined household income ≈ $650,000

Child
Age 8, autism spectrum diagnosis, future earning capacity uncertain

Prepared
August 2026, for discussion with special needs / elder law counsel

GUIDING PRINCIPLES

Four things this plan is built to do

Everything below — every account, trust, and policy — exists in service of these four commitments. Where a tactic conflicts with one of them, the principle wins.

01

Protect the benefits

SSI and Medicaid — especially Medicaid's home & community-based waivers — will likely fund the bulk of lifetime care. No asset should be titled or

02

Stay flexible

At 8, no one can predict his needs at 28. The plan favors vehicles that can flex — a trust with broad distribution powers, not a rigid formula.

03

Fund parents first

A well-funded parental retirement is itself special needs planning — it keeps the parents solvent, housed, and able to advocate for decades. Retirement savings are not

04

Document the intangible

Money follows instructions. A Letter of Intent — routines, preferences, medical and care history — is what lets a future

gifted in a way that disqualifies him.

sacrificed to over-fund the trust.

trustee actually use the money well.

THE LONG VIEW

Seven milestones between now and full funding

Each age is a decision point — a filing deadline, a legal capacity question, or a shift in which system (school, SSI, Medicaid, SSDI) is primarily responsible for him.

8 · Now

Build the foundation

Draft the trust, buy the insurance, open the ABLE account, write the first Letter of Intent.

12 · ~2030

Get on waiver lists

Many states allow early registration for Medicaid HCBS waivers — often years-long waits reward early filing.

17 · ~2035

Capacity review

Guardianship vs. supported decision-making vs. power of attorney — decided close to majority, based on his actual capacity then.

18 · ~2036

He applies in his own right

Parental income no longer counts against him ("deeming" ends). SSI and Medicaid applications typically filed here.

22 · ~2040

Ages out of school

IDEA entitlement to services ends. Adult day/vocational programs are not guaranteed — this is the most common funding gap.

~65 · Parents' retirement

Disabled Adult Child benefit

Once a parent files for Social Security (or dies), he may qualify for SSDI on that record — often larger, and it starts a Medicare clock.

∞ · Second death

Trust becomes irrevocable

Life insurance and residual estate pour into the special needs trust. Successor trustee takes over, guided by the Letter of Intent.

FUNDING ARCHITECTURE

Where the money comes from, where it lives, what it protects

The core design choice: almost nothing is ever titled in his name. Instead, money is routed into two purpose-built containers that the benefits system already knows how to treat correctly.

SOURCES

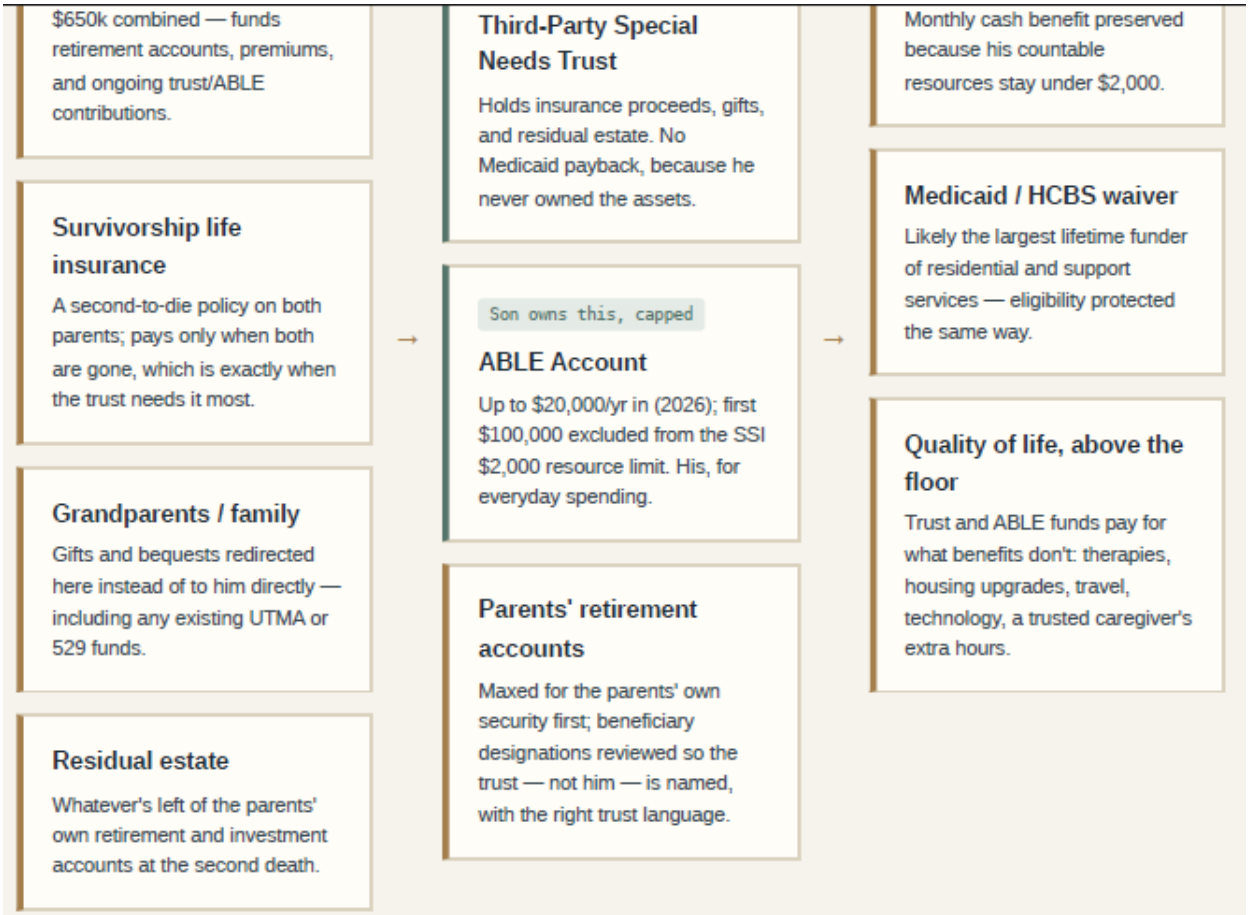
Earned income

VEHICLES

Son does not own this

WHAT IT PROTECTS

SSI eligibility



TWO CONTAINERS, COMPARED

Special needs trust vs. ABLE account

These aren't competitors — nearly every family plan uses both. The trust is for scale and discretion; the ABLE account is for small, everyday autonomy.

	Third-Party SNT	ABLE Account
Who owns the assets	The trust — not him	He does, directly
Practical funding limit	None — sized to the family's estate	$20,000/yr in; $100,000 balance shielded from SSI

Who decides on spending	Trustee, using discretion for his benefit	He (or his agent) spends it directly
Medicaid payback at death	None — it was never his asset	Yes, for Medicaid paid after the account opened
Best for	Housing, large purchases, long-term care funding, professional management	Groceries, rent, transportation — everyday dignity and choice

BENEFITS LANDMINES

The mistakes that most often cost a family their child's benefits

These are almost always well-intentioned — a grandparent's gift, a beneficiary form filled out on autopilot. Counsel should stress-test the family's existing accounts against this list.

AVOID

Naming him directly as beneficiary on life insurance or retirement accounts.

UTMA/UGMA accounts or any account titled in his name once he's an adult applicant.

Direct cash gifts from grandparents or relatives above the resource limit.

Leaving him assets outright in a will — even a well-meaning "equal shares to all children" clause.

A self-settled ("first-party") trust when a third-party trust will do — it carries a Medicaid payback provision the third-party version avoids entirely.

INSTEAD

Name the special needs trust as beneficiary, with counsel confirming the trust language qualifies for favorable retirement-account tax treatment.

Redirect existing UTMA or 529 funds into the trust or ABLE account before he turns 18.

Ask relatives to gift to the trust or ABLE account — one relative's ABLE gift and the trust can both receive funds in the same year.

Update the will so his share pours into the trust, not to him outright.

Confirm every existing account and policy with the attorney before, not after, a life event forces the issue.

THE FIRST 12 MONTHS

Where to start

Organized by who's driving each task. Nothing here is sequenced — most can run in parallel.

WITH THE ATTORNEY

- Draft the third-party special needs trust and name trustee/successors
- Update both wills to pour over into the trust
- Review retirement account beneficiary language for trust compatibility
- Confirm the state's specific SSI/Medicaid rules and waiver waitlist process

WITH THE FINANCIAL ADVISOR

- Get survivorship life insurance quotes and confirm ownership structure
- Open and begin funding the ABLE account
- Confirm both parents' retirement accounts are being maxed
- Redirect or convert any existing UTMA/529 assets earmarked for him

AS A FAMILY

- Draft the first version of the Letter of Intent
- Tell grandparents and relatives how to gift going forward
- Calendar a full plan review every 2–3 years and at each milestone above
- Register for the state Medicaid waiver waitlist if early enrollment is allowed

THE TEAM

Who holds which piece

Elder law / SN attorney	Financial advisor	CPA	Insurance specialist	Care coordinator
Trust drafting, benefits eligibility, guardianship	Funding strategy, investments, insurance coordination	Trust and family tax filings	Survivorship policy design and underwriting	Waiver navigation, day/vocational program search

Figures reflect 2026 federal rules (ABLE contribution limit, SSI resource limit); state Medicaid and waiver rules vary and should be confirmed locally.

Example #3 from Robert

Here's the prompt:

"If I gave you these additional pieces of information, could you update your roadmap?

1. The child with autism is the third of four children. The oldest is now 18 and headed off to college this year, the next oldest is 13 and seems to be very bright, the youngest is 6 and it's too early to tell whether she will be self-supporting or have any special needs of her own.
2. This family lives in New York state.
3. The couple owns their own home, and is convinced that it would be the perfect place for their disabled son to live after they both die.
4. They do not currently have life insurance of any kind. Their investment portfolios are worth about $500,000, and their retirement accounts another $1,000,000."

DRAFT FOR LEGAL REVIEW — NOT LEGAL OR TAX ADVICE

A Lifelong Security Roadmap for Your Son

A funding framework built around one goal: give an 8-year-old with an autism spectrum diagnosis every resource his parents can provide, without ever putting his eligibility for SSI or Medicaid at risk — because no one yet knows how much support he'll need, or for how long.

Family
Two working parents, physician + banker, combined income ≈ $650,000. Four children: 18 (college-bound), 13, 8 (our subject), 6

Location
New York State — state-specific Medicaid, OPWDD, and estate tax rules apply throughout

Current assets
$500,000 investments, $1,000,000 retirement accounts, a home they own outright — no life insurance in place today

Prepared
August 2026, for discussion with special needs / elder law counsel

GUIDING PRINCIPLES

Four things this plan is built to do

Everything below — every account, trust, and policy — exists in service of these four commitments. Where a tactic conflicts with one of them, the principle wins.

01

Protect the benefits

SSI and Medicaid — especially the OPWDD home & community-based waiver — will likely fund the bulk of lifetime care. No asset should be titled or gifted in a way that disqualifies him.

02

Stay flexible

At 8, no one can predict his needs at 28 — or whether his 6-year-old sister will one day need parallel planning of her own. The documents should flex without a full rewrite.

03

Fund parents first

A well-funded parental retirement is itself special needs planning. With four children to launch and no life insurance yet in place, sequencing matters as much as the total amount saved.

04

Document the intangible

Money follows instructions. A Letter of Intent — routines, preferences, medical and care history — is what lets a future trustee, sibling, or caregiver actually use the money well.

THE LONG VIEW

Seven milestones between now and full funding

Each age is a decision point — a filing deadline, a legal capacity question, or a shift in which system (school, SSI, Medicaid, SSDI) is primarily responsible for him.

8

Now

Build the foundation

Draft the trust, get insurance underwriting started, open the ABLE account, register with OPWDD, write the first Letter of Intent — while the oldest heads off to college.

12

~2030

Confirm waiver status

New York's OPWDD waiver has long waits — early registration (already begun) should be converted to active waiver status well before he needs services.

17

~2035

Capacity review

Guardianship vs. supported decision-making vs. power of attorney — decided close to majority, based on his actual capacity then.

18

~2036

He applies in his own right

Parental income no longer counts against him ("deeming" ends). SSI and Medicaid applications typically filed here.

22

~2040

Ages out of school

IDEA entitlement to services ends. Adult day/vocational programs are not guaranteed — this is the most common funding gap.

~65

Parents' retirement

Disabled Adult Child benefit

Once a parent files for Social Security (or dies), he may qualify for SSDI on that record — often larger, and it starts a Medicare clock.

∞

Second death

Trust becomes irrevocable

Life insurance, the home, and residual estate pour into the special needs trust. Successor trustee takes over, guided by the Letter of Intent.

WHY THIS IS URGENT

Sizing the gap

Nobody can hand you a precise target number today — that takes a real needs analysis with the attorney and a life-care planner. But the order of magnitude is already clear enough to act on.

$1.5M

Today's investments and retirement accounts combined — the pool currently expected to cover two parents' retirement, three siblings' launches, *and* a lifetime plan for your son.

$0

Life insurance in force today. This is the single largest gap in the plan, and the one item on this page that should not wait for the trust to be finished.

$7.35M

New York's 2026 estate tax exemption — comfortably above the family's current net worth, but worth watching once a large death benefit and a growing home value are added in.

A rough way to think about it: if unreimbursed care and quality-of-life costs beyond what Medicaid/OPWDD covers run **$30,000–$60,000 a year** for his adult life, a trust corpus of roughly **20–25 times that** would be needed to sustain it indefinitely, in today's dollars. That points toward a survivorship life insurance death benefit in the **low seven figures** as the anchor of this plan — a number the advisor and attorney should refine together, but not one to wait on before applying for coverage.

FUNDING ARCHITECTURE

Where the money comes from, where it lives, what it protects

The core design choice: almost nothing is ever titled in his name. Instead, money is routed into purpose-built containers that the benefits system already knows how to treat correctly.

SOURCES

not yet in place

Survivorship life insurance

A second-to-die policy on both parents; pays only when both are gone. Apply now — pricing only gets worse with age and health changes.

Earned income

$650k combined — funds retirement accounts, premiums, and ongoing trust/ABLE contributions.

Grandparents / family

Gifts and bequests redirected here instead of to him directly.

The home

Currently owned outright by the parents; earmarked as his future residence — see the dedicated section below before assuming this works automatically.

Residual estate

Whatever's left of the parents' own retirement and investment accounts at the second death.

↓

VEHICLES

policy owned outside the estate

Irrevocable Life Insurance Trust

Holds the survivorship policy so the death benefit lands outside the taxable estate — increasingly relevant as the benefit and the home's value grow.

son does not own this

Third-Party Special Needs Trust

Receives insurance proceeds, gifts, and residual estate. May ultimately hold the home itself. No Medicaid payback, because he never owned the assets.

son owns this, capped

NY ABLE Account

Up to $20,000/yr in 2026; first $100,000 excluded from the SSI resource limit. His, for everyday spending. No NY state tax deduction on contributions, unlike NY 529.

Parents' retirement accounts

Maxed for the parents' own security first; beneficiary designations reviewed so the trust — not him — is named, with the right trust language.

↓

WHAT IT PROTECTS

SSI eligibility

Monthly cash benefit preserved because his countable resources stay under $2,000.

Medicaid / OPWDD waiver

Likely the largest lifetime funder of residential and support services — eligibility protected the same way.

Quality of life, above the floor

Trust and ABLE funds pay for what benefits don't: therapies, housing upkeep, travel, technology, a trusted caregiver's extra hours.

NEW YORK NOTE

New York's estate tax exemption is **$7.35 million in 2026** — but it has a harsh "cliff": cross about 105% of that (~$7.72M) and the *entire* estate becomes taxable, not just the excess. The family is well under that today, but a several-million-dollar death benefit owned personally, stacked on a home that's appreciated for another 20–30 years, could approach it. Owning the policy inside an ILIT rather than personally is the standard fix.

TWO CONTAINERS, COMPARED

Special needs trust vs. ABLE account

These aren't competitors — nearly every family plan uses both. The trust is for scale and discretion; the ABLE account is for small, everyday autonomy.

	Third-Party SNT	ABLE Account
Who owns the assets		
	The trust — not him	He does, directly
Practical funding limit		
	None — sized to the family's estate	$20,000/yr in; $100,000 balance shielded from SSI; $520,000 NY ABLE account cap
Who decides on spending		
	Trustee, using discretion for his benefit	He (or his agent) spends it directly
Medicaid payback at death		
	None — it was never his asset	Yes, for Medicaid paid after the account opened
Best for		
	Housing, large purchases, long-term care funding, professional management	Groceries, rent, transportation — everyday dignity and choice

NEW YORK NOTE

SSI's cash benefit still uses the federal **$2,000** resource limit. But New York's own Medicaid resource limit for adults applying on a disability basis is far more generous — roughly **$33,038** for a single applicant in 2026. In practice that

means it's possible to lose the SSI cash payment while keeping Medicaid, and the OPWDD services it unlocks, fully intact. Worth confirming with counsel exactly how tightly the ABLE balance needs to be managed given that gap.

THE FAMILY HOME

Protecting the plan you've already made

Wanting him to live in the family home after both parents are gone is a plan, not just a hope — but only if the home is positioned correctly well before that day.

THE RISK

Medicaid Estate Recovery. If either parent ever needs Medicaid-funded long-term care themselves in old age, New York can seek repayment from their estate at death — including the home — unless it's protected in advance.

A house-rich, cash-poor trust. A home with no accompanying liquidity becomes a burden: property tax, insurance, and upkeep still need to be paid every year, indefinitely.

An SSI reduction, misunderstood. If the trust owns the home and he lives there rent-free, SSI can treat that as in-kind support and reduce his cash benefit — manageable, but easy to miss if no one plans for it.

Four children, one house. Without an explicit plan, siblings may reasonably expect the home's value is part of a shared inheritance, not set aside for one of them.

THE FIX

Separate the parents' own Medicaid planning from his. A Medicaid Asset Protection Trust for the parents' home, started with a five-year runway, can shield it from estate recovery on their side.

Plan for the home to ultimately sit inside his special needs trust, funded with enough liquid assets alongside it to cover taxes, insurance, and maintenance indefinitely — not just the house itself.

Ask the attorney about an occupancy agreement that structures how he "pays" for housing, to manage the SSI in-kind-support reduction deliberately rather than by accident.

Address the home explicitly in the estate plan so the other three children understand — and ideally were part of the conversation about — why it's earmarked this way.

NEW YORK NOTE

New York exempts up to **$1,097,000** of home equity from the Medicaid asset test while a parent still lives there. That protection is about the parents' own eligibility during their lifetimes — it does not, by itself, protect the home from estate recovery after both have passed, which is the piece that actually determines whether the house is still available for your son.

ONE PLAN, FOUR CHILDREN

Balancing fairness with what he specifically needs

"Equal" and "fair" aren't the same thing here. The goal is a plan the other three children understand and don't resent — which starts with naming it explicitly rather than assuming it works itself out.

AGE 18

Heading to college

Normal 529 funding continues. Any funds left in this account after school can later roll into your son's ABLE account tax-free — a family member rollover, not a new gift.

AGE 13

On a similar track

No complications yet. Her inheritance can mirror her older sibling's. Whether she's ever asked to play a role — co-trustee, informal support — is worth raising as a choice, not an assumption, as she gets older.

AGE 8

Our subject

His "share" flows through the special needs trust instead of outright — likely a larger share in practice, given the lifetime need. Naming that difference openly, now, is easier than explaining it later.

AGE 6

Still an open question

Too early to know if she'll need parallel planning. Ask the attorney to draft the estate plan so *any* child receiving means-tested benefits at the time of distribution automatically inherits through a trust — no full rewrite required if she turns out to need one.

BENEFITS LANDMINES

The mistakes that most often cost a family their child's benefits

These are almost always well-intentioned — a grandparent's gift, a beneficiary form filled out on autopilot. Counsel should stress-test the family's existing accounts against this list.

AVOID

Naming him directly as beneficiary on life insurance or retirement accounts.

Leaving him assets outright in a will — even a well-meaning "equal shares to all four children" clause.

Direct cash gifts from grandparents or relatives above the resource limit.

Assuming the home passes to him automatically without addressing Medicaid estate recovery first.

A self-settled ("first-party") trust when a third-party trust will do — it carries a Medicaid payback provision the third-party version avoids entirely.

INSTEAD

Name the special needs trust as beneficiary, with counsel confirming the trust language qualifies for favorable retirement-account tax treatment.

Draft contingent special needs language into all four children's shares, not just his — see the sibling section above.

Ask relatives to gift to the trust or ABLE account instead of to him directly.

Register with OPWDD's intake process now, even though services are years away — New York's waiver waits reward early registration.

Confirm every existing account, policy, and the home's title with the attorney before, not after, a life event forces the issue.

THE FIRST 12 MONTHS

Where to start

Organized by who's driving each task. Nothing here is sequenced — most can run in parallel.

WITH THE ATTORNEY

— Draft the third-party special needs trust and name trustee/successors

— Draft contingent SNT language into all four children's shares

— Evaluate a Medicaid Asset Protection Trust for the home, on its own timeline

— Set up the ILIT to own the new life insurance policy

— Confirm New York's current OPWDD, Medicaid, and estate-tax specifics

WITH THE FINANCIAL ADVISOR

— Start survivorship life insurance underwriting now — this is the most time-sensitive item on the page

— Open and begin funding the NY ABLE account

— Confirm both parents' retirement accounts are being maxed alongside the new premium

— Model a real target trust corpus with a life-care planner, once available

AS A FAMILY

— Draft the first version of the Letter of Intent

— Register with OPWDD's front-door intake process

— Talk with the older two children about how the home and trust are structured, and why

— Calendar a full plan review every 2–3 years and at each milestone above

THE TEAM

Who holds which piece

Elder law / SN attorney Trust drafting, benefits eligibility, guardianship, home protection	**Financial advisor** Funding strategy, investments, insurance coordination
CPA Trust and family tax filings	**Insurance specialist** Survivorship policy design and underwriting

OPWDD care coordinator

Waiver registration, day/vocational program search

Discussion draft — prepared for review with elder law / special needs counsel. Not legal or tax advice.

Figures reflect 2026 federal and New York State rules (ABLE limits, SSI and NY Medicaid resource limits, NY estate tax exemption); confirm current figures before relying on them.

Materials Pending: Speaker has requested that materials be distributed at or after the conference. Please check the online materials for availability, as these materials will not be included in the printed conference materials.

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National Conference on Special Needs Planning and Special Needs Trusts

Thursday
October 22, 2026

Veterans Benefits Law: An Overview

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Veterans Benefits Law: An Overview

Special Needs Trust Conference
October 22, 2026

Chief *Judge Michael P. Allen*
United States Court of Appeals for Veterans Claims

1

Organization of the VA

- Executive Branch/Cabinet level agency
- VA is a "them," not an "it."
- Three main components
  - Veterans Benefits Administration Agency of original jurisdiction for claims = VA Regional Office (RO or VARO)
    - 58 VARO's
  - Veterans Health Administration, including VAMCs
  - National Cemetery Administration

2

VA Benefits

- Medical care (VHA)
- Home loan guarantees
- Educational assistance
- Survivor benefits
- Pension for indigent wartime veterans
- Caregiver Benefits (VHA)
- Disability compensation
  - Monthly nontaxable check
  - For current disabilities connected to the veteran's military service

3

Who is a Veteran?

- Requirement of Veteran Status for benefits
- Active Military, Naval, Air, or Space Service Requirement, including Coast Guard. Also, uniformed segments of the National Public Health Service and the National Oceanic and Atmospheric Administration
- Reserve or National Guard Service is complicated.
- To be a "veteran" one must meet a discharge requirement.
  - "Who was discharged or released therefrom under conditions other than dishonorable."
  - DD Form 214

4

The DD-214

- What's on it?
  - Biographical information
  - Verifies complete span of time served on active duty
  - Lists MOS (Military Occupational Specialty)
  - Overseas service
  - Awards
  - Rank
  - Character of Discharge
  - Reason for Discharge

5

VA BENEFITS: Pensions & Compensations

6

Pension vs. Compensation:
The Basics

- Non-service-connected disability
- Needs-based
- Need to show:
  - Low income
  - Wartime Service
  - Total and permanent disability

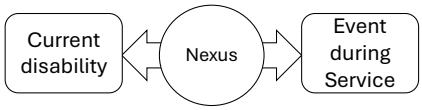
- Service-connected disability
- Not needs-based
- Need to show:
  - Eligibility
  - Current Disability
  - Nexus

7

Establishing Entitlement to Disability Compensation

8

Establishing entitlement
to disability compensation



(Statute; regulation; case law)

9

Disability Compensation:
1. Current Disability

- Must have current disability or current disabling residuals
- May be awarded disability compensation if resolves prior to adjudication

10

Disability Compensation:
1. Current Disability

- Made by a medical professional or some other person with specialized training that qualifies them to give medical diagnosis
- Generally, lay evidence will not satisfy the requirement

11

Disability Compensation:
2. In-service Event

- Does not have to be directly related to military duties if happened between entry and discharge
- STANDARD: Evidence in the record demonstrates that it is *as likely as not* that there was an in-service aggravation of disease/injury
- How do you prove this?

12

Disability Compensation: 3. Nexus

- Direct causative link between current disability and in-service event
- Aggravation of pre-existing condition
- Presumptive service connection
- Secondary service connection
- Consequence of injury by VA health care

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Disability Compensation: 3. Nexus (cont'd)

- Medical evidence of nexus almost always required (Biggest denial basis)
- Competent medical evidence: Evidence provided by a person qualified through education, training, or experience to offer medical diagnoses, statements, or opinions.
- Does not have to be a medical doctor.

14

Sometimes, the requirements for compensation are hard to prove, so VA created some "short-cuts" called presumptions.



15

Examples of Presumptions (Just a quick comment)

- Agent Orange
- Gulf War Syndrome
- Burn Pits
- Camp Lejeune water/Litigation
- Other diseases and situations
- PACT ACT: "Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022'' or the "Honoring our PACT Act of 2022'' PL 117-168

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Presumptions: Agent Orange

- Presumption applies if you:
  - Served in Vietnam
    - Between Jan. 9, 1962 and May 7, 1975
    - Set foot on land or inland waterways or served within 12 nautical miles of the shore of Vietnam
  - Have one of a list of specified diseases
  - For some diseases, got the disease within 1 year of serving
  - Do NOT need to prove exposure to Agent Orange

17

Navy Veterans and AO Exposure

- ***Procopio v. Wilkie*** (Fed. Cir. Jan 29, 2019)
  - 12 nautical miles
  - Stay on cases
- Blue Water Navy Vietnam Veterans Act of 2019 (June 25, 2019 became law amending 38 USC 1116A)
  - Vets who filed claims between 9/85 and 1/20 (or survivors)
  - 12 nautical miles seaward of a line commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia interesting at a number of geographic points latitude and longitude.

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Presumptions: Agent Orange

- List of diseases includes:
  - Many types of cancer
    - Lung, prostate, myeloma, leukemia
    - Hodgkins Disease
    - Non-Hodgkins Lymphoma
  - Type 2 Diabetes
  - Many others
    - See http://www.va.gov/agentorange

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Presumptions: Camp Lejeune

- Served at Camp Lejeune or MCAS New River for at least 30 cumulative days from August 1953 through December 1987; AND
- Have at least one of these conditions:
  - Adult leukemia
  - Aplastic anemia and other myelodysplastic syndromes
  - Bladder cancer
  - Kidney cancer
  - Liver cancer
  - Multiple myeloma
  - Non-Hodgkin's lymphoma
  - Parkinson's disease

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Presumptions: For All Veterans

- Tropical Diseases
  - Within 1 year of service
- Tuberculosis
  - Within 3 years after service
- Multiple Sclerosis
  - Within 7 years after service

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Presumptions: For Certain Veterans

- Prisoners of War
- Veterans injured in combat
  - Note: If records show you were in combat, do NOT have to prove you were injured
- Veterans exposed to radiation

22

Disability Compensation: Ratings

- Disability refers to the "average impairment in earning capacity" resulting from the rated condition.
- VA created a schedule of ratings providing for degrees of impairment evaluated from 0 to 100 percent in increments of 10 percent.
- Combined ratings. *See* "Combined Ratings Table," 38 U.S.C.S. § 1155
- A brief word about "effective dates."

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Accrued Benefits Dependency and Indemnity Compensation (DIC)

24

Accrued Benefits

- At one point, a veteran's claim died with him or her.
- That is no longer true. A veterans surviving spouse, surviving children, and dependent parents may seek to complete claims pending at the time of the veteran's death.
- Can either substitute into the veteran's shoes or pursue as a new claim. Difference in evidence considered.

25

DIC Eligibility

- The Service-member died while on active duty, active duty for training, or inactive duty training, **OR**
- The Veteran died from an injury or disease deemed to be related to military service, **OR**
- The Veteran died from a non service-related injury or disease, but was receiving, **OR** was entitled to receive, VA Compensation for service-connected disability that was rated as totally disabling
  - For at least 10 years immediately before death, **OR**
  - Since the Veteran's release from active duty and for at least five years immediately preceding death, **OR**
  - For at least one year before death if the Veteran was a former prisoner of war who died after September 30, 1999

26

Program for Comprehensive Assistance for Family Caregivers

27

Caregiver Program

- In 2010, Congress adopted the Caregiver Program that at the time was limited to post-9/11 veterans. However, as of October 1, 2022, the program is open to veterans of all eras.
- The basic notion is that seriously disabled veteran (generally rated as 70% disabled) who is in need of caregiver services because they need assistance in ADL (or similar need) may have a family member received a monthly financial stipend to provide such care.

28

Caregiver Program

- Additional, non-monetary benefits are also available to caregivers (respite service, counseling, etc.)
- Has been an extraordinarily popular program. But it has also been controversial.
- Program has recently been expanded. As it stands now, it provides an important source of benefits for veterans of all eras.
- For more information, see the VA's website at:
  - https://www.caregiver.va.gov/support/support_benefits.asp

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Entitlement to Pension Benefits

30

Pension: Low Income

- Countable income does not exceed Maximum Annual Pension Rate
  - What is veteran's net worth?
  - What are the incomes of the veteran, veteran's spouse, and the veteran's dependent children?
- Amount of pension increases with each dependent
- Need is reassessed annually
- Can be for a veteran or the spouse of a deceased veteran.



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Non-Service Connected Pension Requirements

(1) wartime service that ultimately results in a discharge under other than dishonorable conditions,

(2) permanent and total disability, and

(3) demonstrated need. The VA determines need by calculating the income and net worth of the claimant.

Periods of War:

1. World War II: December 7, 1941 – December 31, 1946
2. Korean Conflict: June 27 1950 – January 31, 1955
3. Vietnam Era: August 5, 1964 – May 7, 1975.
4. Persian Gulf War: August 2, 1990 – date to be prescribed by Presidential proclamation.

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Requirement: Wartime Service

- Discharged under conditions other than dishonorable
- Minimum period of service (if enlisted after Sept. 8, 1980 24 mos or the full period for which you called up.)
- PLUS one of the following:
  - Total of 90 days during one or more periods of war
  - 90 or more consecutive days with one day during a period of war
  - At least one day of wartime service resulting in discharge for service-connected disability

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Requirement: Permanent and Total Disability

- Permanent = Unlikely veteran's disability will get better over time
- Total = 100% rating
  - Ineligible if veteran has *substantial gainful employment*
- Veterans 65+ are *presumed* to be permanently and totally disabled
- Vets in nursing homes (SNFs) qualify/Not ALF
- Disability does NOT have to be service-connected!

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Income Requirement

Needs based program.

In order to establish entitlement to improved pension, the VA considers the claimant's **net worth** as well as his or her **income**.

-Need does not refer to physical disability.

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Income Requirement

If countable income exceeds the maximum annual pension rate (MAPR), a claim for improved pension will be denied.

-MAPR for Veteran 2025: $16,965 [no dependents]

-MAPR for Spouse 2025: $11,380 [no dependents]

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Exclusions and Deductions from Income for Improved Pension Purposes

Sources of income excluded and deductions from income for VA improved pension purposes include*:

1.)Welfare
2.)Fire insurance proceeds
3.)Profit from sale of property
4.)Funds in joint accounts acquired by death
5.)Medical Expenses
6.)Interest accrued on retirement annuity accounts
7.)Expenses of last illness and burials
8.)Educational Expenses

* 38 U.S.C.S. § 501(a); 38 C.F.R. § 3.272

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The Formula Used to Calculate Improved Pension

Simple Income Example:

-MAPR is $16,965 a year

-Veteran income is $10,000

-VA pension will be $6,965 ($16,965 - $10,000 = $ 6,965) paid in monthly installments

$580.42/month

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The Formula Used to Calculate Improved Pension - Deducting Medical Expenses

- **A portion of your unreimbursed medical expenses** (what you paid out of pocket after medical insurance pays) may **reduce** your countable income. If your medical expenses for a year are $8,000 and your medical insurance pays $6,000 of that, your **unreimbursed medical expense is $2,000.**
- That **portion** of your unreimbursed medical expenses ($2,000 in the example above) which is **more than 5%** of the maximum rate of pension, or **$848.25** in this example ($16,965 x .05 = $848.25), may be deducted from your total combined income which then increases the amount VA will pay to you.

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The Formula Used to Calculate Improved Pension Deducting Medical Expenses

Since the $2,000 out of pocket expenses is greater than $848.25, you may reduce your income by $1,151.75 ($2,000 - $848.25). So, your income for VA pension purposes is now **$8,848.25** ($10,000 - $ 1,151.75).

Your VA pension would then be $16,965 (maximum rate for a veteran) minus $8,848.25 (total income after deducting unreimbursed medical expenses), or **$8,116.75** for that year.

$676.40/month

40

Net Worth

- Was an arbitrary standard designed to take into account life expectancy, depletion rate of assets, etc…
- Now (EFF DATE: 10/18/18) is pegged to the Medicaid CSRA (community spouse resource allowance)
- 2025: $159,240
- The length of the penalty period is determined by dividing the fair value of the income or assets given away by a "penalty divisor." For 2025 the penalty divisor is $2,795.

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Spending Down Assets

- May be expended on any item that claimant pays fair market value for that isn't an ASSET.
- Transfers change!!!
  - 36-month look-back period. 5-year max penalty period.
  - Any transfer for less than market value that cannot be liquidated for claimant benefit (irrev. Trust) for an amount that would have made claimant ineligible for pension benefits.
  - Exception: trust for child incapable of self-sufficiency.

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Special Monthly Pension (SMP)

Special Monthly Pension (SMP) is awarded for disability levels exceeding permanent and total disability. There are two types of SMP:

1.) Housebound benefits (HB).
also permanently housebound (essentially confined to his or her home).
$20,732 (2025 Veteran alone)/$13,908 (2025 Spouse alone)
2.) Aid & Attendance (A&A).
needs the regular aid and attendance of another person for ADL.
$28,300 (2025 Veteran alone)/$18,187 (2025 Spouse alone)

43

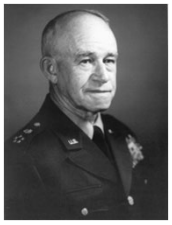
Aid & Attendance

- Require the aid of another person in order to perform personal functions required in everyday living such as:
  - Bathing, showering, toileting
  - Feeding (not merely meal preparation)
  - Transferring from bed/chair, overall mobility
  - Incontinence
  - Adjustment of prosthetic
  - Bedridden due to disability
- Patient in a nursing home due to mental or physical incapacity;
- Limited eyesight (blind or very nearly blind)

44

"We are dealing with veterans, not procedures -- with their problems, not ours."

General of the Army
Omar Bradley, speaking
as Administrator of the
U.S. Veterans Administration
in 1947



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QUESTIONS

?????????

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Crossing Borders: When Special Needs Planning Goes International

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Crossing Borders

When Special Needs Planning Goes International

Presented by:
Benjamin Rubin JD LLM

1

1st, a "little" about the speaker

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Benji Rubin (JD/LLM)

Having Mitchell as a brother profoundly shaped who Benji is today, & thus the area of law he chose to practice. His personal experiences as a sibling offer a unique perspective into the responsibilities that come with caring for a sibling with special needs, a concern that he shares with all brothers & sisters of individuals with special needs.

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- Former Director and Treasurer, The Arc of Illinois
- Past President & Director, of S.I.B.S., the Illinois Chapter of Sibling Leadership Network (National Sibling Association)
- Past Chair of the American Bar Association Elder Law and Special Needs Planning Group
- Past Chair of the American Bar Association Special Needs Planning Committee
- Director, Clearbrook Board of Directors
- Director, NSSRA (North Suburban Special Recreation Association) Foundation
- Director, DayOne Pact, trustee of special needs trusts & serves as guardian
- Director, SEDOL (Special Education District of Lake County) Foundation
- Director, Special Needs Alliance, the national, non-profit, membership by invitation, organization of special needs planning attorneys
- Continuing Legal Education Faculty Member (teaching other attorneys) of the Illinois Institute for Continuing Legal Education, as well as for the Illinois State Bar Association, & for the American Bar Association, on the topic of special needs trusts, and special needs legal & future planning

*

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"Legal and future planning for our fellow families of individuals with special needs, including intellectual disabilities, developmental disabilities, and/or mental illness, is not one thing we do, it's the only thing we do; it's not one area of our practice, it's our only area of practice."

5

January 27, 1981
MITCH

















MEMBER SNA
President 2017-2018

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6

Growing up as a "Sibling"…

- Helps put things in perspective in life
  - Different than parents…
  - Vacations…
  - Trips to the Store…
- Understanding our future responsibilities

MEMBER SNA SPECIAL NEEDS ALLIANCE Attorney for special needs planning

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Benji Rubin

President

S.I.B.S.

Supporting **I**llinois **B**rothers & **S**isters

Illinois Chapter of the national **Sibling Leadership Network**





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8

ROADMAP

What we are going to work through

1	**The U.S. benefits triage**	Which benefits travel, which stop at the border, and which are gone for good once the person leaves.
2	**The receiving country's answer**	Whether a U.S. special needs trust is even recognized — and whether it is a countable resource there.
3	**Canada · U.K. · Mexico**	Three legal traditions, three very different answers. Plus a Chicago-to-Toronto case study.
4	**Guardianship across borders**	Why there is no such thing as 'transferring' a guardianship internationally.
5	**Foreign situs property**	What happens when the SNT owns — or inherits — real property abroad. India as the working example.
6	**Drafting ideas**	Thoughts of how to draft for internationally mobile beneficiaries.

9

THE PROBLEM

Why this lands on your desk more than it used to

Parents retire abroad
A parent takes a package, retires to Mexico or returns to family in the U.K., and assumes the adult child comes along.

Job relocation
A sibling or parent takes a transfer to Toronto, London or Bangalore. The support network moves with them.

Return migration
First-generation clients go home to family caregiving. The person with a disability is a U.S. citizen who has never lived there.

Cost of care arbitrage
Families discover that residential support abroad costs a fraction of U.S. private pay — and that the trust corpus stretches further.

Inherited foreign property
Nobody planned a move at all. A grandparent in India or Mexico dies and the SNT beneficiary is now a co-owner of real estate.

Dual citizenship
The beneficiary already holds a second passport. The family assumes benefits and trusts travel with the passport. They do not.

The common thread: the family makes the decision first and calls counsel second. Assume you are being asked to fix, not to plan.

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Four Questions:

Q1 **What happens to the U.S. public benefits?**
Federal entitlement vs. federal means-tested vs. state-administered. Only one of them is portable.

Q2 **Does the destination recognize the trust at all?**
Common law jurisdictions generally ask whether the beneficiary can compel a distribution. Civil law jurisdictions may not recognize the trust as a separate thing.

Q3 **Who taxes the trust now — and at what rate?**
Trust-level residence, beneficiary-level attribution, and distribution-level charges. Plus the U.S. question of whether the trust just became foreign.

Q4 **Who has legal authority over the person?**
Guardianship, conservatorship, powers of attorney and supported decision-making do not cross borders on their own.

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1 What happens to the U.S. benefits?

Some travel. Some suspend. Some are simply gone.

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THE TRIAGE TABLE

Portability at a glance

Benefit	Travels abroad?	The rule that controls	What to warn the client about
SSI	No	Ineligible after 30 consecutive days / a full calendar month outside the U.S.	Terminated outright after 12 months — a brand new application on return
SSDI	Generally yes	Payable to U.S. citizens in most countries; alien nonpayment rules for non-citizens	Cuba and North Korea are barred; payments withheld, not forfeited
DAC / CDB	Generally yes	Childhood disability benefits follow the SSDI rules, not the SSI rules	Continuing-disability reviews are still conducted from abroad
Medicare	Enrolled — yes Covered — no	Essentially no coverage for care received outside the U.S.	Dropping Part B creates a permanent 10%-per-year late enrollment penalty
Medicaid	No	State residency is a condition of eligibility	Loss of the HCBS waiver is usually the single largest financial hit
ABLE account	Account survives	No residency test to keep the account open	Qualified disability expenses abroad, and the potential Medicaid payback continue as before.
SNAP / Section 8 (HUD)	No	Benefit Card doesn't work outside US, and Must be resident of State you are enrolled (under Medicaid).	Nothing to preserve; plan around the gap

SSI figures for 2026: federal benefit rate $994 individual / $1,491 couple; resource limits remain $2,000 and $3,000.

13

SUPPLEMENTAL SECURITY INCOME

SSI: the thirty-day cliff

30 consecutive days outside the United States and SSI eligibility ends

20 C.F.R. § 416.1327 · POMS SI 02301.225

- "United States" means the 50 states, D.C. and the Northern Mariana Islands — Puerto Rico, Guam and the USVI count as outside.
  - Norther Mariana Islands are tough negotiators!
- The clock starts the day after departure and ends the day before return.
- Reinstatement requires 30 consecutive days of physical presence back in the U.S.; payment resumes the month after that.
- After 12 continuous months abroad, the record is terminated — a new application, new medical development, new five-year bar analysis for non-citizens.

The narrow exceptions

Children (under 18 or sometimes 22) of a parent on active military duty stationed abroad, and certain students under 22 studying abroad, may keep SSI. Neither exception fits the typical family relocation.

The trap nobody sees coming

A "long visit" to test the move is the same thing as a move. Six weeks with grandparents in Toronto costs the client a full SSI suspension and a 30-day re-presence period.

Downstream effect

In most states SSI is the gateway to Medicaid. Losing SSI is rarely just a $994 problem — it is the loss of categorical Medicaid eligibility and, with it, the waiver. Of course, losing residency in that state will cause loss of Medicaid eligibility anyway even in 209(b) states.

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TITLE II

SSDI and disabled adult child benefits do travel

- Title II disability benefits — including disabled adult child (DAC) benefits on a parent's record — are generally payable to U.S. citizens anywhere in the world.
- For non-citizens, the alien nonpayment provisions suspend benefits after six consecutive calendar months abroad unless an exception applies.
- Totalization agreements are one route to an exception. The U.S. has agreements with Canada and the U.K.; it does not have one with Mexico or India.
- Payments cannot be sent to Cuba or North Korea. For U.S. citizens the money is withheld and recoverable on leaving; for others it can be forfeited.

Marriage still matters

A DAC benefit generally terminates on marriage to someone who is not also receiving certain Social Security benefits. Local marriage customs abroad could therefore end DAC benefits

The administrative reality

SSA administers overseas cases through Federal Benefits Units at U.S. embassies. Expect slower service, periodic questionnaires, and continuing-disability reviews conducted by mail.

Planning consequence

For a beneficiary who has a Title II record — or a parent's record to draw on — an international move is survivable. For an SSI-only beneficiary it is a cliff. One of the first things to check is whether the beneficiary can convert to, or is already dually entitled to, DAC benefits.

15

HEALTH COVERAGE, PART 2

Medicaid and the waiver: the biggest loss is state specific.

- Medicaid eligibility requires residency in the administering state. Leaving the country ends it; there is no portability and no reciprocity.
- The cash value of the medical card is not the point. The key is the home and community-based services waiver: day programs, supported employment, behavioral supports.
- Those services are frequently worth $40,000 to $300,000+ per year — far more than the SSI or even CDB check the family is often focused on.
- The waiver slot does not wait. Give it up and the beneficiary rejoins the queue on return.

Three questions to run before anyone books a flight

1. How long may the beneficiary be out of state before the agency treats residency as abandoned? This is a state-by-state and sometimes county-by-county answer.
2. Does the state have any reserved-capacity, re-entry or priority-restoration policy for people who leave and come back? Get it in writing from the agency, not from a phone call.
3. What does the destination country's system actually offer, and what is its own waiting list? Many are less generous than the US.

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2 How will the new country treat the SNT?

Recognition, means-testing, and three layers of tax.

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QUESTION A

Recognition: Civil Vs. Common Law

	Canada (common law provinces)	United Kingdom	Mexico
Trust recognized?	Yes — a mature domestic trust law of its own	Yes — the source of the doctrine	Not as a domestic institution; the closest analogue is the fideicomiso, a bank-administered trust
Hague Trusts Convention	Ratified; in force for most common law provinces	Ratified and in force	Not a party
Domestic analogue	The Henson trust — absolute discretionary trust	Discretionary trust; the statutory 'disabled person's trust' ("DPT"). Tax relief and benefit protection.	There really is none.
Practical result	A well-drafted U.S. SNT usually functions, but is not automatically a Henson trust. Special language important.	Probably only use DPT for UK Situs Property. Taxes are a mess with Trusts, be careful.	Recognition is uncertain; plan for tax attribution rather than trust protection

Practice point: recognition and protection are different questions. Every one of these jurisdictions will recognize that the trustee holds legal title. Not one of them will automatically give a U.S. SNT the benefit-preserving treatment it was drafted to achieve at home.

18

THE U.S.-SIDE MALPRACTICE TRAP

Do not let the trust become a foreign trust by accident

IRC § 7701(a)(30)(E) — both prongs required

COURT TEST — a court within the United States must be able to exercise primary supervision over administration.

CONTROL TEST — one or more United States persons must have authority to control all substantial decisions.

Fail either one and the trust is foreign from the day it failed, subject to a 12-month cure window.

How SNTs fail these tests

- The successor trustee named in the instrument is the sibling who now lives in Toronto or London. If Trustee is US Citizen still should be okay as they are a US Person.
- A non-U.S. person — often a parent abroad — holds a removal-and-replacement power or a veto over distributions.
- An automatic migration or 'flight' clause inherited from an asset protection form.
- A foreign court asserts supervisory jurisdiction after the beneficiary relocates.

What it costs

Treasury regulations treat a domestic trust that becomes foreign as transferring its assets to a foreign trust — a deemed sale with gain recognition. Then come Forms 3520 and 3520-A, throwback tax on accumulated income distributed later, withholding exposure, and penalties that start at $10,000.

The reassuring part

A U.S. citizen trustee who happens to live abroad is still a United States person for the control test. Citizenship, not residence, is what the statute measures. So the fix is usually simple: name U.S.-person fiduciaries, and say so expressly in the instrument.

Treas. Reg. §§ 301.7701-7 and 1.684-4. The 12-month cure period for inadvertent changes is in the regulations — but only if somebody notices.

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Spotlight: Canada

The most common move, and the most instructive one.

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SPOTLIGHT 1 OF 3

Canada at a glance

Benefits are provincial

There is no national disability income program on the U.S. model. Ontario runs ODSP; Alberta runs AISH; B.C. runs PWD. The rules differ materially.

Federal layer is new

The Canada Disability Benefit launched in 2025 as a federal top-up, gated on the Disability Tax Credit. Up to $204.20 per month for the July 2026 to June 2027 year.

The trust tool is the Henson trust

A fully discretionary trust that the beneficiary cannot compel. It is a creature of case law, not statute, and its ODSP treatment is governed by policy directive.

Health care is provincial too

Ontario eliminated the three-month OHIP waiting period. Coverage begins with residency — but coverage is not the same as service capacity.

Immigration is the gating item

Medical inadmissibility on excessive demand grounds can defeat the move entirely for economic-class applicants. This is often the first issue, not the last.

Tax follows residence, quickly

Canada taxes on residence, not citizenship, and the residence tests for individuals and trusts are separate and both aggressive.

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ONTARIO DISABILITY SUPPORT PROGRAM

ODSP: the numbers that drive the plan

Item	2026 figure
Maximum monthly income support, single recipient	$1,436 (rose 1.9% on July 1, 2026)
Asset limit, single / couple	$40,000 / $50,000
Inheritance or life insurance held in trust — exempt up to	$100,000 (combined with cash surrender value)
Henson trust — capital exemption	No limit
Discretionary trust payments to beneficiary, any purpose	$10,000 per 12-month period
Disability-related items and services	Exempt without dollar limit, if properly characterized (Per the expert on Henson Trusts: Ken Pope this sounds like the ABLE account "Disability Related Expenses" so really no restriction
RDSP balance	Fully exempt as an asset

The comparison that matters

ODSP $1,436 / month
SSI $994 / month

ODSP asset limit $40,000
SSI resource limit $2,000

Canada is, on these two numbers alone, considerably more generous. Families notice. Do not let that headline comparison carry the whole decision — the service side is where the losses live.

The $10,000 is a nice exception allowing direct distribution to beneficiary (think spending money for the beneficiary). But also could apply to payments that are not "properly categorized"

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DRAFTING COMPARISON

The Henson trust — and whether your SNT is one

Three structural requirements

1. **Absolute discretion**
   The trustee's power to pay or withhold must be unfettered and not reviewable on a support standard.
2. **No enforceable entitlement**
   The beneficiary must have no right to compel income or capital — and no power to terminate or vest.
3. **Third-party settled**
   Created for the person by someone else, typically by a parent's will. A self-settled trust will not work, though there is an exemption for a certain amount of law suit settlement funds.

Where a U.S. SNT falls short

- Mostly it will probably be okay but suggest add ability to change Trust as necessary in the even the beneficiary's residence changes to another state "or province of Canada"
- A first-party d4A trust: self-settled, and the payback runs to U.S. states that will never provide services again.

Summary: A carefully drafted third-party SNT with genuine sole discretion will usually satisfy Ontario's requirements. A first-party payback trust will almost certainly not.

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DTC · RDSP · CDB

The Canadian toolkit the family gains

Disability Tax Credit
The gateway. Form T2201, certified by a medical practitioner, assessed on functional limitation rather than diagnosis. Nothing else in the Canadian system opens without it — and it can take months. Start the application before the move, not after.

Registered Disability Savings Plan
Lifetime contribution limit of $200,000, matched by federal grants and, for low-income beneficiaries, bonds. Fully exempt as an ODSP asset. This is the single best planning vehicle Canada offers — and it requires DTC eligibility, a SIN and Canadian residency.

Canada Disability Benefit
Federal, income-tested, launched 2025. Up to $204.20 per month for July 2026 through June 2027. Requires DTC approval, Canadian tax residency and filed returns. Ontario has exempted it from counting as income against ODSP.

The RDSP can be complicated for a U.S. person

If the beneficiary is a U.S. citizen — and in these families they usually are — the RDSP's Canadian tax deferral means nothing automatically to the IRS. Internal growth, grants and bonds are generally taxable income in the United States, with no treaty election available; the U.S.-Canada treaty's retirement-plan election reaches RRSPs and RRIFs, not RDSPs. Revenue Procedure 2020-17 relieves the Form 3520 and 3520-A filing burden for RDSPs and RESPs that meet its conditions. Nor does it touch FBAR or Form 8938. And the plan's investment menu is largely Canadian mutual funds — which are generally passive foreign investment companies to a U.S. holder.

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CANADIAN TRUST RESIDENCE

Will Canada tax the U.S. trust? Section 94

The deemed-residence machinery

A non-resident trust is deemed resident in Canada — and taxed on worldwide income — if at the relevant time it has either:

- a RESIDENT CONTRIBUTOR, meaning a contributor resident in Canada; or
- a RESIDENT BENEFICIARY, which requires both a Canadian-resident beneficiary AND a CONNECTED CONTRIBUTOR.

Resident contributors and resident beneficiaries can be jointly and severally liable for the trust's Canadian tax.

What this means in practice

- GOOD NEWS: a Canadian-resident beneficiary alone does not deem the trust resident. If the U.S. parents settled the trust and never lived in Canada, there is generally no connected contributor.
- BAD NEWS: if the parents later join the child in Canada, they become contributors resident in Canada and the trust is swept in.
- WORSE NEWS: a self-settled first-party SNT has the beneficiary as its contributor. Move the beneficiary and you have a resident contributor on day one.
- The rules can apply retroactively to the year of the contribution in some fact patterns.

The 21-year rule

A trust resident in Canada faces a deemed disposition of its capital property every 21 years, at fair market value, with tax on the accrued gain. A U.S. SNT designed to run for a beneficiary's 60-year lifetime has no answer to this built in.

The qualified disability trust

A testamentary trust that jointly elects QDT status with a DTC-eligible beneficiary is taxed at graduated rates rather than the top marginal rate. It is a real benefit — and it requires a Canadian testamentary trust, which a U.S. inter vivos SNT is not.

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BEFORE ANYTHING ELSE

Immigration: the excessive demand problem

$144,390

The 2026 excessive demand cost threshold — $28,878 per year over five years. If a medical officer projects that publicly funded health and social services for the applicant will exceed it, the applicant can be found medically inadmissible.

Who is exempt

- Sponsored spouses and common-law partners.
- Sponsored dependent children — including an adult child who cannot be financially self-supporting because of a physical or mental condition.
- Refugees, protected persons and their dependants.

Why this reorders the whole engagement

One family member's medical inadmissibility can sink the entire application. If the parents are immigrating in an economic class, the adult child with a disability is assessed — and an intellectual disability with residential and day-program needs can blow past the threshold easily.

The answer is often to restructure: a parent immigrates first, then sponsors the adult child as a dependent child, where the excessive demand test does not apply. Get immigration counsel involved before you touch the trust.

Who is NOT exempt

- Economic class and provincial nominee applicants, and their accompanying family members.
- Sponsored parents and grandparents.

A procedural fairness letter gives 90 days to respond with a costed mitigation plan. A funded SNT is real evidence for that response.

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4 Case study: Chicago to Toronto

Everything above, on one family's facts.

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CASE STUDY · FACTS

The Kaplan family

The people

DANIEL, 29. Autism and a moderate intellectual disability. U.S. citizen, born in Skokie. Lives in a supported apartment in Evanston, attends a day program four days a week, works eight hours a week at a grocery store.

SAMANTHA and JOEL, his parents, 61 and 63. Joel has been offered a five-year posting in Toronto. Samantha's sister lives there. They want Daniel with them.

REBECCA, Daniel's sister, 33, lives in Denver and is named successor trustee.

The money and the paper

- SSI $994/month; Illinois Medicaid; a funded HCBS waiver slot obtained after long wait on PUNS (Illinois HCBS Waiting list).
- Third-party SNT funded by parent's revocable trust, unfunded, projected at $1.5 Million.
- First-party (d)(4)(A) SNT holding $210,000 from a 2016 auto accident settlement.
- ABLE account, $31,000.
- Plenary guardianship of the person and estate, Cook County, with Samantha and Joel as co-guardians.

What they asked for

"We're moving in eight months. Can you update Daniel's trust so it works in Canada?"

What they actually need

1. An immigration answer before anything else.
2. A benefits reconciliation showing what is lost, what is gained, etc.
3. A decision about which trust crosses the border and which one does not.
4. A Canadian will and a Canadian trust, drafted by Ontario counsel.
5. A fresh guardianship application in Ontario.

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CASE STUDY · THE NUMBERS

Benefits reconciliation: before and after

	Evanston, today	Toronto, month 13	Net effect
Cash income	SSI $994/mo	ODSP up to $1,436/mo + CDB up to $204.20/mo	Improves — once eligibility is established
Health coverage	Illinois Medicaid	OHIP from residency; no three-month wait	Roughly neutral on coverage; not on access
Day / residential services	Funded HCBS waiver slot	Ontario developmental services, applied for on arrival, with its own queue	The real loss. Assume a multi-year gap.
Asset limit	$2,000	$40,000	Improves materially
Trust corpus treatment	Both SNTs non-countable	Third-party SNT likely exempt if truly discretionary; first-party trust is a problem	Requires restructuring
Medicare	Not yet eligible	Not yet eligible	Revisit at DAC entitlement
ABLE account	$31,000, excluded	Remains open	Keep

Daniel's income goes up and his asset ceiling goes up twentyfold. His services go away for an unknown number of years, and the trust will have to buy privately what Illinois was providing for free.

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CASE STUDY · RESTRUCTURING

The two trusts treated very differently

The third-party SNT

Unfunded, so this is a drafting problem rather than a restructuring problem. The Parents' revocable trusts should be amended to:

- broaden the purpose clause to reference public benefits "of any jurisdiction in which the beneficiary may reside";
- restrict trusteeship and any removal power to United States persons;
- give a trust protector power to divide the trust and decant a share to a new trust in the beneficiary's jurisdiction of residence. Contact local counsel in Ontario https://kpopelaw.com/

The first-party (d)(4)(A) SNT

This one does not travel well, and probably should not try.

- Daniel is the contributor. Once he is resident in Canada the trust is deemed Canadian-resident and taxed as such.
- Self-settled, so it is not a Henson trust and Ontario will likely treat it as available.
- The Illinois payback survives — and pays a state that will provide nothing further.

Options: spend down on permitted purposes before departure, move value to the ABLE account within limits, or leave it in the U.S. and accept the friction.

And a third trust that does not exist yet

Once Samantha and Joel are Canadian residents, the cleanest structure is usually a Canadian will containing a testamentary Henson trust, drafted by Ontario counsel, capable of a qualified disability trust election. It might possibly sit alongside — not instead of — the U.S. plan. Two wills, two trusts, one coordinated instruction letter, and an express statement in each about how the other is meant to operate. Coordinate the residuary clauses carefully;

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Spotlight: the United Kingdom

Familiar trust law. Unfamiliar, and unforgiving, trust tax.

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SPOTLIGHT 2 OF 3

The United Kingdom at a glance

Two kinds of benefit

Means-tested benefits with hard capital limits, and non-means-tested disability benefits with residence and presence tests instead.

Capital limits are low

£6,000 lower limit, £16,000 upper limit for Universal Credit and income-related ESA. Above £16,000 there is no entitlement at all.

Trusts are recognized natively

This is the home jurisdiction of the discretionary trust. Recognition is not the issue. Tax is.

A statutory disabled person's trust exists

Trusts for disabled persons under section 89 of the Inheritance Tax Act sit outside the relevant property regime, and a vulnerable beneficiary election is available for income tax and CGT (Capital Gains Tax).

Taxes are a big deal with trusts in UK

From 6 April 2025 domicile was replaced by 'long-term residence' for inheritance tax, and the protected-settlement regime for offshore trusts was abolished outright.

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ELIGIBILITY

U.K. benefits: two regimes, two different tests

Means-tested — capital matters

Universal Credit · income-related ESA · Housing Benefit · Pension Credit

- Capital at or below £6,000 is ignored. Between £6,000 and £16,000, tariff income is assumed. Above £16,000, entitlement stops.
- A beneficiary's interest in a properly drafted discretionary trust is generally not their capital, because they cannot compel payment.
- Personal injury payments held in trust receive their own statutory disregard — the closest U.K. analogue to a first-party SNT.
- Watch the notional capital rules: deprivation of capital to secure benefit can be treated as still held.
- Distributions of cash may be treated as income even where the corpus is disregarded. Pay providers directly wherever possible.
- Habitual residence and right to reside tests apply to the means-tested benefits on arrival.

Non-means-tested — presence matters

Personal Independence Payment · Attendance Allowance · DLA (children)

- No capital or income test at all. A trust is irrelevant to PIP entitlement.
- But the PAST PRESENCE TEST requires presence in Great Britain for 104 of the previous 156 weeks — two of the last three years.
- A U.S. beneficiary arriving from Illinois fails that test on day one and must wait roughly two years.
- Habitual residence, ordinary residence, presence in Great Britain, and not being subject to immigration control are all separate requirements.
- Temporary absence of up to 13 weeks is tolerated, or 26 weeks for medical treatment abroad.
- Terminal illness under the special rules is the principal exception to the past presence test.

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TRUSTS

U.K. trust treatment: the good news and the bill

Discretionary trusts work

A fully discretionary trust under which the beneficiary has no right to income or capital is not the beneficiary's capital for means-tested benefit purposes. The doctrinal test is the same one you already apply in US. A U.S. third-party SNT with genuine discretion will generally hold up.

The statutory disabled person's trust

Section 89 of the Inheritance Tax Act 1984 gives favorable treatment to trusts where a disabled person is entitled to substantially all distributions. A vulnerable beneficiary election under the Finance Act 2005 can then reduce income tax and capital gains tax to what the beneficiary would have paid personally. It is powerful — and it requires U.K.-specific drafting that a U.S. SNT will not have.

Then the tax code arrives

TRANSFER OF ASSETS ABROAD. A U.K.-resident beneficiary who receives a benefit from a non-resident trust can be charged to income tax by reference to the trust's relevant income, whenever it arose.
CAPITAL PAYMENTS MATCHING. Capital payments are matched against the trust's stockpiled gains, and a supplemental charge can add up to 60% to the tax on gains realized in earlier years.
PROTECTED SETTLEMENTS ARE GONE. From 6 April 2025 the regime that let foreign income and gains roll up untaxed in an offshore trust was abolished, with no grandfathering for income tax or CGT.

THE FOUR-YEAR FIG REGIME. A newly arriving resident may claim relief on foreign income and gains for four years. It is a window, not a solution — plan distributions inside it.

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Spotlight: Mexico

A civil law system, and a different set of problems entirely.

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SPOTLIGHT 3 OF 3

Mexico at a glance

No asset-tested disability system

Mexico has no analogue to SSI or ODSP. There is no resource limit for the SNT to protect against, because there is no resource test.

A non-contributory pension instead

The Pensión para el Bienestar de las Personas con Discapacidad Permanente pays 3,300 pesos bimonthly in 2026 — roughly US$90 per month.

Coverage is uneven by state

Universal 0 to 64 coverage exists only in states that signed a cofinancing agreement with the federation. Elsewhere it is narrower.

Health care is contributory or public

IMSS and ISSSTE cover formal-sector workers and dependents. IMSS-Bienestar serves the uninsured. Private care is common and, by U.S. standards, inexpensive.

Trusts are not a domestic institution

Mexican law knows the fideicomiso, a bank-administered trust. It does not know the Anglo-American trust, and Mexico is not a party to the Hague Trusts Convention.

The problem is tax, not benefits

The question is not whether the SNT protects eligibility. It is whether Mexico attributes the trust's income to your client.

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"Transferring" guardianship abroad

The short version: you cannot. Here is what you do instead.

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ONE SLIDE, HONESTLY

Guardianship and conservatorship across borders

There is no mechanism to transfer a U.S. guardianship to another country. The interstate transfer machinery attorneys are used to — the UAGPPJA — is a state-to-state uniform act. It has no international counterpart the United States has joined.

Why there is no treaty route

The Hague Convention of 13 January 2000 on the International Protection of Adults does exactly this job — jurisdiction, applicable law, and recognition of protective measures across borders. The United States has not joined it. Neither has Canada or Mexico. The United Kingdom ratified for Scotland only, though England and Wales gave broadly similar effect through Schedule 3 of the Mental Capacity Act 2005.

What the UAGPPJA does offer

Most states, Illinois included, have adopted the uniform act. It contains a provision allowing a court to treat a foreign country as if it were a state for jurisdiction and recognition purposes. That is permissive and discretionary, it runs inbound rather than outbound, and it does nothing to bind the foreign court.

So what actually happens

A fresh application in the destination, under its own law, with its own evidence and its own standard. In Ontario that is an application under the Substitute Decisions Act. In England and Wales it is a deputyship application to the Court of Protection. The U.S. order is evidence, not authority.

Mexico is a special case

The Supreme Court held the state of interdiction unconstitutional, and the Código Nacional de Procedimientos Civiles y Familiares replaces it with a system of supports and safeguards — in force nationwide no later than 1 April 2027. There may simply be no Mexican equivalent of the plenary guardianship your client holds.

The practical checklist

Retain the U.S. guardianship for U.S. assets · Apply fresh in the destination · Get copies and certified translations · Expect a gap, and plan for it

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SNTs and foreign situs property

The issue that arrives without anyone planning it — India as the working example.

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FRAMING

How the SNT ends up owning land abroad

Four common paths

- The residuary clause. A parent's pour-over will funds the SNT with "all my property, wherever situated" — including a flat in Pune.
- Direct inheritance. A grandparent dies intestate abroad and the beneficiary takes a share by operation of foreign law.
- Ancestral or family property. The beneficiary holds an undivided interest nobody has ever partitioned.
- Deliberate purchase. The family buys a home abroad in the trust's name because the beneficiary will live there.

Why India specifically

This comes up far more often than you might think. Large Indian-American communities, high rates of property retention in India, family land held across generations without formal partition, and a strong cultural norm against selling ancestral property all combine to put Indian real estate into American estate plans — including special needs trusts — with some regularity.

India is also a useful teaching example because it stacks every category of problem: exchange control, succession, title, tax and repatriation.

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EXCHANGE CONTROL · FEMA

India: can the trust hold the property at all?

Who may acquire Indian immovable property

- NRIs and OCI cardholders may buy residential and commercial property freely, without RBI approval.
- None of them may buy agricultural land, plantation property or a farmhouse — though they may inherit it.
- A person resident outside India may acquire immovable property by inheritance from a person resident in India, or from a person outside India who acquired it lawfully.
- Foreign nationals of non-Indian origin cannot acquire property at all except by inheritance, and cannot transfer inherited property without RBI permission.

Notice what is missing from that list

A U.S. trust is not an NRI. It is not an OCI cardholder. It is not a natural person at all.

The general permissions under the Non-Debt Instruments Rules are framed around individuals of Indian origin. A foreign trust holding Indian immovable property sits outside them and, as a practical matter, requires specific RBI approval — which is not routinely granted.

This is the single most important slide in this section. Before you draft a residuary clause that sweeps Indian real estate into an SNT, confirm that the SNT can lawfully receive it.

Structuring around it

The usual answer is that the property is inherited by the beneficiary as an individual — who, if of Indian origin, may hold it as an NRI or OCI — and is then sold, with the net proceeds remitted to the United States and contributed to the trust. That means the beneficiary owns real estate outright, however briefly, which is exactly the thing the SNT exists to prevent. Sequence it against the benefits calendar, consider whether a sale can close before the estate distributes, and if the beneficiary is on SSI, understand that you may be trading a resource problem for a transfer-penalty problem.

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GETTING IT INTO THE RIGHT HANDS

India: succession, title, and the paper trail

Succession is personal-law based

Whose law applies depends on the decedent's religion, not just their residence. The Hindu Succession Act governs Hindus, Buddhists, Jains and Sikhs; the Indian Succession Act governs Christians and Parsis; Muslim personal law governs Muslims. Each has different intestate shares and different limits on testamentary freedom.

A U.S. will is not self-executing

There is no recognition of American probate. Depending on where the property sits, the personal representative may need probate or letters of administration from an Indian court, or a succession certificate. In the former presidency towns of Mumbai, Kolkata and Chennai probate is mandatory for certain wills. Expect years, not months.

Coparcenary and undivided interests

Property held as ancestral coparcenary property under Mitakshara law is not freely disposable in the same way self-acquired property is. Since the 2005 amendment daughters are coparceners by birth. Establish which category the property falls into before assuming anyone can leave it to a trust.

Title diligence you should insist on before the trust touches anything

- Mutation of revenue records — often not done for a generation.
- Encumbrance certificate and the chain of title.
- Whether the land is classified as agricultural in the revenue records, regardless of how it is used.
- Stamp duty and registration, which vary by state and can be substantial.
- Whether anyone is in adverse possession or holds a tenancy.
- Whether the property was ever held benami — the prohibition statute has real teeth.

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Answer in most jurisdictions including India: Probably just get Indian Will to leaves it the other kids.

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The U.S.-side consequences of foreign situs property

Reporting obligations multiply

Foreign bank accounts opened to receive rent or sale proceeds trigger FBAR at the $10,000 aggregate threshold, and Form 8938 at its own thresholds. The trustee is the filer. If the trust holds an interest in a foreign entity used to hold the property, Forms 5471, 8865 or 8858 may follow. Penalties in this area are severe and are assessed on a per-form, per-year basis.

Watch the trust's own status

Appointing a local co-trustee abroad to manage the property is the intuitive move and the wrong one — it can fail the control test and make the trust foreign. If administration must happen locally, use an agent or a power of attorney rather than a fiduciary appointment, and document that substantial decisions remain with the U.S. trustee.

A practical playbook for foreign real property in an SNT

1 **Ask the question at intake**	"Does anyone in this family own property outside the United States?" belongs on your intake form. It is not currently on most of them.
2 **Prefer cash to dirt**	Wherever the family can be persuaded, have the foreign property sold and the proceeds remitted before it reaches the trust. A trust is a poor owner of foreign land.
3 **Carve it out expressly**	If the property must pass, give the trustee explicit authority to decline it, to disclaim, to hold it through a permitted vehicle, and to sell it without beneficiary consent.
4 **Retain local counsel early**	Not at closing. At drafting. The exchange control and succession answers change the estate plan, not just the closing checklist.

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9

Drafting Considerations

What to put in every SNT you write, starting Monday.

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CLAUSES

The cross-border drafting checklist

Absolute discretion, stated twice
No support standard, no HEMS residue, no mandatory income. Say expressly that the beneficiary cannot compel any distribution and has no enforceable interest.

A jurisdiction-neutral purpose clause
Reference public benefits "under the laws of the United States, any state, or any other jurisdiction in which the beneficiary may reside" — not just SSI and Medicaid by name.

Trustee eligibility limited to U.S. persons
Define "United States person" by reference to the Code, apply it to trustees, co-trustees, protectors and anyone holding a removal power, and prohibit automatic migration.

A situs and governing law clause with a change mechanism
Fix state law and a U.S. court's primary supervision; give a named party power to change situs. Only among U.S. jurisdictions?

Division and decanting authority
Power to divide the trust into separate shares and to decant to a new trust — including one governed by the law of the beneficiary's country of residence — without court approval.

A trust protector with real powers
To amend for changes in benefit law in any jurisdiction, to remove and replace fiduciaries, to terminate a share, and to direct that no distribution be made that would impair eligibility anywhere.

Express authority over foreign property
Power to disclaim, decline, hold, or sell foreign situs assets, to engage foreign counsel and agents, and to pay foreign taxes and compliance costs from the trust.

A relocation notice covenant
Require the beneficiary, guardian or representative to notify the trustee before any change of country of residence, and authorize the trustee to suspend distributions pending advice.

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Nine things to take back to the office

1
SSI stops after thirty days abroad and terminates at twelve months. SSDI and DAC benefits generally travel.

2
The waiver slot, not the SSI check, is the expensive thing your client is giving up.

3
Absolute discretion is the common currency. It is what makes a trust invisible in Illinois, in Ontario and in England alike.

4
A first-party payback trust usually should not cross the border. A third-party trust might be able to, sometimes with amendments.

5
Naming a foreign successor trustee can make the trust foreign, with a deemed sale and a reporting regime attached.

6
In Canada, watch Taxes , the twenty-one year rule, and medical inadmissibility.

7
In the U.K., the trust is recognized and then taxed hard. Track the settlor's residence, not just the beneficiary's.

8
In Mexico there is nothing to protect eligibility from. The question is attribution of income, not availability of corpus.

9
Guardianship does not transfer. You file again, under local law, and you plan for the gap in between.

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STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

Thursday
October 22, 2026

Demystifying Social Security's Childhood Disability Benefit

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Demystifying Social Security's Childhood Disability Benefits (formerly DAC Benefits)

2026 National Conference on Special Needs Planning and Special Needs Trusts

October 22, 2026

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I. WHAT ARE CHILD'S DISABILITY BENEFITS?

A. WHAT ARE CHILDHOOD DISABILITY BENEFITS (CDB)?

Childhood Disability Benefits (CDB), still widely known as Disabled Adult Child (DAC) benefits, are Social Security benefits available to certain adults whose disability began before age 22. These benefits are paid on the earnings record of a parent who is retired, disabled, or deceased.

> ***Many people still call this the "DAC benefit." Technically, DAC stands for "Disabled Adult Child" and describes the person who may qualify for the benefit rather than the benefit itself. The term is also not person-centered language and is increasingly disfavored. However, it remains deeply embedded in practice. SSA's own POMS uses the term "DAC" in many places, and state Medicaid manuals, including Michigan's BEM 158, continue to use it as well. As a result, many practitioners, including me, still sometimes use "DAC benefit" as shorthand even though it is not technically precise.***
>
> ***Strictly speaking, the statutory benefit is a Child's Insurance Benefit (CIB) under Section 202(d) of the Social Security Act, 42 U.S.C. § 402(d). Childhood Disability Benefits (CDB) are one category of Child's Insurance Benefits.***

CDB is entirely separate from Supplemental Security Income (SSI). CDB is a Title II insured benefit, while SSI is a Title XVI means-tested benefit. Eligibility for one does not require eligibility for the other. However, as discussed below, the order in which a person becomes entitled to SSI and CDB can have significant Medicaid consequences and may determine whether important Medicaid protections remain available.

B. WHY IS THE CDB BENEFIT SO SPECIAL?

The CDB benefit is such an important benefit for several reasons:

- **Not means tested**. A person's assets, unearned income, or family wealth do not affect eligibility. Warren Buffett's child could qualify for CDB benefits. Mere financial wealth does not disqualify a person from receiving CDB benefits.

- **Medicare eligibility**. Generally, after 24 months of entitlement to CDB benefits, the beneficiary becomes eligible for Medicare. Medicare is not means-tested and provides more access to providers than Medicaid.

- **Higher Than SSI Benefit Amounts**. The CDB benefit amount is typically much higher than Supplemental Security Income (SSI), as it is generally based on 50% of a parent's Primary Insurance Amount (PIA) while the parent is living and 75% after the parent's death.

- **Increased income is usually disregarded for Medicaid**. Not only is the income usually higher than SSI, but that higher income is often disregarded for Medicaid qualification purposes if the child first received SSI before receiving CDB benefits.

- **Lifetime (and COLA adjusted) benefit**. A child can turn 90 and still receive CDB benefits. Unlike many disability programs, CDB does not terminate at retirement age and receives annual cost-of-living adjustments.

That sounds great, right?

It *is* great.

But there are many traps associated with CDB benefits that can make a child ineligible for them. Hence, this is an hour-long presentation.

C. WHAT ARE THE REQUIREMENTS FOR CDB BENEFITS?

To qualify for CDB, a child must meet these requirements (42 U.S.C. § 402(d); 20 C.F.R. § 404.350):

- **Must be age 18 or older**. Child does not mean "minor" here. The CDB benefit is only available beginning at age 18.

- **Parent has RIB, DIB, or died insured**. The adult child may qualify if the parent is entitled to Retirement Insurance Benefits (RIB) or Disability Insurance Benefits (DIB), or died fully or currently insured under Social Security. 42 U.S.C. § 402(d)(1); POMS RS 00203.001A.1.b.

- **Must meet Social Security's definition of disability**. The child must meet Social Security's definition of disability, which is generally the same standard used for Social

Security Disability Insurance (SSDI) and Supplemental Security Income (SSI). This is discussed in more detail below.

- **Onset of disability began before age 22**. The individual must establish that the disability began before his or her 22nd birthday.

- **Continuous disability**. Although the statute does not expressly state it, courts have interpreted CDB eligibility to require that the individual's disability remain continuous from before age 22 until entitlement.

- **Not engaged in substantial gainful activity**. Working and earning money above the Substantial Gainful Activity limit (earning $1,690/month or more in 2026) may jeopardize CDB eligibility.

- **Not Married**. Tragically, marriage generally ends entitlement to CDB benefits, with a narrow exception for marriage to certain other Social Security beneficiaries (see below).

Whenever possible, get a disability application filed before age 22. That way, SSA makes a disability determination before age 22, which can make proving onset and continuous disability significantly easier when the CDB claim is eventually filed.

D. HOW IS THE CDB BENEFIT CALCULATED?

The amount of CDB an individual receives is based on the earnings record of a parent:

- **While the Parent is Alive**. The benefit is generally 50% of the parent's Primary Insurance Amount (PIA), which is the amount the parent would receive at full retirement age.

- **After the Parent's Death**. If the parent is deceased, the CDB benefit is generally 75% of the parent's PIA.

Primary Insurance Amount is discussed in more detail below.

- **Family Maximum Benefit**. For most clients, you can stop here. But for some clients, you must understand the Family Maximum Benefit rule. The FMB refers to the limit on the total amount of Social Security benefits that can be paid to a family based on a single

worker's earnings record. When multiple family members, such as a spouse, children, or disabled adult children, are entitled to benefits on one worker's record, the total amount paid may be subject to this cap.

For Retirement and Survivor Benefits, the FMB generally ranges from 150% to 188% of the worker's PIA, depending on the applicable formula. For Disability Benefits, a different formula applies: the family maximum is generally 85% of the worker's Average Indexed Monthly Earnings, but cannot be less than the worker's PIA or more than 150% of the PIA.

Example: If a wage earner's PIA is $2,000 and the FMB is 150%, the family maximum would be $3,000. If the wage earner receives $2,000, the remaining $1,000 is the maximum amount available to be paid to eligible family members.

The family maximum is a ceiling, not an amount that must be paid out. Each family member is still limited to his or her own benefit rate (typically 50% or 75% of the worker's PIA), and unused room under the Family Maximum Benefit does not pass to anyone else.

When a child is entitled on both parents' records, the child is ultimately paid on only one record. However, SSA may apply the Combined Family Maximum Benefit rules, which can allow the family maximums from both parental records to be considered, subject to statutory limits. See POMS RS 00615.770.

Note: And this gets a lot more complicated than this.

E. WHEN DO CDB BENEFITS BEGIN?

Unlike Social Security Disability Insurance benefits, there is no five-month waiting period for CDB benefits. Once a parent becomes entitled to Retirement Insurance Benefits or Disability Insurance Benefits, or dies while insured under Social Security, a qualifying adult child may become entitled to CDB. Medicare generally begins after 24 months of CDB entitlement.

CDB benefits may also be retroactive. Retroactivity is generally limited to six months when CDB is awarded on the earnings record of a parent who is not entitled to Disability Insurance Benefits. Up to 12 months of retroactivity is available when the CDB claimant is entitled on the earnings record of a parent entitled to Disability Insurance Benefits. POMS DI 10115.030.

F. HOW DO I KNOW IF A CLIENT IS RECEIVING CDB BENEFITS?

Identifying CDB can be surprisingly difficult. SSA benefit letters may show the payment amount, SSI status, and Medicare coverage without clearly saying, "This is CDB." Look for an award notice or detailed SSA record showing that the benefit is paid on a parent's earnings record. You may see the parent's Social Security number followed by a "C" beneficiary code, such as "C1."

Still, it may be easy to distinguish CDB from SSI:

- **Check the payment date**. SSI is ordinarily paid on the first of the month. Social Security benefits are generally paid later, on the second, third, or fourth Wednesday. If the person receives both SSI and Social Security, or began receiving Social Security before May 1997, the Social Security payment generally arrives on the third.

- **Check for Medicare**. CDB leads to Medicare after 24 months of entitlement. Medicare does not come with SSI.

- **Check the amount**. The maximum federal SSI payment is $994 per month in 2026. A payment above $994 generally is not federal SSI alone, but it does not prove CDB. SSI may be lower because of income or living arrangements, and some states add a supplement.

But note, just knowing that the amount is greater than the maximum SSI limit does not distinguish CDB from SSD on an individual's own work record. It can be harder to figure out CDB benefits if a child has a work history. While this often does not matter, the difference can be significant if Medicaid is a concern because of the income disregard for certain CDB beneficiaries under 42 U.S.C. § 1383c(c). For example, if a client has income over a Medicaid limit (e.g., higher than the Medicare Savings Program limit) yet is eligible for QMB, the client is likely receiving CDB benefits (although there could be other reasons).

State Medicaid agencies should already have most of this information through SSA data exchanges. In Michigan, MDHHS verifies DAC status through a centralized review process. Still, obtaining an SSA award notice or benefit verification letter can save everyone a lot of time.

II. OVERVIEW OF OTHER SOCIAL SECURITY BENEFIT CATEGORIES

Now that we have discussed the CDB benefit, we should discuss other Social Security benefits because these benefits are relevant to CDB benefits.

A. RETIREMENT SOCIAL SECURITY (RIB).

Why do we care about Retirement Social Security in a CDB presentation? Because a child's CDB benefit is calculated from a parent's Social Security record. Understanding a few basic retirement concepts makes many of the CDB rules easier to understand or explain.

i. Claiming at Full Retirement Age.

Childhood Disability Benefits (CDB) are based on a parent's Primary Insurance Amount (PIA), which is the monthly Social Security benefit the parent would receive if he or she claimed Retirement Insurance Benefits at Full Retirement Age (FRA). Thus, it is important to understand the basics of Retirement Social Security to understand CDB benefits and properly advise families.

- The PIA is based on a worker's **Average Indexed Monthly Earnings (AIME)**, which generally reflects the worker's highest 35 years of earnings after adjusting those earnings for changes in national wage levels.

Notice that it is Average Indexed Monthly Earnings. Earlier earnings are adjusted before calculating the AIME. The PIA formula is also progressive, meaning lower earnings receive proportionately greater weight than higher earnings.

- Claiming Retirement Social Security at Full Retirement Age (FRA) results in a retirement benefit equal to 100% of the worker's PIA.

- For anyone born in 1960 or later, Full Retirement Age is 67. Earlier birth years may have a slightly lower Full Retirement Age, but for most clients today, you can safely think of FRA as age 67.

ii. Claiming Before or After Full Retirement Age – We don't care!.

A parent can claim Retirement Social Security before or after Full Retirement Age (FRA):

- **Claiming Early**. Claiming early (as early as age 62) permanently reduces the parent's retirement benefit. For an individual with a Full Retirement Age of 67, claiming at age 62 generally results in about a 30% reduction in the monthly retirement benefit.

- **Claiming After Full Retirement Age**. Claiming late increases the parent's retirement benefit through delayed retirement credits. For individuals born in 1960 or later, waiting until age 70 generally results in a benefit that is approximately 24% higher than the Primary Insurance Amount (PIA).

For purposes of calculating Childhood Disability Benefits (CDB), however, the parent's claiming age generally does not matter. A child's CDB benefit is based on the parent's Primary Insurance Amount (PIA), not the amount of the parent's actual retirement check. Early retirement reductions and delayed retirement credits affect the parent's benefit, not the child's.

Likewise, if a parent receives Disability Insurance Benefits (DIB), the child's benefit is still calculated from the parent's PIA.

The real question is often not: "Should the parent claim Social Security early or late?" For parents that have a child with a disability, the question is often: "Does the value of starting CDB benefits now outweigh the value of delaying the parent's Social Security benefit?"

For the parent, Medicare is largely a non-issue. Medicare eligibility generally begins at age 65 regardless of when Retirement Social Security is claimed. For the child, however, timing can matter significantly. A child generally cannot receive CDB benefits, and therefore cannot begin the path toward Medicare eligibility, until the parent becomes entitled to Social Security. This is discussed in more detail below.

B. DISABILITY INSURANCE BENEFITS (DIB/SSDI).

Why are we discussing SSDI in a CDB presentation? Because the same disability rules apply, a parent's DIB entitlement can create CDB eligibility, and DIB on the child's own work record may be an important backup when CDB is unavailable.

i. Medical Eligibility.

Medical eligibility criteria matter in two ways for Childhood Disability Benefits (CDB). First, the child must satisfy Social Security's definition of disability to receive CDB benefits. Second, a parent becoming entitled to Disability Insurance Benefits (DIB) can trigger eligibility for CDB benefits on the parent's earnings record. The disability standard for CDB is generally the same standard used for Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI). SSA uses a five-step sequential evaluation process:[1]

1. **Substantial Gainful Activity (SGA)**. The claimant must not be engaged in substantial gainful activity. In 2026, SGA is $1,690 per month for most individuals and $2,830 per month for blind individuals. Earnings above those levels will generally result in a denial unless an exception applies.

2. **Severity of Impairment**. The claimant must have a medically determinable impairment that significantly limits basic work activities.

3. **Listed Impairment**. The claimant is disabled if the impairment meets or medically equals one of Social Security's listed impairments.

4. **Past Relevant Work**. If the claimant does not meet a listing, SSA determines whether the claimant can perform past relevant work.

5. **Other Work**. If the claimant cannot perform past relevant work, SSA determines whether the claimant can adjust to other work considering age, education, work experience, and residual functional capacity. At this stage, the burden shifts to SSA to show that other work exists.

In most CDB cases, proving disability itself is not the hardest issue. The real battles are often establishing disability before age 22, proving continuous disability, and addressing work activity after age 22.

[1] *See* Avram Sacks, The Nuts and Bolts of SSI and SSDI, Stetson Law 2023 SSA Mechanics Boot Camp.

ii. Calculating the Social Security Disability Benefit.

The Social Security Disability benefit is calculated similarly to Retirement Social Security. SSA still calculates a worker's Average Indexed Monthly Earnings (AIME) and then applies the Primary Insurance Amount (PIA) formula. However, unlike Retirement Social Security, SSA generally considers only the years up to the disability onset date rather than a full lifetime work history.

The formula is highly progressive. In 2026, 90% of the first $1,286 of Average Indexed Monthly Earnings is included in the Primary Insurance Amount calculation. Because younger workers typically have fewer years in the calculation and fewer zero-earning years, individuals who become disabled at younger ages may receive surprisingly high Disability Insurance Benefits.

iii. Younger Workers Need Less Credits.

Many practitioners assume a young adult has not worked long enough to qualify for Disability Insurance Benefits (DIB) on the individual's own work record. That is often incorrect. Social Security applies much more lenient insured-status rules to younger workers.

- Before **age 24**. Generally, 6 work credits earned during the 3-year period ending when disability begins.

- **Age 24 to 31**. Generally, the individual must have worked about half of the time between age 21 and the date disability began.

- **Age 31 or older**. Generally, 20 work credits earned during the 10-year period before disability began (often described as working 5 of the last 10 years).

If CDB benefits are unavailable because of a continuous-disability issue, work history, marriage, or another eligibility problem, do not automatically assume Social Security benefits are unavailable. A young adult with even a modest work history may qualify for Disability Insurance Benefits on his or her own record.

C. SUPPLEMENTAL SECURITY INCOME (SSI).

Why do we care about SSI in a CDB presentation? Because many of the Medicaid protections that make CDB so valuable depend on the beneficiary first receiving SSI. Further, many children

with disabilities will spend years on SSI and Medicaid before a parent retires, becomes disabled, or dies and makes CDB available.

Unlike Retirement Insurance Benefits (RIB), Disability Insurance Benefits (DIB), and Childhood Disability Benefits (CDB), SSI is a means-tested Title XVI benefit. Assets matter, and income matters.

i. Medical Eligibility.

SSI uses the same medical disability standard discussed above for Disability Insurance Benefits. The five-step sequential evaluation process applies equally to SSI and CDB claims.

ii. Income Eligibility.

For SSI, the SSA considers all income but treats earned and unearned income very differently.

- **Earned Income**. SSI is somewhat forgiving of earned income. Earned income includes wages and self-employment income. SSI excludes the first $20 of income, excludes an additional $65 of earned income, and then counts only half of the remaining earned income.

  Example: John earns $1,000 per month from work.

  1. **Earned income:** $1,000
  2. **Apply the $20 general income exclusion** (which applies to both earned and unearned income):
     - $1,000 - $20 = $980
  3. **Apply the $65 *earned* income exclusion**:
     - $980 - $65 = $915
  4. **Divide the remaining income by 2** (since only half of earned income counts):
     - $915 ÷ 2 = $457.50
  5. **Subtract the countable income from the federal benefit rate**:
     - In 2026, the SSI federal benefit rate for an individual is $994.
     - $994 - $457.50 = **$536.50 (John's SSI payment)**

- **Unearned Income**. SSI is much less forgiving of unearned income. Unearned income includes Social Security benefits, gifts, pensions, annuities, dividends, rental income, child support, spousal support, and cash distributions from a special needs trust. Unearned income generally reduces SSI dollar-for-dollar after the $20 general income exclusion.

Example: John receives $1,000 per month of unearned income.

1. **Unearned income:** $1,000
2. **Apply the $20 general income exclusion**:
    - $1,000 - $20 = $980
    - **Subtract from the 2026 Federal Benefit Rate ($994)**:
    - $994 - $980 = $14 (John's SSI payment).

Small, but as discussed below, even a few dollars of SSI can be worth a great deal.

It is quite common for our clients to receive both Social Security and SSI when their non-SSI Social Security benefit is under $1,014 ($994 federal benefit rate plus the $20 income disregard). A small SSI payment may not seem important, but it can trigger automatic Medicaid eligibility in many states and can become extraordinarily valuable when later transitioning to CDB benefits.

Common Mistake: Cash distributions from a special needs trust generally count as unearned income for SSI purposes.

iii. Asset Eligibility.

To qualify for SSI, an individual generally must have countable resources below $2,000 ($3,000 for a married couple). Countable resources include cash, bank accounts, stocks, bonds, investment accounts, and non-exempt real estate.

Fortunately, many assets are excluded from the SSI resource calculation, including:

- A primary residence;
- One vehicle;
- Personal and household belongings;
- Certain prepaid funeral and burial arrangements;
- ABLE accounts (subject to applicable limits); and
- Certain special needs trusts.

SSI resource rules can be unforgiving, but they are also filled with exceptions. Before concluding that a client is over the $2,000 resource limit, always determine whether the asset is actually countable. The list of exempt resources is surprisingly long and can be found at POMS SI 01110.210.

III. CDB BENEFITS WITH RETIREMENT

A. TIMING RETIREMENT AND THE CDB BENEFIT

A *parent's* decision about when to claim Social Security retirement benefits can have significant consequences for a child with a disability. The analysis is not simply about maximizing the parent's lifetime Social Security benefits. It may also affect when the child becomes entitled to CDB, when the child becomes eligible for Medicare, and whether the child can preserve Medicaid eligibility after transitioning from SSI to CDB.

For that reason, families with a child who may qualify for CDB should consider Social Security planning well before the parent claims retirement benefits. Age 60 is not too early to begin that analysis, particularly if the child is approaching age 18. Retirement-maximization software can be useful, but the analysis should also account for the disabled child's benefits.

Among attorneys who regularly attend Stetson, Avram L. Sacks in Illinois is particularly knowledgeable about Social Security. A commercially available planning program is Maximize My Social Security (https://maximizemysocialsecurity.com/).

There are at least three considerations that traditional retirement-maximization software may not adequately value:

- **Establishing SSI eligibility before CDB begins**. For many families, it may be important for the child to establish SSI eligibility after age 18 before the parent's retirement triggers CDB eligibility. This can be critical to preserving Medicaid under the special rules applicable when CDB causes the loss of SSI. The Medicaid protection may ultimately be worth substantially more than the CDB cash benefit itself.
- **Starting the child's path to Medicare**. CDB entitlement can also start the clock toward Medicare eligibility. Medicare ordinarily becomes available after the applicable 24-month qualifying period. Thus, delaying the parent's claim can also delay the child's eventual access to Medicare.
- **Reducing dependence on means-tested benefits**. CDB and Medicare are not themselves means-tested programs. Moving from SSI to CDB can therefore reduce some of the financial-eligibility issues associated with SSI. But Medicaid may remain essential,

particularly for individuals receiving community-based services, so the goal is often Medicare plus preserved Medicaid, not Medicare instead of Medicaid.

B. DON'T OVERLOOK THE CHILD-IN-CARE BENEFIT.

When a parent becomes entitled to Social Security retirement or disability benefits, do not overlook a potential additional benefit for the other parent who has the worker's disabled adult child in care. A spouse may qualify at any age based on having an entitled child in care. 42 U.S.C. § 402(b)(1)(B)(ii), (c)(1)(B)(ii); 20 C.F.R. §§ 404.330, 404.348-.349. The benefit can be up to 50% of the worker's PIA without the usual reduction for the spouse's age, although the family maximum and an earnings test can reduce the amount. In 2026, the earnings-test exempt amount is $24,480 for someone below full retirement age for the entire year.

The rules change after the worker dies. A surviving parent, including a qualifying surviving divorced parent, may receive mother's or father's benefits based on having a disabled child in care, generally equal to 75% of the worker's PIA before application of the family maximum or earnings test. 42 U.S.C. § 402(g). SSA expressly recognizes surviving divorced mother's and father's benefits when the applicable child-in-care requirements are satisfied.

What does "in care" mean for an adult child? For a disabled child age 16 or older, the answer depends on the nature of the disability. For a child with a mental disability, the parent must exercise parental control and responsibility, such as supervising the child's activities and participating in important decisions regarding the child's needs. For a child with a physical disability, the parent must regularly perform personal services for the child. Providing financial support, food, or shelter alone is not necessarily enough. This is also another reason to carefully consider how guardianship and other arrangements may affect the child-in-care benefit.

And don't forget the family maximum. Assume a parent first becomes eligible for retirement benefits in 2026 with a PIA of $3,000. The family maximum is approximately $5,288, leaving approximately $2,288 available for auxiliary beneficiaries. The child's unreduced CDB rate is $1,500. Add a $1,500 child-in-care spouse's benefit, and the two auxiliary benefits exceed the amount available under the family maximum, reducing each to approximately $1,144. Even after the family maximum reduction, however, adding the child-in-care benefit increases total family Social Security income by approximately $788 per month.

IV. WORKING AND ITS IMPACT ON CDB BENEFITS

The CDB benefit gets complicated quickly when a child has or is working. Let's break this down to whether the child works *before* receiving CDB or *after*.

A. WORK BEFORE CDB ENTITLEMENT: THE CONTINUOUS DISABILITY PROBLEM.

Nothing complicates a CDB claim quite like significant work before the individual becomes entitled to CDB. The statute simply requires that the disability begin before age 22. 42 U.S.C. § 402(d)(1)(B)(ii). In practice, however, SSA may technically deny an initial CDB claim when there is any month of post-age-22 substantial gainful activity. *See, e.g.*, POMS DI 11020.050.

This problem falls particularly hard on children of younger parents. A child cannot become entitled to CDB on a living parent's record until the parent becomes entitled to retirement or disability benefits. Thus, there may be many years between the child's 22nd birthday and the parent's entitlement during which work activity can complicate the child's eventual CDB claim.

For example, suppose an individual with a lifelong disability works for a year at age 23 and earns $1,750 per month. The 2026 SGA guideline for a nonblind individual is $1,690 per month. This will likely become a problem.

But earnings above the SGA guideline do not necessarily end the analysis. Before giving up on the CDB claim, examine the work carefully:

- **Impairment-Related Work Expenses (IRWE)**. Deductible impairment-related expenses associated with the individual's work may reduce the earnings considered in evaluating SGA. SSA maintains separate rules governing the development and deduction of IRWEs. *See* POMS DI 10520.001

- **Subsidies and Special Conditions**. The individual's wages may overstate the actual value of the work because of extra supervision, a job coach, reduced duties, additional breaks, accommodations, or other special conditions. SSA considers the value of the work actually performed in determining SGA. *See* POMS DI 10505.025.

- **Unsuccessful Work Attempt**. Work lasting no more than six months may be disregarded when the individual stops working, or reduces the work below SGA, because

of the impairment or the removal of special conditions necessary to perform the work. POMS DI 24005.001.

And losing CDB may not mean losing Social Security disability benefits altogether. Ironically, the same work that creates the CDB problem may help the individual become insured for SSDI on his or her own earnings record. Younger workers have special rules and can qualify with substantially fewer credits than the ordinary 20-out-of-40-quarter requirement. 20 C.F.R. § 404.130(c); POMS RS 00301.140.

SSDI on the individual's own record is not necessarily equivalent to CDB. Most importantly for our clients, it does not itself provide the special 42 USC § 1383c(c) Medicaid protection associated with the loss of SSI because of CDB. The benefit may also be lower than CDB payable on a parent's record. Still, SSDI, Medicare, and, where available, a Medicaid Buy-In program can sometimes produce a very good alternative outcome. SSA recognizes Medicaid Buy-In programs as another potential Medicaid pathway for working individuals with disabilities.

Tell your Congressional Representatives to support the Work Without Worry Act of 2026 (S. 5006, introduced July 15, 2026), eliminating this perverse incentive for a potential CDB beneficiary to not even try to work.

As you can see, the general advice to parents is to get CDB benefits before trying significant work if possible.

B. CHILD WORKS AFTER RECEIVING CDB BENEFITS.

The consequences of work are generally less severe once a child is already receiving CDB benefits. Before entitlement, work can threaten eligibility for CDB. After entitlement, the principal concerns become preserving Medicaid and navigating Social Security's work incentive rules.

Work and the Potential Impact on Medicaid

Many families assume the Medicaid protection provided by 42 U.S.C. § 1383c(c) is permanent. It is not.

The protection continues only so long as the beneficiary would remain eligible for SSI if the CDB benefit were completely disregarded. The CDB benefit is excluded from the calculation, but

earnings are not. Under the normal SSI income rules, after the $20 general income exclusion and $65 earned income exclusion, one-half of the remaining earnings count toward SSI eligibility.

As a result, a beneficiary can lose the Medicaid protection provided by 42 U.S.C. § 1383c(c) even while continuing to receive CDB benefits. In 2026, a beneficiary living independently generally retains that protection until earnings reach approximately $2,073 per month (($994 × 2) + $85). A beneficiary living in the household of another person, including many adult children who live with parents, generally loses protection at approximately $1,411 per month (($663 × 2) + $85). Notably, that figure is below the 2026 substantial gainful activity amount of $1,690 per month. Impairment-related work expenses and similar exclusions may increase both thresholds.

The practical lesson is simple: a CDB beneficiary may lose Medicaid protection before earning enough to jeopardize the CDB benefit itself.

Although the details vary by state, earnings can eventually cause a beneficiary to lose the Medicaid protection provided by 42 U.S.C. § 1383c(c) even while the beneficiary continues to receive CDB benefits. For many working beneficiaries, a state's Medicaid Buy-In program becomes the next source of Medicaid coverage.

Work and its Impact on the CDB Benefit

Work presents a second concern: whether earnings eventually jeopardize the CDB benefit itself.

Fortunately, Social Security does not immediately terminate CDB benefits simply because a beneficiary works. Most CDB beneficiaries are subject to the same work incentive rules that apply to other Title II disability beneficiaries, including the Trial Work Period and Extended Period of Eligibility.

In oversimplified terms:

- **Earnings consistently below the Trial Work Period amount ($1,210/month in 2026)**. Generally, beneficiaries who never trigger a Trial Work Period month face relatively little risk of losing CDB benefits.

- **Occasional Trial Work Period months**. A beneficiary may test the ability to work without immediately losing benefits. Occasional Trial Work Period months are not

necessarily a problem, but they should be monitored carefully because only nine Trial Work Period months are available.

- **Regular earnings above Trial Work Period levels**. Once Trial Work Period months are exhausted, the analysis becomes substantially more complicated. The beneficiary enters the Extended Period of Eligibility, and careful review of earnings, subsidies, special conditions, impairment-related work expenses, and substantial gainful activity rules becomes critical.

I find it healthy to think –

Substantial Gainful Activity to get on Social Security Disability - $1,690/month in 2026.

Trial Work Period trigger to stay on Social Security Disability without issues - $1,210/month in 2026.

V. CDB INCOME DISREGARD FOR MEDICAID ELIGIBILITY (SECTION 1634(C))

A. WHY SHOULD A CHILD ALWAYS GET SSI BEFORE RECEIVING CDB BENEFITS?

For many, one of the most valuable features of CDB is ability to receive a higher Social Security benefit while preserving Medicaid.

Under 42 U.S.C. § 1383c(c), an individual age 18 or older who loses SSI because of entitlement to, or an increase in, Childhood Disability Benefits is treated as if he or she were still receiving SSI for Medicaid purposes. SSA refers to these individuals as a "special group of former SSI recipients." *See* POMS SI 01715.015. The practical result is that many beneficiaries can receive a substantially larger CDB benefit while retaining Medicaid.

Two important caveats apply.

First, protection lasts only while the individual would still be eligible for SSI with the CDB disregarded. All other income and resources still count. SSI's $2,000 limit is the federal baseline, but a state may apply a more generous SSI-related limit. Michigan, for example, now uses the Medicare Savings Program limit for DAC Medicaid ($9,950 in 2026). Either way, this is where special needs trusts and ABLE accounts still matter.

Second, the protection is not administered uniformly across the country. Section 1634 states and 209(b) states apply different Medicaid eligibility methodologies, and the details vary significantly from state to state. As a result, attorneys should always analyze the Medicaid consequences separately from the Social Security entitlement.

But the most important takeaway is this:

> **The Medicaid protection provided by 42 U.S.C. § 1383c(c) generally applies only if the individual was receiving SSI before losing that SSI because of CDB.**

That creates a significant problem for some families. A child whose parent dies, retires early, becomes disabled, or simply never applied for SSI may go directly onto CDB without ever receiving SSI. In those cases, the CDB increase may not receive the special Medicaid treatment available under 42 U.S.C. § 1383c(c). The result can be devastating. The child receives a higher Social Security benefit but loses Medicaid eligibility or becomes subject to restrictive state Medicaid rules.

Attorneys should be particularly careful when SSI and CDB applications are filed at the same time. SSA procedures generally contemplate paying SSI first in order to protect Medicaid eligibility. In theory, SSI is awarded, CDB is awarded later, SSI terminates because of the higher CDB benefit, and the individual qualifies for the Medicaid protection provided by 42 U.S.C. § 1383c(c).

In practice, however, attorneys should not assume the process will work perfectly. Timing issues, retroactive awards, and state Medicaid agency interpretations can create unexpected problems. Whenever possible, the safer course is to establish SSI eligibility well before CDB entitlement begins.

After nearly a decade of advocacy from the Special Needs Alliance, Representative Debbie Dingell introduced the Childhood Disability Benefits Fairness Act (H.R. 9846) in July 2026. The bill would eliminate the requirement that an individual receive SSI before becoming entitled to Childhood Disability Benefits to preserve Medicaid protections under 42 U.S.C. § 1383c(c). If enacted, it would correct this injustice where individuals with identical disabilities and financial circumstances can receive dramatically different Medicaid treatment solely because of the timing of a parent's retirement, disability, death, or the order in which benefits were claimed.

B. WHAT CAN A PARENT DO IF A CHILD DOES NOT HAVE SSI FIRST?

If the parent has reached full retirement age but is not yet 70, there may be an opportunity to preserve the Medicaid protection provided by 42 U.S.C. § 1383c(c) by establishing SSI eligibility before CDB begins. A child generally cannot become entitled to CDB on a living parent's record unless the parent is entitled to retirement or disability benefits. Whether a parent may be able to "suspend" their benefit is way too complicated for here.

If that option is unavailable, such as when a parent has died, or already claimed benefits years earlier, the next question is whether the child can engage in any meaningful work activity. Even modest employment may qualify the child for a state's Medicaid Buy-In program for workers with disabilities, potentially avoiding a Medicaid spend-down. These programs vary considerably from state to state, including differences in income limits, resource limits, premiums, and age restrictions. As a result, attorneys should carefully review the rules of the applicable state program.

If neither solution is available, the family may be left with a medically needy spend-down, assuming the state offers a medically needy pathway at all. See 42 U.S.C. § 1396a(a)(10)(C) and 42 C.F.R. § 435.831. At that point, the analysis becomes highly state-specific. Depending on the jurisdiction, potential options may include Medicaid Buy-In programs, qualified income trusts, pooled special needs trusts, spend-down strategies, or other state-authorized pathways to Medicaid eligibility.

The practical lesson is straightforward: the best solution is usually to establish SSI before CDB begins. If that opportunity is lost, the case often becomes a Medicaid planning problem rather than a Social Security problem.

VI. MARRIAGE PENALTY

Perhaps the most shocking CDB rule is also one of the easiest to understand: marriage usually terminates CDB benefits.

Unlike SSI, which treats marriage primarily as a financial event, the CDB program generally treats marriage as a loss of eligibility. Congress created only a narrow exception. A CDB beneficiary may marry without losing benefits if the spouse is entitled to certain Title II Social Security benefits, including another CDB beneficiary or an individual receiving retirement,

disability, divorced-spouse, widow(er)'s, mother's, father's, or parent's benefits. 42 U.S.C. § 402(d)(5); 20 C.F.R. § 404.352(b)(4). The exception does not apply to marriage to a student child beneficiary, nor does it apply to marriage to someone who receives only SSI because SSI is not a Title II benefit.

What happens if the marriage ends? The answer depends on whether the child was entitled to CDB before the marriage:

- **The child was never entitled to CDB before the marriage**. Initial entitlement requires only that the applicant be unmarried at the time of application. Accordingly, a child whose marriage ended by divorce, annulment, or the spouse's death may still qualify for CDB benefits. 42 U.S.C. § 402(d)(1)(B); SSR 84-1; POMS RS 00203.020.

- **The child was entitled to CDB and later married**. This is where the rule becomes particularly harsh. Once entitlement terminates because of a disqualifying marriage, SSA generally will not re-entitle the child on the same parent's record, even if the marriage later ends through divorce or the spouse's death. 20 C.F.R. § 404.351; POMS RS 00203.015B. In some situations, however, the child may still qualify for initial entitlement on the other parent's record if that parent is entitled to retirement or disability benefits or has died.

- **The marriage was void or annulled**. A void marriage does not terminate entitlement. An annulled voidable marriage generally permits reentitlement beginning with the month of annulment, unless the court awarded, or retained authority to award, permanent alimony. SSR 84-1; POMS RS 00203.015B.

One final coordination rule deserves mention. A person who qualifies for both CDB and a divorced-spouse benefit does not receive both benefits in full. SSA pays the higher benefit, not the sum of the two. 42 U.S.C. § 402(k)(2)(B); 20 C.F.R. § 404.407.

A top issue of the national and local Arcs is lobbying Congress to end these marriage penalties.

Demystifying Social Security's Childhood Disability Benefit

2026 National Conference on Special Needs Planning and Special Needs Trusts

October 22, 2026

PRESENTED BY

Christopher W. Smith

Chalgian & Tripp Law Office, PLLC · Michigan

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01

What Is The Childhood Disability Benefit (CDB)?

The Social Security benefit paid on a parent's work record.

2

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The Acronyms

TITLE XVI · Needs-based

SSI

Supplemental Security Income

Means-tested cash benefit for aged, blind, or disabled individuals.

$994/month

2026 federal individual maximum

TITLE II · Earnings-record insurance

RSDI Retirement, Survivors, and Disability Insurance. The umbrella Title II program.

SSDI / DIB

Social Security Disability Insurance / Disability Insurance Benefits

Worker disability benefit.

RIB

Retirement Insurance Benefits

Worker retirement benefit.

CDB

Childhood Disability Benefit

Adult disabled child on a parent's work record.

3

3

CDB Is Not SSI

	TITLE II · INSURANCE-BASED **Childhood Disability Benefit**	TITLE XVI · NEEDS-BASED **Supplemental Security Income**
Funding source	Paid from a parent's insured status	Needs-based federal benefit
Resources	No resource limit or unearned income limit	$2,000 individual resource limit in 2026; Income limits
Benefit amount	Benefit tied to parent's PIA	Federal maximum is $994/month in 2026
Health coverage	Medicare + Possibly Medicaid	Medicaid

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CDB vs. DAC – What Term Should I Use?

CORRECT TERM

CDB

Childhood Disability Benefit

The current SSA term — try to always use this.

STILL USED IN PRACTICE

DAC

Disabled Adult Child

Still used in certain SSA publications and by many state Medicaid agencies.

DAC describes the person, not the benefit — and isn't person-centered. Know it anyway: it's still in use.

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One Benefit Unlocks Three Crucial Programs

Cash Benefit
A non-means tested Social Security benefit based on a parent's earnings record.

Medicare
Medicare generally follows after the 24-month entitlement period.

Medicaid
Prior SSI eligibility can preserve Medicaid despite higher CDB income.

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Wealth Does Not Block CDB

No limit on the child's wealth

- Child of a billionaire
- Large inheritance
- Litigation settlement
- Any other substantial assets

YET

CDB still pays

✓ Cash benefit

✓ Medicare

? Medicaid

No special needs trust is required for CDB — but one may still be needed to protect Medicaid.

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02

Who Qualifies And When

Two clocks: the child's disability and the parent's claim.

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The Initial Questions

1	Is the adult child **unmarried and age 18 or older**?
2	Has a parent **retired, become disabled, or died insured**?
3	Did the disability begin **before age 22**?
4	Does the child currently meet the **adult disability test**?
5	Has **work or marriage** created an **eligibility trap**?

The same facts in a different order can produce a very different result.

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Parents Drive Benefit Timing

No Qualifying Parent Event → No CDB Benefit.

Retirement	Disability	Death
Parent claims retirement benefits.	Parent becomes entitled to disability benefits.	Parent dies while insured.

The adult child need not have their own work record to qualify on the parent's record.

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Qualifying Disability Begins **BEFORE 22**

Often the real fight is when disability began.

PROVE ONSET

Before 22

Qualifying disability

PROVE CONTINUITY

Waiting for parent to claim

Continuous disability · No SGA that breaks continuity

Parent claims

= First CDB payment

22nd Birthday Deadline

Duration unknown — the wait may last years

Practice tip: An SSI award before age 22 provides strong evidencethat disability began before age 22 . One of several reasons to advise clients on the importance of SSI!

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Honest Work Discussions Required!

Work discussions may also impact when parents claim.

BEFORE ENTITLEMENT	AFTER ENTITLEMENT
Must meet disability test continuously.	**Work incentives can now apply.**

Avoid Substantial Gainful Activity that breaks continuity.
2026 SGA: $1,690/month ($2,830 if blind)

SSA's five-step disability test

1	2	3	4	5
SGA	Severity	Listed impairment	Past relevant work	Other work

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How Do I Tell If A Client Is Receiving CDB Benefits?

Look at SSA Verification Letter Claim Numbers

123-45-6789 C1

Benefits paid on a parent's record. Confirm it's CDB, not a minor-child benefit.

987-65-4321 A

Benefits on the person's own record. A disabled worker usually shows HA.

When is it paid?	SSI: usually 1st. Social Security Disability: 2nd / 3rd / 4th Wednesday based on the parent's birth date.
Is there Medicare?	SSI does not include Medicare.
How much?	2026 federal SSI max: $994 / month, individual. Higher ≠ federal SSI (excluding state supplements)

These three don't guarantee CDB.

It could still be based on the beneficiary's own work history.

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03

Calculating The Childhood Disability Benefit

How the parent's record sets the amount.

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A Parent's Primary Insurance Amount (PIA) Sets The CDB Cash Assistance

PIA = Primary Insurance Amount — the monthly benefit the parent's own earnings record would pay at full retirement age.

EXAMPLE

Parent's PIA =

$2,000

PARENT ALIVE & ENTITLED

50% **of the parent's PIA** = **$1,000** **per month to the child**

PARENT DECEASED

75% **of the parent's PIA** = **$1,500** **per month to the child**

Before family maximum adjustments.

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Calculating Primary Insurance Amount (PIA)

Three steps turn a parent's lifetime earnings into the PIA.

1 AIME

Average Indexed Monthly Earnings — the parent's highest 35 years of wage-indexed earnings, averaged to a monthly figure.

2 Bend points

2026 formula applied to AIME:

- **90%** of the first $1,286
- **32%** of $1,286 – $7,749
- **15%** above $7,749 — Cap

3 Primary Insurance Amount at Full Retirement Age (67)

That PIA is the base and the CDB benefit pays 50% of it while the parent is alive and entitled and 75% if the parent is deceased.

Oversimplified: the actual computation involves further adjustments.

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The Parent's Claiming Age Doesn't Change the CDB

Illustration: a living parent with a $2,000 PIA and FRA 67 — the same PIA used on the previous slides.

	Claim at 62 Early	Claim at 67 FRA	Claim at 70 Late
Parent's retirement check	$1,400	$2,000	$2,480
CDB base benefit	$1,000	$1,000	$1,000

UNCHANGED AT EVERY CLAIMING AGE

Parent receives Disability Insurance Benefits (DIB)? The CDB calculation still starts with the parent's PIA.

The family maximum can still reduce what is actually payable when other dependents draw on the same record.

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The Family Maximum Can Compress the Family's Shares

Illustration: a living parent drawing retirement benefits, PIA $2,000. The retirement family maximum is set by its own formula (here about 172% of PIA).

Family maximum **$3,435.50** from the bend-point formula → **Worker's own benefit not reduced** **– $2,000** paid first, never reduced → **Room for the family** **$1,435.50** split among the auxiliaries

CHILD WITH A DISABILITY ONLY

Benefit due: $1,000. Room: $1,435.50.

$1,000 the full 50% of PIA — nothing is cut

SPOUSE + CHILD WITH A DISABILITY

Benefit due: $2,000. Room: $1,435.50.

$717 each — $1,435.50 ÷ 2 = $717.75, rounded down

Deceased parent? No worker benefit is paid, so the full family maximum is available to the survivors.

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Claim Social Security Earlier Or Wait?
- Special Considerations Because Of CDB

REASONS TO CLAIM EARLIER	REASONS TO WAIT
CDB cash sooner Claiming earlier allows CDB beneficiaries (and potentially others) to draw down on cash benefits sooner.	**Bigger parent check** Waiting can increase retirement income, up to age 70.
Medicare starts sooner The CDB beneficiary gets Medicare sooner.	**SSI-first planning** As will be discussed, it is often crucial to get SSI before CDB. But once a parent claims, getting SSI is usually foreclosed.
Safer attempt at work The beneficiary can more safely attempt to go to work without jeopardizing CDB benefits forever.	
Off means-tested Social Security Moving off SSI sheds its income and asset limits.	

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Don't Overlook The Child-In-Care Benefit

WORKER ENTITLED	⇨	ADULT CHILD	⇨	OTHER PARENT
Retirement or disability		**Gets CDB** on worker's record		**May qualify if...** **1** Currently married to the worker. **2** Child receives CDB on that record. **3** Provides qualifying care.

What counts as qualifying care?

Mental/Intellectual Disability: Exercises parental control and responsibility.

Physical Disability: Personal services other than routine household services.

BENEFIT FOR THE CAREGIVING SPOUSE

Up to 50%	At any age	Family maximum
of the worker's PIA	No age reduction even before 62	Still applies and may reduce the amount payable

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The Importance Of SSI

Why we still care about SSI when looking at CDB benefits.

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The 42 U.S.C. § 1383c(c) Medicaid Income Disregard

Medicaid can continue with higher CDB income!

Get SSI First And Make Sure To Keep It When CDB Eligible → **Claim CDB (and Lose SSI)** → **Medicaid**

can continue with the **HIGHER CDB INCOME**.

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SSI First May Preserve Medicaid (42 U.S.C. § 1383c(c))

Preferred sequence when available

STEP 1	STEP 2	STEP 3	RESULT
Adult SSI eligibility	**Parent entitlement event**	**CDB begins**	**CDB increase disregarded for Medicaid**

The federal protection is tied to loss of SSI caused by the CDB increase.

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Income Disregard ≠ Medicaid Asset Protection

- Other countable income and assets still count — the disregard reaches CDB only.
- Check whether your state is 209(b); its standards may be more restrictive.

Unspent CDB income becomes an asset next month.

THIS MONTH	Next month if unspent.
CDB Income disregarded →	**ASSET**

KEY TOOLS FOR MANY CDB BENEFICIARIES TO STAY ON MEDICAID

ABLE accounts
Use when onset was before 46 and contributions stay under the annual cap.

Pooled trusts
Use when the amount exceeds the ABLE cap or onset came later in life.

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SSI Asset Eligibility

$2,000
Individual

$3,000
Couple

Exempt Assets



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Earned Income Shrinks SSI Gradually

Beneficiary earns $1,000/month in 2026

$1,000 − $20 general exclusion − $65 earned-income exclusion = $915

$915 ÷ 2 = $457.50 countable income

$994 − $457.50 = $536.50 SSI payment

Earned income is not counted dollar-for-dollar after exclusions.

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Unearned Income Creates a Sharper Cliff

Beneficiary receives $1,000/month of unearned income

$1,000 − $20 general exclusion = $980 countable income

$994 − $980 = $14 payable federal SSI

Cash from a special needs trust may count as unearned income. Other Social Security benefits are also unearned income. In-kind support rules require separate analysis.

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05

Trap 1: Work Issues With CDB Benefits

The issues with working and the CDB benefit.

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The Continuous Disability Trap

Disability before 22 is only the starting point.

Work before CDB entitlement can put eligibility at risk.
Before CDB entitlement

Disabled before 22

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Age 22

Parent claims years later and CDB can begin

Evaluate work activity under SGA rules.

$1,690/month
2026 non-blind SGA guideline

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Gross earnings above the SGA guideline?

Gross earnings aren't always the final answer.

1 IRWE
Impairment-related work expenses

Goal: Deduct qualifying disability-related expenses

Reasonable, unreimbursed costs paid by the worker for disability-related items or services needed to work.

2 Work subsidies

Goal: Exclude the subsidized portion

Wages exceed the **reasonable value** of the worker's services. Exclude the subsidized portion.

3 Unsuccessful work attempt

Goal: Exclude qualifying work from the SGA finding

After a **qualifying break** in work, an SGA-level attempt lasts six months or less and ends or falls below SGA because of the impairment or loss of essential special conditions.

POMS: DI 10520.001; DI 10505.010; DI 10505.025; DI 11010.145; DI 24005.001

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Losing CDB May Not Be the End of the World

No CDB Due To Work? → **SSDI own child's own work record may be an option**

The opportunity

Fewer work credits
Younger workers need fewer credits.

Progressive formula
Lower earnings get more weight; younger workers average fewer years.

Medicare
Generally after **24 months** of SSDI entitlement.

The tradeoffs

No CDB Medicaid Income Disregard
Own-record SSDI does not receive the DAC/CDB income disregard.

Check your state's Medicaid buy-in options.

Cash assistance may be lower
Compare projected SSDI with CDB, including the survivor benefit based on 75% of the parent's PIA.

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After Entitlement, Work Has Guardrails

Trial Work Period

9 MONTHS

Within a rolling 5-year window
Months need not be consecutive

What counts as a trial work month?

over $1,210

Gross employee wages per month (2026) count towards the nine months

Benefits do not automatically stop after the nine-month period, but that's for another seminar. For our purposes, the flexibility to test a client's ability to work goes up greatly *after* CDB is awarded.

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The Work Without Worry Act

2026 proposal · S. 5006 **PROPOSED / NOT LAW** As of October 7, 2026

Past work would no longer, by itself, bar CDB eligibility.

For otherwise eligible people with a qualifying impairment that began **before age 22.**

Would remove the continuous-disability trap.

Introduced by Senator Ron Wyden on July 15, 2026.
Source: Congress.gov, S. 5006 (119th Congress), introduced text

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Trap #2: Not Having SSI Immediately Before CDB

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SSI Timing Can Create a Medicaid Trap

For Section 1634 states (34 states plus D.C.):

SSI immediately before CDB SSI lost because CDB starts or increases.	→	**CDB income excluded** CDB disregarded under § 1383c(c), if otherwise eligible.
CDB Without SSI § 1383c(c) protection may be unavailable.	→	**CDB income counted** Possibly subject to spend-down/deductible or coverage loss, which include the possibility of no Medicare Savings Program eligibility.

Particularly penalizes beneficiaries whose parents died or became disabled young, or retired while the beneficiaries were young.

There is no good public policy reason for this.

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CDB Income Disregard: State Differences

42 U.S.C. § 1383c(c)

- **Impact differs in the 16 states using SSI criteria or 209(b) rules.**
- **Know your state—rules vary widely.**
  Check local eligibility rules and administration.
- **Evaluate alternative Medicaid pathways.**
  Michigan: Freedom to Work

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Childhood Disability Benefits Fairness Act

H.R. 9846

PROPOSED / NOT LAW

Would remove the SSI-first hurdle for Medicaid

CDB recipients would count as SSI recipients for Medicaid.

Introduced by Rep. Debbie Dingell on July 22, 2026.

Referred to House Ways and Means and Energy and Commerce.

Know someone affected by this gap?

Contact the Special Needs Alliance

Brian Lindberg
SNA Public Policy Advisor

blindberg@healthsperien.com

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Trap #3: Marriage

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The CDB Marriage Penalty

WHEN APPLYING

Cannot be married to get CDB.

AFTER ENTITLEMENT

Marriage usually ends CDB.

The exceptions apply if the person they marry is on certain benefits:

CDB can continue

Qualifying Title II benefits

- CDB or DIB
- Retirement or survivor benefits
- Spouse or divorced-spouse benefits
- Widow(er), mother/father, or parent benefits

CDB ends

Exception does not apply

- SSI-only recipient
- Child student beneficiary ages 18–19
- Child beneficiary under age 18

SSI = Title XVI, not Title II.

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If the Marriage Ends

Divorce does not always restore CDB.

INITIAL ENTITLEMENT

Never previously entitled to child's benefits on a parent's record

Divorce, death, or annulment can restore unmarried status.

May seek initial entitlement.

RE-ENTITLEMENT

Child's-benefit entitlement ended because of marriage

Divorce or spouse's death generally bars re-entitlement on the same parent's record.

Initial entitlement may remain possible on the other parent's record.

VOID OR ANNULLED MARRIAGE

Re-entitlement is possible.

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Ending the CDB marriage penalty

H.R. 1389, Marriage Equality for Disabled Adults Act (119th Congress)

Under H.R. 1389

Amends 42 U.S.C. § 402(d)

Strikes the "unmarried" requirement and repeals § 202(d)(5)

Marriage is no longer a terminating event: a CDB beneficiary may marry anyone

There are other SSI-related parts of the bill too.

PROPOSED / NOT LAW

Introduced Feb. 14, 2025

Rep. Panetta (D-CA) with six original cosponsors; third introduction since 2022.

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Final Takeaways

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Final Takeaways

- Integrate this knowledge into your **turning age 18 planning.**
- **Advocate for legislative changes** to eliminate the traps.
- Collaborate with a **Social Security Disability attorney.**

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Demystifying Social Security's Childhood Disability Benefit

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STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

Thursday
October 22, 2026

Navigating AI's Wild West: Trends, Ethics, and Backlash in Legal Practice

STETSON LAW

Center for Elder Justice

Access and Justice For All®

NAVIGATING AI'S WILD WEST

Trends, Ethics, and Backlash in Legal Practice

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2026 National Conference on Special Needs Planning

and Special Needs Trusts

Thursday, October 22, 2026

I. INTRODUCTION AND SCOPE

These materials[1] accompany the breakout session "Navigating AI's Wild West: Trends, Ethics, and Backlash in Legal Practice." They address the professional and ethical dimension of artificial intelligence in trusts and estates practice and the legal profession, broadly. It explores the current tool landscape, the duties implicated under the Rules of Professional Conduct, the particular problem of bias against beneficiaries with disabilities, and the reasons confidence in AI-assisted work product is eroding among judges, clients, and counsel.

The technical reliability of these tools, the taxonomy of tasks for which they are suited, the recurring substantive errors they produce in special needs matters, and the verification protocol that responds to those errors are treated in the companion materials prepared for the morning session, "Are the Machines in Charge? Using AI to Review Trusts and Other Things." Those subjects are not repeated here.

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[1] As many jurisdictions now require attorneys to provide disclosure and/or verification statements for documents prepared with assistance from or containing information generated by generative artificial intelligence, it seems fitting to include a specific and conspicuous disclosure and verification statement here: These materials were prepared with the assistance of generative artificial intelligence. The author used various large language models to organize some parts and subsections; to rephrase some content for brevity; to format citations; to summarize lengthy reports or articles, particularly because they pertain to an area of the law that is NOT the author's area of expertise; and to compile research material. The author certifies that all citations have been manually verified to ensure their existence and confirm their propositions as accurate representations.

However, in Part V.C, the author intentionally included unverified citations to certain changes in the law impacting conference participants. The author invites participants to find incorrect AI outputs!

One connection between the two sets of materials should be stated at the outset, because it organizes much of what follows. A verification protocol of the kind described in the morning materials checks whether the output is accurate. It does not check whether the output is fair. The failures discussed in Part IV below would ostensibly pass a citation our output verification checklist.

II. THE CURRENT LANDSCAPE

Any inventory of specific products has a shelf life measured in weeks. What follows is therefore organized around categories and evaluation criteria rather than recommendations.

A. Categories of Tools

1. General-purpose frontier models accessed through consumer or enterprise interfaces.
2. Legal research platforms with integrated AI, grounded in a curated database of primary authority.
3. Contract and document review tools, generally oriented toward transactional review.
4. Trusts-and-estates-specific platforms performing estate plan summarization, visualization, and intake.
5. Firm-deployed internal tools built on enterprise interfaces, typically with contractual protection against training on inputs.
6. Agentic tools that take multi-step actions rather than answering a question, which raise supervision questions of a different order.

B. Adoption

Practitioners assessing where the profession actually stands should consult the ABA Legal Technology Survey Report, the Clio Legal Trends Report, and the Thomson Reuters Future of Professionals report, each updated annually. The most informative figure in these surveys is the gap between firm-sanctioned use and actual use.

C. Vendor Diligence

Before any tool touches client data, the following questions should be answered from the terms of service rather than from marketing materials: Does the vendor train on user inputs? Where is data stored, and for how long? Are terms negotiable? What becomes of prompts and outputs in litigation or on subpoena? Does the tool cite to source, and can the citation be opened? Does the contractual language match the sales representation?

D. Shadow AI

The most common deployment in law firms and trust departments is not a firm-procured platform. It is an associate, paralegal, or trust administrator using a personal consumer account on a personal device. Any policy that does not account for this is not a policy. It is a document.

III. PROFESSIONAL RESPONSIBILITY

The starting point for any practitioner is ABA Formal Opinion 512 (July 29, 2024), which addresses generative AI across the range of implicated duties. State authority has developed alongside it, and practitioners must consult their own

jurisdiction's guidance; opinions and task force reports have issued in a substantial number of states, and several state supreme courts have adopted interim rules or standing requirements.

A. Competence

Model Rule 1.1, comment 8, requires a lawyer to keep abreast of the benefits and risks associated with relevant technology. The duty runs in both directions. A lawyer who uses a tool she does not understand is not competent; and an emerging argument holds that a lawyer who declines available tools that would materially improve accuracy or reduce cost may likewise fall short. The second proposition is contested and should be presented as such.

B. Confidentiality

Model Rule 1.6 presents the sharpest issue in this practice area, because special needs files contain an unusual concentration of sensitive material: diagnoses, psychiatric and substance use history, capacity evaluations, sealed guardianship records, school records, and information concerning minors.

Three points warrant particular attention. First, consumer and enterprise terms differ materially on whether inputs are used for training, and the consumer default is frequently the less protective. Second, informed consent under Rule 1.6(a) requires that the client understand what is being disclosed and to whom; a general engagement letter recital that the firm "uses technology" is unlikely to suffice. Third, and most difficult, where the trustee is the client, the most sensitive information in the file frequently belongs to a beneficiary who is not the client, who

cannot consent, and whose interests in that information are not represented in the consent conversation.

C. Supervision

Model Rules 5.1 and 5.3 supply the governing analogy: the tool is treated as a nonlawyer assistant whose work must be supervised and whose output the lawyer remains responsible for. The obligation extends to the conduct of the firm's staff in their use of these tools, which is where most unsupervised use occurs.

This analysis should be extended beyond the lawyers in the room. Pooled trust administrators, corporate trust officers, and care managers make consequential decisions with AI assistance and are subject to no analogue of Rules 5.1 and 5.3. They are frequently the individuals handling the most sensitive information in the file.

D. Communication and Disclosure

Whether use must be disclosed to the client under Model Rule 1.4 depends on the nature of the use. Opinion 512's treatment is more nuanced than either the disclose-always or the disclose-never position, and the variables it identifies — whether the client has asked, whether the use bears on fees, whether confidential information is input, whether the output is material to the representation — are what practitioners should be applying.

E. Fees

Model Rule 1.5 prohibits billing for time not expended. A task that formerly took three hours and now takes twenty minutes may be billed at twenty minutes.

Whether the efficiency gain belongs to the client is a question firms should resolve deliberately and disclose in the engagement letter rather than resolve by default. Costs of AI tools passed through to clients should be handled as any other disbursement.

F. Candor and Unauthorized Practice

Fabricated citations implicate Model Rules 3.1 and 3.3, and the reported decisions treat them as misconduct rather than as embarrassment.[2]Separately, Model Rule 5.5 and state unauthorized practice statutes are increasingly implicated by AI-generated trust instruments produced by nonlawyer fiduciaries and consumer platforms.

IV. BIAS AND VULNERABLE BENEFICIARIES

The general observation that AI systems encode bias is familiar and not particularly useful. The disability-specific bias is concrete and directly relevant to this practice.

A. Mechanism

These models were not trained principally on writing produced by disabled adults describing their own lives. They were trained on the far larger available corpus of clinical literature, caregiver material, risk-management guidance, and institutional policy—text produced about disabled people by the people and

[2] *See Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023); *Park v. Kim*, 91 F.4th 610 (2d Cir. 2024).

institutions managing them. A model reproduces the stance that dominates its source material.

B. Manifestations in Practice

Asked to analyze a distribution request, a model will reliably produce output exhibiting a recognizable set of features: deficit framing and concessive constructions; treatment of a competent adult beneficiary's stated preference as a data point requiring family corroboration; the introduction of a family member as a de facto decision-maker where no guardianship exists; risk analyses that typically only count the risks of acting and rarely the costs of denial; staged, conditional, and revocable approvals for ordinary adult expenditures; and monitoring conditions attached to routine purchases.

The corresponding drafting risk, when these tools are used to generate distribution standards or trustee guidance, is the importation of paternalistic assumptions about what a beneficiary should be permitted to spend money on.

C. Historical Precedent

This population has encountered opaque automated decision-making before, in the benefits context, with documented results.[3]

[3] See *K.W. v. Armstrong*, No. 1:12-cv-00022-BLW (D. Idaho) (challenge to an undisclosed algorithmic budget tool used to reduce home and community-based services, in which the state asserted the formula was a trade secret); *Arkansas Department of Human Services v. Ledgerwood*, 530 S.W.3d 336 (Ark. 2017) (litigation arising from algorithmic reallocation of in-home care hours).

Today, the technology is more sophisticated and with increased potential for automated judgments. The distinction now is that algorithmic decision-making systems have moved into the practitioner's and the trustee's own workflow, where it is subject to no due process challenge at all because it never issues a decision. It only advises.

D. Detection

Two practices are worth adopting. First, ask who is absent from the analysis; where the output describes a person who was never consulted, that is the flag. Second, apply a substitution test: replace the disabled beneficiary with a non-disabled person of the same age and resources and re-read the analysis. Where the analysis changes and nothing about the request was disability-related, the difference is bias rather than prudence. Improved prompting mitigates this and does not cure it.

V. THE FIDUCIARY OVERLAY

Trustee use of AI raises duties that exist independently of the Rules of Professional Conduct and that apply to corporate and pooled trust fiduciaries who are subject to no professional responsibility regime at all.

1. Prudent administration. Uniform Trust Code § 804 requires administration as a prudent person would, exercising reasonable care, skill, and caution. A trustee who adopts AI-generated reasoning without independent evaluation has arguably not satisfied that standard.

2. Delegation. Uniform Trust Code § 807 permits delegation of functions a prudent trustee of comparable skills could properly delegate, with duties of care in selecting the agent, establishing the scope of the delegation, and monitoring performance. Whether the core discretionary distribution decision is delegable at all is a serious question; delegation to a system that cannot explain its reasoning, cannot be examined,[4] and produces different output on different runs satisfies none of the three monitoring obligations.

3. Impartiality and the duty to inquire. A trustee must consider the circumstances of the beneficiary. Analysis that substitutes a statistical profile of a diagnostic category for inquiry into the actual beneficiary does not discharge that duty.

4. Records and accountings. Where the reasoning supporting a denial exists only as a chat log the trustee did not write, the trustee's ability to defend the exercise of discretion on an accounting is materially impaired.

5. Abuse of discretion. Even under sole and absolute discretion, a trustee must act in good faith and consistently with the purposes of the trust. See Restatement (Third) of Trusts § 87. A supplemental needs trust exists to enhance quality of life beyond what public benefits supply,

[4] Lou Blouin, *AI's Mysterious "Black Box" Problem, Explained*, U. Mich.-Dearborn News (Mar. 6, 2023), https://umdearborn.edu/news/ais-mysterious-black-box-problem-explained.

and a pattern of denials generated by a system disposed toward restriction is difficult to reconcile with that purpose.

VI. WHY TRUST IN THESE TOOLS IS FRAYING

Skepticism about AI-assisted work product is not irrational, and practitioners who treat it as mere technophobia will handle client conversations badly.

A. The Sanctions Record

Beginning with *Mata* and *Park v. Kim*, the volume of reported decisions involving fabricated AI-generated authority has grown substantially. Because the count changes continuously, practitioners should consult a maintained database rather than any static list; the AI Hallucination Cases database compiled by Damien Charlotin[5] is updated on an ongoing basis and is the most useful current source.

B. Judicial Response

Courts have responded with standing orders requiring disclosure or certification of AI use. These orders are inconsistent across and within jurisdictions, and compliance requires checking the individual judge's requirements. The reputational consequence is asymmetric: a single fabricated citation attaches to a lawyer's name permanently and is trivially discoverable by opposing counsel and clients.

[5] Damien Charlotin, *AI Hallucination Cases*, https://www.damiencharlotin.com/hallucinations/ (last updated Sept. 23, 2026).

C. Institutional and Client Pushback

Outside counsel guidelines increasingly restrict or prohibit AI use; professional liability carriers have begun asking about it at renewal; and corporate trustees have adopted vendor policies governing what their outside counsel may use.

D. Cultural Backlash

Practitioners should understand the broader challenges to the proliferation of AI. This includes pending copyright litigation, objections concerning energy consumption, concern about labor displacement, and a general fatigue with low-quality machine-generated content (colloquially known as "AI slop").[6] A client's skepticism frequently originates outside the legal context entirely.

E. Disability Community Distrust

This deserves to be named separately rather than folded into general skepticism. It has its own history, described in Part IV.C, and it is well founded.

VII. A FRAMEWORK FOR WEIGHING USE

A workable internal policy sorts uses along two axes: the sensitivity of the data involved and the reversibility of an undetected error.

1. Prohibited. Client-identifying or beneficiary health information in consumer tools; any use generating a legal conclusion relied upon

[6] For an excellent law review article on "AI slop," *see* Jessica Silbey & Woodrow Hartzog, *AI Slop* (Sept. 2026) (unpublished manuscript), https://scholarship.law.bu.edu/faculty_scholarship/4308.

without independent verification; delegation of discretionary distribution decisions.

2. Permitted with mandatory verification. Document review, summarization, cross-document consistency checking, and drafting assistance, subject to the verification protocol in the morning materials and to a documented file note.

3. Unrestricted. Tasks involving no client data and no legal conclusion — internal research orientation, formatting, general drafting of non-client material.

The policy should address staff and non-lawyer fiduciaries explicitly, should state what is permitted rather than only what is forbidden, and should be written on the assumption that personal-device use will occur unless a sanctioned alternative is genuinely easier to use.

VIII. "DID YOU WRITE THIS WITH AI?"

Practitioners should prepare an answer to this question before it is asked. The answer should not be defensive, and it should not overclaim. In most cases the accurate answer is that the tool was used for a specified task, that the output was independently reviewed, and that the professional judgment is the lawyer's own.

Familiar analogies—form books, document assembly systems, a junior associate's first draft—are incomplete. Each differs in that the intermediate work product remains inspectable and the human assistant can be asked to explain a

choice. Acknowledging where the analogy fails is considerably more persuasive to a skeptical listener than insisting that it holds.

Two further points are worth consideration. First, evaluating potential AI use requires you to ask if a machine made the decisions, or if a machine just touched the document. Clients almost always mean the first and almost always ask the second, and separating them usually resolves the concern. Second, the appropriate answer differs by audience. A skeptical adult child of a beneficiary, opposing counsel in a surcharge proceeding, and a judge operating under a standing order are asking for different things and are entitled to different responses.

IX. CONCLUSION

The competence question and the fairness question are distinct, and the second is the harder of the two. A practitioner who verifies every citation, confirms every statutory reference, and documents the review has addressed accuracy. She has not addressed whether the framing she adopted was one she would have chosen. In a practice serving beneficiaries who are frequently unable to detect or contest how they are being characterized, that second question is the one that ultimately governs whether these tools are used well.

Navigating AI's Wild West

Trends, Ethics, and Backlash in Legal Practice

Mason Clark · National Conference on Special Needs Trusts · October 22, 2026

1

What's Being Used?

- Frontier chat models
- Research platforms
- Contract review
- T&E-specific tools
- Firm-built internal
- Agentic tools

The most common deployment is a personal account on a personal phone

2

2

Rules and Opinions

1.1 Competence	**1.6** Confidentiality	**5.1 / 5.3** Supervision
1.4 Disclosure	**1.5** Fees	**3.3** Candor

ABA Formal Opinion 512 (July 29, 2024) — the baseline document

3

3

What's in a SNT File?

Diagnoses	Psychiatric history	Substance use	Capacity evaluations
Sealed guardianship	School records	Minors	Family finances

When the trustee is your client, the most sensitive material belongs to a beneficiary who is not your client, cannot consent, and is not in the room.

4

4

Bias

NOT TRAINED ON	TRAINED ON
Disabled adults writing about their own lives	**Clinical literature, caregiver guidance, risk management**

Text written about disabled people by the institutions managing them.
A model reproduces the stance that dominates its sources.

5

5

Bias (cont'd)

"despite his limitations" Concessive framing	***"confirm with his mother"*** Invented surrogate
"a six-month trial period" Adulthood as earned	***"verify it is being used"*** Routine surveillance
"impulsive requests" A planned trip, reclassified	***"autonomy within limits"*** Constraining autonomy

None of this fails a citation check.

6

6

Catching Bias

1. **Who is missing from this analysis?**
2. **Swap in a non-disabled beneficiary. Does it change?**

If it changes and nothing was disability-related, that is bias, not prudence.

7

7

Ethics and Law

UTC 804	Prudent administration
UTC 807	Delegation — is discretion even delegable?
Accountings	Your reasoning is a chat log you did not write
Restatement 87	Abuse of discretion, even under sole discretion

Corporate and pooled trustees are bound by all of this (and by no Rule of Professional Conduct.)

8

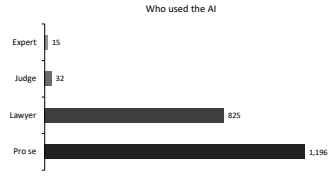
8

Why confidence is eroding

2,077

HALLUCINATION CASES LOGGED WORLDWIDE

Charlotin database, Sept. 2026.
Updated daily (i.e., this number is already out of date).



Not only a pro se problem. 825 of them were lawyers.

9

9

AI Use Policies

PROHIBITED

Client or beneficiary data in consumer tools · unverified legal conclusions · discretionary decisions

VERIFY, ALWAYS

Document review · summarization · consistency checks · drafting — with a file note

UNRESTRICTED

No client data, no legal conclusion · orientation · formatting · internal drafting

Say what is permitted, not only what is forbidden. Cover non-lawyer staff.

10

10

"Did you write this with AI?"

Have the answer ready before you are asked

11

11

The answer

"I used it for this. I checked that. The judgment is mine."

Two questions in one

Did it decide, or merely touch it?
They mean the first, ask the second.

The analogies break

A form book can be asked why.
Saying so beats insisting.

Audience matters

A daughter, opposing counsel
and a judge each want something else.

12

12

Accurate is not the same as fair

Verify every citation and you have addressed the first.
You have not yet asked whether the framing was one you would have chosen.

13

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National Conference on Special Needs Planning and Special Needs Trusts

Thursday
October 22, 2026

Bankruptcy Filings by Care Facilities

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Center for Elder Justice

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BANKRUPTCY FILINGS BY CARE FACILITIES: WHEN RESIDENTS & PATIENTS BECOME CREDITORS

2026 NATIONAL CONFERENCE ON
SPECIAL NEEDS PLANNING
AND SPECIAL NEEDS TRUSTS

PROFESSOR THERESA PULLEY RADWAN
STETSON UNIVERSITY COLLEGE OF LAW

1

JUST ONE EXAMPLE OF THE CONCERNS WITH FACILITY FILINGS

Widow paid $1M to join senior facility that went bankrupt - wiping her out - Manhattan Daily

2

FACILITY FILINGS BY THE NUMBERS

- Becker's Hospital Review tracks chapter 11 "healthcare bankruptcy" filings of facilities with liabilities exceeding $10m
  - Average of about 4 chapter 11 filings every month
  - About ¼ of those tracked are "senior care", and about ¼ are in pharmaceutical industry. The remainder includes primarily hospitals, clinics, medical suppliers.

3

FACILITIES FILING FOR BANKRUPTCY

- Why facilities file
  - Reimbursement from insurance (including Medicare/Medicaid) does not adequately cover costs
    - Funding cuts to Medicaid in progress (the "big beautiful bill")
    - Becker report noted increase in denials of claims from 2024 to 2025
  - Significant expenditures (new technology, update premises, etc.)
  - Increased costs for supplies and labor
    - Becker report noted more than 4% increase in 2025 in median pay for healthcare workers
- Difference between chapter 7 and chapter 11 (and chapter 9)

4

IMPACTS OF FACILITY FILINGS

- Impact on employees
  - Leaving due to uncertainty regarding future employment, delayed wages, reduction of benefits
  - Cuts required to facilitate plan confirmation mean job losses
- Impact on patients
  - Reduction in staff to care for patients
  - Changes in providers
  - Increased cost to patients
  - Potential of closing altogether or of consolidations (esp. hospital systems)—note that Becker report indicated largest quarterly number of M&A transactions since 2020 in first quarter of 2026
  - Impact on the existing claims of patients and former patients
- Impact on third-party contracts

5

OPERATING FACILITY IN BANKRUPTCY

- CMS.gov: requires notification of Medicare Administrative Contractor if facility files for bankruptcy to "resolve Medicare financial obligations". Medicare will sue estate to clawback "overpayments" and can use its setoff powers to get paid "in full".
- Patient Care Ombudsman
  - 11 U.S.C. section 333(a)(1): "the court shall order, not later than 30 days after the commencment of the case, the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case."
    - In re Unique Third Ave. LLC, 675 B.R. 690 (Bankr. S.D.N.Y. 2026): consider existence of satisfactory "internal safeguards" in determining whether to include ombudsman
    - In re Valley Health Sys., 381 B.R. 756 (Bankr. C.D. Cal. 2008): other factors include reasons for bankruptcy filing, whether subject to supervision from other sources, level of care facility provides for patients, significance of injuries resulting from reduction in case, how cost of ombudsman will affect payout to creditors or success of reorganization (cost-benefit analysis), past record of patient care, whether conflict between patients and facility is likely
  - What is a health care business? "primarily engaged in offering to the general public facilities and services for …diagnosis or treatment …" (hospitals, long-term care facilities)

6

SPECIAL CONCERN: PREPAID SERVICES, CCRCS

- The executory contract issue: residents enter into an agreement with the facility to provide services
  - Loss of their money if contract is rejected
  - Might have a claim for return of deposit if services are terminated (or reduced), but….
- Priority claim for unused deposits capped at less than $10K, with remainder being unsecured
  - A Wall Street Journal article indicated that hundreds of millions in refunds have gone unpaid in bankruptcy cases
- Issue of whether state-law protections are preempted by federal bankruptcy provisions
  - Ex: does the state require that the CCRC continue certain services or have certain cash reserves

7

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Thursday
October 22, 2026

Exceptional Family Member Programs

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Volume 231 Issue 4 2025

MILITARY LAW REVIEW

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Belligerent Transmissions Through Neutral Cyberinfrastructure: Why the Anarchy of Cyberspace Demands Special Treatment Under the Law of Neutrality
Lieutenant Colonel Amanda L. Lythgoe

Fueling Innovation: Resolving Ambiguity and Striking a Balance for Markings on Unlimited-Rights Data
Major Sara J. Hickmon

Voir Dire, Voir Dire, Everywhere, But Not a Strike to Spare: A Defense-Focused Proposal to Increase Peremptory Challenges in Military Capital Cases
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IMPROVING CARE FOR THE ARMY'S YOUNGEST DEPENDENTS

Major Pamela M. Gaulin[*]

> *Service members can't focus on the mission when they have concerns about a family member's health or education needs.*[1]

I. Introduction

At the end of 2023, as part of the Army's previous "People First" strategy, the Army touted efforts to increase spouse employment opportunities, streamline moving processes, increase childcare availability, add parental leave entitlements, encourage economic stability through pay raises, improve infrastructure, and support health among the force.[2] However, increased support for military Families with special

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[1] *See* Press Release, DEP'T OF DEF., *New Defense Department Policy Standardizes Exceptional Family Member Program Across the Services* (June 23, 2023), https://www.defense.gov/News/Releases/Release/Article/3437493/new-defense-department-policy-standardizes-exceptional-family-member-program-ac/.

[2] Christopher Hurd, *Year in Review: Army's Quality of Life Changes Place People First*, U.S. ARMY NEWS SERVICE (Dec. 6, 2023), https://www.army.mil/article/272178/year_in_review_armys_quality_of_life_changes_place_people_first.

needs is notably lacking from the Army's highlighted achievements during the 2023 calendar year.[3] In highlighting the Department of Defense's (DoD's) policy to support Families, Secretary of Defense Lloyd Austin remarked that "[the DoD] is deeply committed to ensuring that family members with exceptional needs have access to superb care, support, and expertise."[4] This care should specifically address the needs of young children with disabilities.

Congress has recognized the need to support Families of children with special needs for many years, finding that for children from birth through the age of three, "there is an urgent and substantial need . . . to enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to recognize the significant brain development that occurs during a child's first [three] years of life[.]"[5] Moreover, in April 2023, President Biden issued an executive order, noting that "[e]arly care and education give young children a strong start in life," and "[a]ccess to . . . care is also critical to our national security because it helps ensure the recruitment, readiness, and retention of our military [S]ervice members."[6] Given the expressly affirmed importance of special education by leaders and policymakers at all levels, the DoD and the Army should increase services and legal support for children with special needs, specifically those under the age of three.

Historical developments in special education law demonstrate Congress's intent to support children with disabilities. Congress promulgated what is now the Individuals with Disabilities Education Act (IDEA) in 1975, a significant statutory advancement to protect the educational rights of children with disabilities.[7] The protections established in the IDEA were specifically extended by Congress in 1991 and 1994 to children attending schools on a military installation in the United States and overseas, placing responsibility on the Department of

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[3] *Id.*

[4] Memorandum from Sec'y of Def. to Senior Pentagon Leadership, Commanders of the Combatant Commands & Def. Agency and Dep't of Def. Field Activities, subject: Strengthening Our Support to Service Members and Their Families 3 (22 Mar. 2023) [hereinafter Strengthening Our Support Memo].

[5] 20 U.S.C. § 1431(a)(1).

[6] Exec. Order No. 14,095, 88 Fed. Reg. 24669, § 1 (Apr. 18, 2023).

[7] *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (amended 1991); *see also* Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 587, § 1 (renaming the Education for All Handicapped Children Act of 1975 the Individuals with Disabilities Education Act).

Defense (DoD) to ensure special education needs were met in certain instances.[8] In 2009, Congress established the Office of Community Support for Military Families with Special Needs to "enhance and improve [DoD] support around the world for military families with special needs."[9] Since then, Congress has mandated improvements to the DoD's support of Families with special needs annually through the National Defense Authorization Act (NDAA) and continued prioritizing efforts to support special education through annual authorizations.[10] In response to congressional oversight and highlighting issues related to Families with special needs, the DoD has taken significant steps to advance its services and support for dependents with disabilities.[11] Recent improvements include mandating the standardization of Exceptional Family Member Programs (EFMPs)[12] across the military services; requiring medical

[8] *See, e.g.*, Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 605, § 24 (amending the Defense Dependents Education Act of 1978 to require IDEA implementation overseas); National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 351, 108 Stat. 2663, 2727 (1994) (authorizing special education and early intervention on military installations within the United States).

[9] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 563(a)(1), 123 Stat. 2190, 2304 (2009).

[10] *See, e.g.*, *id.*; Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§ 582, 582(c), 124 Stat. 4137, 4226 (enhancing "community support for military families with special needs" and authorizing secretaries of the military departments to "establish or support centers on or in the vicinity of military installations under the jurisdiction of such Secretary to coordinate and provide medical and educational services for children with special needs of members of the Armed Forces who are assigned to such installations"); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 574, 125 Stat. 1298, 1427–1428 (2011) (appointing the Director of the Office of Community Support for Military Families with Special Needs to the DoD Military Family Readiness Council); National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 714, 126 Stat. 1632, 1803 (expanding evaluation of Tricare Program effectiveness to include "dependents of members on active duty with severe disabilities and chronic health care needs"); Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 624(a)(1), 128 Stat. 3292, 3403 (2014) (adding survivor benefit plan annuities for special needs trusts); National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 578, 130 Stat. 2000, 2144 (2016) (requiring evaluation and reporting on the effectiveness of Exceptional Family Member Programs across the military departments).

[11] *See* Press Release, *supra* note 1 (detailing improvements and standardization for the Exceptional Family Member Program (EFMP) in the areas of identification and enrollment, assignment coordination, Family support, disenrollment, and respite care).

[12] The EFMP model is to "work[] in concert with other military and civilian agencies, provid[ing] a comprehensive, coordinated, multiagency approach for community support,

coordination and documentation for enrollment in the program; ensuring branches use the same criteria to evaluate assignments for Service members who have dependents with special needs and communicating assignment issues; mandating annual contact with Family support providers; providing transparency and guidance for removal from the EFMP; and standardizing, and in some cases increasing, eligibility for respite care.[13] However, the DoD continues to struggle in many areas to ensure support for Families with special needs.[14] One of the areas most lacking support for individuals and Families with special needs is ensuring care for children with disabilities from birth through the age of three.

Many hurdles for family members receiving special needs care occur within the first few years of life.[15] The laws that govern early intervention services (EIS) and care for children with disabilities under the age of three are complex and vary significantly from State to State.[16] Nevertheless, within each State, there is one statewide standard for eligibility and provision of EIS.[17] Despite the complexity of current laws and support,

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housing, medical, educational, and personnel services to Families with special needs." U.S. DEP'T OF ARMY, REG. 608-75, EXCEPTIONAL FAMILY MEMBER PROGRAM para. 1-6 (27 Jan. 2017) [hereinafter AR 608-75]. The military requires Families to enroll in the EFMP to assist in tracking special needs for the Family and the support required. *Id.* paras. 1-7(a), 1-9.

[13] Press Release, *supra* note 1.

[14] INSPECTOR GEN., U.S. DEP'T OF DEF., NO. DODIG-2023-102, AUDIT OF THE DOD EXCEPTIONAL FAMILY MEMBER PROGRAM 10–15 (AUG. 1, 2023) (detailing the need for establishing and standardizing performance metrics and data repositories); *see also 2023 Update: EFMP Standardization*, PARTNERS IN PROMISE (June 27, 2023), https://thepromiseact.org/2023-update-efmp-standardization/ (finding that the DoD's recent update to the EFMP policy is "underwhelming" and "still fails to address the intersections of EFMP and special education").

[15] *See* CTR. ON THE DEVELOPING CHILD AT HARVARD UNIV., THE FOUNDATIONS OF LIFELONG HEALTH ARE BUILT IN EARLY CHILDHOOD 5 (2010) (finding that "[e]arly childhood is a time of rapid development in the brain and many of the body's biological systems that are critical to sound health. When these systems are being constructed early in life, a child's experiences and environments have powerful influences on both their immediate development and subsequent functioning").

[16] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106019, SPECIAL EDUCATION: ADDITIONAL DATA COULD HELP EARLY INTERVENTION PROGRAMS REACH MORE ELIGIBLE INFANTS AND TODDLERS app. II (2023) [hereinafter GAO-24-106019], https://www.gao.gov/products/gao-24-106019 (listing the varying standards for EIS eligibility by jurisdiction).

[17] *Id.*; *see also* 20 U.S.C. § 1400(d)(2) (stating the purpose of the Individuals with Disabilities in Education Act to "assist States in the implementation of a statewide,

there is no standard eligibility or application of EIS for military Families and their dependents, who are left to navigate a new EIS program for eligibility and related services each time a Service member moves to a new duty location.[18] Based on current DoD policy limitations, Family members with disabilities under the age of three are limited in receiving early intervention, and the DoD should resolve discrepancies in the policy to expand services for this demographic. Regardless of how the DoD resolves gaps in current policies and regulations, the Army should continue expanding legal support and expertise for Families with special needs.

Part II of this article begins by briefly examining the history of the IDEA and the applicability and implementation of regulations for special education services across the DoD. Part III then evaluates the justification for increasing services and legal support regarding disabilities identified before a child's third birthday. Next, Part IV addresses statutory and regulatory gaps related to early intervention within the military and how the DoD should resolve those gaps. Part V discusses the Fiscal Year 2021 (FY21) National Defense Authorization Act (NDAA) mandate to provide special education-trained attorneys across the DoD and the Army's subsequent actions to satisfy that mandate. Lastly, before concluding, Part VI proposes an expansion of the Army's legal expertise beyond the limited requirements of the NDAA mandate to advise units and organizations more effectively.

II. Background on Special Education Law in the Military

Legal protections in education for children with disabilities, including military dependents, have evolved significantly over the past 50 years in the United States. In September 1973, Congress passed the Rehabilitation Act of 1973, intending to eliminate widespread discrimination against

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comprehensive, coordinated, multidisciplinary, interagency system of early intervention services").

[18] While the DoD has a policy for providing EIS to dependents, such programs only exist for those at an installation with a DoD Education Activity school on their installation. *See* U.S. DEP'T OF DEF., INSTR. 1342.12, PROVISION OF EARLY INTERVENTION AND SPECIAL EDUCATION SERVICES TO ELIGIBLE DOD DEPENDENTS para. 4(a) (June 17, 2015) [hereinafter DODI 1342.12]. *See also EDIS Locations: CONUS & Territory*, DEFENSE MEDIA ACTIVITY, https://www.edis.army.mil/EDIS-Locations/Maps/ (last visited Apr. 13, 2025).

individuals with disabilities.[19] Amendments to the Act, subsequently codified in Title 29, United States Code, Chapter 16, Section 504, decree that "[n]o otherwise qualified individual with a disability in the United States. . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[20] Specifically, the Rehabilitation Act of 1973 provided protections against discrimination by school districts.[21] As this article focuses on increasing support for children under the age of three, it will not specifically address protections afforded to school-age children under the Rehabilitation Act of 1973, Section 504. However, it is helpful to note that this Act ignited educational protections for children with disabilities.[22] Only two years later, President Gerald Ford signed the Education for All Handicapped Children Act into law as Public Law 94-142, later renamed the Individuals with Disabilities in Education Act (IDEA), to ensure access to education and improved outcomes for children with disabilities.[23] This section will review the purpose and protections of the IDEA, its applicability to the DoD, and the current implementation of the IDEA within the Army.

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[19] Rehabilitation Act of 1973, Pub. L. 93–112, § 2, 87 Stat. 357 (amended 2022) (recognizing the need for disabled individuals to have independence and self-sufficiency and recognizing that the affected population was previously underserved and neglected); *see also Rehabilitation Act 50: Advancing Access and Equity—Then, Now and Next*, U.S. DEP'T OF EDUC. (Sept. 21, 2023), https://sites.ed.gov/osers/2023/09/celebrating-the-50th-anniversary-of-the-rehabilitation-act-of-1973/ (detailing the purpose, policy, and principles of the Rehabilitation Act of 1973 on the fiftieth anniversary of its enactment).

[20] 29 U.S.C. § 794(a).

[21] *See* 29 U.S.C. § 794(b)(2)(B) (prohibiting discrimination by "a local educational agency . . . system of career and technical education, or other school system").

[22] *See generally Frequently Asked Questions: Disability Discrimination, General FAQs About Disability Discrimination*, U.S. DEP'T OF EDUC. (Jan 17, 2025) https://www.ed.gov/laws-and-policy/civil-rights-laws/disability-discrimination/frequently-asked-questions-disability-discrimination.

[23] Presidential Statement on Signing the Education for All Handicapped Children Act of 1975, 2 PUB. PAPERS 707 (Dec. 2, 1975).

A. Purpose and Protections of the Individuals with Disabilities in Education Act

The primary purposes of the IDEA, building on previous legislation, [24] are:

> (1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; . . . (2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families; (3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities . . . ; and (4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.[25]

The IDEA encourages a "whole-school approach" to address the learning and behavioral needs of children without having to "label children as disabled."[26] Overall, the IDEA comprises three main sections: Part A provides general definitions and applicability; Part B provides requirements for the education of school-aged children; and Part C provides the requirements to support special education services for children between birth and a child's third birthday.[27] Congress enacted the IDEA to codify the rights of children with disabilities and their parents and

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[24] *See* 20 U.S.C. § 1400(c)(3) (noting that "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education [(FAPE)] and in improving educational results for children with disabilities"); *see also* 20 U.S.C. § 1400(c)(4) (acknowledging that "the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities").

[25] 20 U.S.C. § 1400(d).

[26] 20 U.S.C. § 1400(c)(5)(F).

[27] *See generally* 20 U.S.C. ch. 33.

assist States in the implementation of services for those families. In addition to funding educational services provided to the children, the IDEA seeks to support parents and educators to achieve maximum success.[28] The majority of support provided to children with disabilities occurs during the school-age years, from the time they reach the age of three until they turn 21 years of age.

One of the hallmarks of the IDEA, as identified in Part B, is that, between the ages of three and 21, children with disabilities must have the opportunity to receive "a free appropriate public education [(FAPE)] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]"[29] The established goal for States receiving funds through the IDEA is to provide a "full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal."[30] In support of these goals, the IDEA requires that each child have an individualized education program (IEP) detailing the child's specific needs and how the school plans to meet those needs.[31] If successful, a child

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[28] 20 U.S.C. § 1400(d)(3) (aiming "to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services").

[29] 20 U.S.C. § 1400(d)(1)(A). A FAPE includes "special education and related services . . . provided at public expense, under public supervision and direction, and without charge[,]" that meet State educational standards at a preschool, elementary, or secondary school, and the requirements of an individualized education plan (IEP). 20 U.S.C. § 1401(9).

[30] 20 U.S.C. § 1412(a)(2).

[31] 20 U.S.C. § 1412(a)(4). IEPs are established in accordance with 20 U.S.C. § 1414(d) to assess a child's disability and the impact of that disability on a child's education. 20 U.S.C. § 1414(d)(1)(A)(i). In establishing an IEP, the program determines "measurable annual goals, including academic and functional goals," to meet that child's educational needs and make progress in the general education program. 20 U.S.C. § 1414(d)(1)(A)(i)(II). An IEP may include a requirement for the school to provide related services, including:

> transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling,

will "be involved in and make progress in the general education curriculum[.]"[32] However, the need to establish the support required to reach these goals often begins even before a child reaches the age of three.

Another hallmark of the IDEA, as detailed in Part C of the IDEA, is the provision of EIS to infants and toddlers with disabilities.[33] The goal of EIS, similar to the requirements for children receiving special education through implementing an IEP, is to provide "statewide, comprehensive, coordinated, multidisciplinary, interagency" services.[34] Congress found that EIS would minimize developmental delays, reduce societal costs, maximize independent living, and enhance the capacity of parents and States to support infants and toddlers with disabilities.[35] Recognizing the significance and benefits of early intervention in development, Congress included provisions within Part C of the IDEA for financial assistance to the States to ensure the identification of needs and provision of services to children with disabilities from birth until their third birthday.[36] Similar to the provisions for support of a school-aged child, States are encouraged and supported in identifying disabilities before a child's third birthday and supporting those children and families through the provision of EIS.[37] Through the IDEA, states are encouraged to "expand opportunities for

> orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26)(A).

[32] 20 U.S.C. § 1414(d)(A)(i)(II)(aa).

[33] 20 U.S.C. § 1400(d)(2).

[34] 20 U.S.C. § 1431(b)(1); *see also* 20 U.S.C. § 1412 (a)(11–12) (noting the requirements for states to conduct interagency coordination for school-age services).

[35] 20 U.S.C. § 1431(a).

[36] *See* 20 U.S.C. § 1431(b); *see also* 20 U.S.C. § 1432(5) (defining "infant or toddler with a disability" as a child "under 3 years of age who needs early intervention services" based on developmental delays, physical or mental diagnoses, or at-risk infants and toddlers).

[37] Early intervention services (EIS) include direct intervention services by a provider, including, but not limited to, physical therapy, occupational therapy, speech therapy, or special instruction. 20 U.S.C. § 1432(4)(E). EIS is designed to support the family and also includes "family training, counseling, and home visits" and "social work services[,]" which, in most instances, means a provider will come to the home and work with the family to implement therapy techniques and encourage maximum development for the child. *Id. See also Sec. 303.13 Early Intervention Services*, DEP'T OF EDUC. (May 2, 2017), https://sites.ed.gov/idea/regs/c/a/303.13.

children under three years of age who would be at risk of having substantial developmental delay if they did not receive early intervention services." [38] In determining the Federal, State, and other agency requirements, it is essential to understand the applicability of the IDEA across the United States.

The IDEA contains limitations in both time and geography. With regard to timing, the IDEA requires periodic re-authorization by Congress.[39] From a geographic perspective, the IDEA applied only to the

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[38] 20 U.S.C. § 1431(b)(4). Under this subchapter, EIS includes:

> developmental services that– (A) are provided under public supervision; (B) are provided at no cost except where Federal or State law provides for a system of payments by families, including a schedule of sliding fees; (C) are designed to meet the developmental needs of an infant or toddler with a disability, as identified by the individualized family service plan team . . . (D) meet the standards of the State in which the services are provided, including the requirements of this subchapter; (E) include– [family training, counseling, and home visits; special instruction; speech-language pathology and audiology services, and sign language and cued language services; occupational therapy; physical therapy; psychological services; service coordination services; medical services only for diagnostic or evaluation purposes; early identification, screening, and assessment services; health services necessary to enable the infant or toddler to benefit from the other early intervention services; social work services; vision services; assistive technology devices and assistive technology services; and transportation and related costs that are necessary to enable an infant or toddler and the infant's or toddler's family to receive another service described in this paragraph; (F) are provided by qualified personnel[] . . .; (G) to the maximum extent appropriate, are provided in natural environments, including the home, and community settings in which children without disabilities participate; and (H) are provided in conformity with an individualized family service plan adopted in accordance with section 1436 of this title.

20 U.S.C. § 1432(4).

[39] Ralph M. Gerstein & Lois Gerstein, *Parents' or Student's Proof in Action for Educational Services or Tuition Reimbursement Under the Special Education Laws*, 93 AM. JUR. PROOF OF FACTS 3d 1 §4 (2007) (database updated Sept. 2023). The last re-authorization of IDEA occurred in November 2004, with an amendment to IDEA in 2015 through Public Law 114-95, Every Student Succeeds Act. *About IDEA*, U.S. DEP'T OF EDUC., https://sites.ed.gov/idea/about-idea (last visited June 12, 2025).

50 States, outlying areas, and freely associated States at its inception.[40] However, when Congress reauthorized the legislation in 1991, the updates provided specific requirements for the DoD to meet various statutory provisions related to special education.[41] Specifically, Congress amended Section 1409(c) of the Defense Dependents' Education Act of 1978, applying the IDEA to all schools operated by the Department of Defense overseas and requiring the DoD to provide comparable early intervention services to eligible infants and toddlers overseas.[42] In 1994, Congress amended Chapter 108 of Title 10, United States Code, to authorize DoD domestic dependent elementary and secondary schools (DDESS) to provide early intervention services and special education.[43] To satisfy its statutory obligations, the DoD has since taken numerous steps to ensure compliance with the IDEA requirements.

B. Applicability of the Individuals with Disabilities in Education Act to the Department of Defense

The DoD most recently published DoD Instruction 1342.12 (DoDI 1342.12) on June 17, 2015, implementing the DoD policy to provide early intervention and special education services for eligible DoD dependents.[44] DoDI 1342.12 provides overarching guidance and policy regarding

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[40] *See, e.g.*, 20 U.S.C. § 1411(a)(1) (authorizing "grants to States, outlying areas, and freely associated States"); 20 U.S.C. § 1443(a)(1) (identifying the allocation of funds available to outlying areas and freely associated states for EIS implementation). Under the definitions in Part A, outlying areas include "the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands." 20 U.S.C. § 1401(22).

[41] Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 605, § 24 (amending the Defense Dependents Education Act of 1978). The amendment also expanded applicability to the Secretary of the Interior to provide services for Indian tribes and programs affiliated with the Bureau of Indian Affairs. *See, e.g.*, 20 U.S.C. § 1411(a)(1) (authorizing grants to states, outlying areas, freely associated states, and the Secretary of the Interior); 20 U.S.C. § 1443(b) (noting the availability of funds to the Secretary of the Interior for tribes, tribal organizations, or consortia in implementing EIS). "The term 'Indian tribe' means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native village or regional village corporation . . . ." 20 U.S.C. § 1401(13).

[42] Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 605, § 24.

[43] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 351, 108 Stat. 2727 (1994).

[44] DoDI 1342.12, *supra* note 18.

implementing the IDEA within the DoD Education Activity (DoDEA) Schools and providing early intervention and related services on DoD installations, with specific implementing instructions separately detailed in DoD Manual 1342.12 (DoDM 1342.12).[45]

1. School-Aged Implementation

Overall, the IDEA implementation within the DoDEA intends to mirror the implementation in any state-provided schooling and ensure that DoD dependents receive the same educational guarantees. The DoD implements similar responsibilities and programs within the DoD to ensure school-age children receive a FAPE, as detailed in Enclosure 4 of DoDM 1342.12.[46] The manual authorizes referral for evaluation by either a parent or teacher.[47] The manual also requires "child-find activities to locate, identify, and screen all children who are entitled to enroll in DDESS or in [DoDEA schools overseas] . . . who may require special education and related services."[48] The school then conducts an assessment and evaluation of the child's educational needs, followed by an eligibility determination and the development of an IEP based on the standards outlined in the IDEA, with many of the same procedural safeguards.[49] The DoD takes a similar approach to ensure that special education services and

[45] U.S. DEP'T OF DEF., MANUAL 1342.12, IMPLEMENTATION EARLY INTERVENTION AND SPECIAL EDUCATION SERVICES TO ELIGIBLE DOD DEPENDENTS (June 17, 2015) [hereinafter DoDM 1342.12]. Department of Defense Education Activity (DoDEA) schools also include schools operated under the oversight of DoDEA, including Domestic Dependent Elementary and Secondary Schools (DDESS) and Department of Defense Dependent Schools (DoDDS). *See id.* para. 2(a)(3).

[46] *See id.* at encl. 4; *see also id.* at encl. 2, para. 3(b) (requiring the Director, DoDEA, to ensure "a [FAPE] and procedural safeguards in accordance with Reference (b), the IDEA and [DoDM 1342.12] to children with disabilities who are entitled to enroll in DoDEA schools . . . .")

[47] *Id.* at encl. 4, paras. 4–5.

[48] *Id.* at encl. 4, para. 2(a)(1).

[49] *Id.* at encl. 4, paras. 6–8. DoDM 1342.12 requires education with non-disabled children to the maximum extent appropriate and requires schools to provide services in the least restrictive environment. *See id.* at encl. 4, para. 10. The manual also provides protections for the student concerning the provision of services in an extended school year. *See id.* at encl. 4, para. 11. DoDM 1342.12 also places specific limitations on discipline administration for children with disabilities, with specific procedural safeguards for parents concerning disciplinary actions. *See id.* at encl. 4, para 12.

protections are available to children and Families receiving early intervention services on eligible DoD installations.

2. Infant and Toddler Implementation

Department of Defense Manual 1342.12 recognizes the "urgent and substantial need" to provide early intervention services in accordance with the IDEA and details requirements for providing those services in Enclosure 3.[50] Under implementing regulations and the IDEA, the Secretaries of the Military Departments must "[e]stablish educational and developmental intervention services (EDIS) to ensure infants and toddlers with disabilities are identified and provided [early intervention services] where appropriate . . . ."[51] The manual requires Military Departments to implement, at a minimum, geographic child-find and public awareness programs related to the provision of early intervention services and authorizes referral of infants and toddlers to EDIS with parental consent and, in some limited circumstances, without consent.[52] The EDIS program is responsible for screening children after referral and determining whether an assessment and evaluation are necessary.[53] Children who meet the screening criteria are assessed and evaluated by a multidisciplinary team

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[50] *Id.* at encl. 3, para. 1.

[51] DoDI 1342.12, *supra* note 18, at encl. 2, para. 4(a).

[52] DoDM 1342.12, *supra* note 45, at encl. 3, para. 2. Referrals to Educational and Developmental Intervention Services (EDIS) do not require parental consent when an infant or toddler under three years of age is involved in a substantiated case of child abuse, involved in a substantiated case of child neglect, affected by illegal substance abuse, or experiencing withdrawal symptoms from prenatal drug exposure. DoDM 1342.12, *supra* note 45, at para. 2(b). Child-find is defined as:

> [a]n outreach program used by DoDEA, the Military Departments, and the other DoD Components to locate, identify, and evaluate children from birth to age 21, inclusive, who may require EIS or special education and related services. All children who are eligible to attend a DoD school under sections 921-932 of Reference (b) or Reference (c) fall within the scope of the DoD child-find responsibilities. Child-find activities include the dissemination of information to Service members, DoD employees, and parents of students eligible to enroll in DoDEA schools; the identification and screening of children; and the use of referral procedures.

DoDI 1342.12, *supra* note 18, at glossary, part II.

[53] DoDM 1342.12, *supra* note 45, at encl. 3, para. 2(e).

to determine the child's level of functioning in cognitive development, physical development, communication development, social or emotional development, and adaptive development to identify the services required to address the child's needs in those areas.[54] In the event a child requires services, EDIS develops an individualized Family service plan (IFSP) detailing the developmental levels, the Family's resources, priorities, and concerns, measurable desired results or outcomes, the specific early intervention services necessary, and the natural environments in which services will be provided, among other details.[55] While the DoD has taken measures to ensure early intervention services, similar to the aims of providing special education services to school-age children, other considerations may impact whether the DoD may provide services at a given installation.

3. Jurisdictional Limitations

In some instances, Families living on a military installation may depend on the DoD to provide EIS based on jurisdictional limitations. States have obligations and funding under the IDEA to provide services to individuals living within the State.[56] However, while the clear language of the IDEA explicitly requires States to provide special education services to "Indian infants and toddlers with disabilities . . . residing on a reservation geographically located in the State," the statute is silent regarding State obligations to provide similar services for Families residing on federal military installations.[57] Nothing in the IDEA prohibits States from providing such services to Families residing on a military installation geographically located in the State.[58] However, because services on a military installation are not explicitly required, a Service

[54] DODM 1342.12, *supra* note 45, at encl. 3, para. 3.
[55] DODM 1342.12, *supra* note 45, at encl. 3, para. 6. Based on the language of the IDEA, there are also procedural safeguards, similar to those for children on an IEP, in place for parents of an infant or toddler eligible for early intervention services. *See* DODM 1342.12, *supra* note 45, at encl. 3, para. 9.
[56] 20 U.S.C. § 1434(1) (requiring state assurances that EIS are "available to all infants and toddlers with disabilities in the State and their families, including Indian infants and toddlers with disabilities . . . residing on a reservation geographically located in the State, infants and toddlers who are homeless children . . . and infants and toddlers with disabilities who are wards of the State").
[57] *Id.*
[58] *Id.*

member residing on a federal installation may not benefit from state legislation regarding special education services on the installation.[59]

A state may not be obligated to provide the same services depending on the type of legislative jurisdiction applicable to that installation.[60] The Army outlines and defines the four types of federal legislative jurisdiction in Army Regulation 405-20, each potentially impacting the provision of special education services on military bases.[61] In instances of exclusive federal legislative jurisdiction, responsibility may fall solely on the federal government to provide special education services for Families that live in installation housing.[62] In this example, a child who is two years old and lives on an exclusive jurisdiction military installation may not be eligible to receive EIS through the state because they live on a federal installation, and the military is then authorized, but not required, to provide such

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[59] U.S. DEP'T OF ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION para. 4(a) (21 Feb. 1974) [hereinafter AR 405-20].

[60] *See* 20 U.S.C. § 1434 (requiring a statewide system of services for individuals in the state, but not explicitly requiring services for individuals residing on federal property within the state).

[61] AR 405-20, *supra* note 59, para. 3. The four types of jurisdiction are exclusive legislative jurisdiction, concurrent legislative jurisdiction, partial legislative jurisdiction, and proprietary interest. *Id*. Under exclusive federal legislative jurisdiction, Congress provides all legislation, the Federal Government provides all law enforcement, and the state has no obligation to provide governmental services such as sewage, trash removal, or road maintenance. *Id.* at para. 4(a).

> In some States residents on areas under exclusive legislative jurisdiction may be denied many of the important rights and privileges of a citizen of the State concerned, such as the right to vote and to have access to State courts. The language of the State statutes generally governs the remaining degree of State obligation where exclusive Federal legislative jurisdiction exists over an area.

Id. Under concurrent legislative jurisdiction, state and federal laws apply, and both entities may punish criminal conduct; most often, the state reserves the right to tax residents, and the state exercises regulatory powers when not impeding federal functions. *Id.* para. 4(b). With partial legislative jurisdiction, the state enacts, executes, and enforces laws reserved by the state as if the Federal Government has no jurisdiction. *Id.* para. 4(c). In contrast, the federal government enacts, executes, and enforces laws granted without reservation by the state to the federal government as if under exclusive federal legislative jurisdiction. *Id*. In some instances of partial legislative jurisdiction, the state may reserve concurrent jurisdiction over certain powers. *Id*.

[62] *See id.* at para. 4(a) (noting that the language of state statutes will dictate state obligations in areas of exclusive federal jurisdiction).

services.[63] However, when concurrent jurisdiction, partial jurisdiction, or a proprietary interest exists, the state and federal government may be responsible for providing special education services.[64]

Since AR 405-20 was implemented in 1974, the Department of the Army policy has been to obtain only proprietary interest in acquired land, rather than exclusive, concurrent, or partial jurisdiction. [65] When only a proprietary interest exists, "[t]he United States exercises no legislative jurisdiction. The Federal Government has only the same rights in the land as does any other landowner." [66] However, it is still important to understand the federal government's responsibility to provide special education services on land previously purchased. The federal government last developed an inventory of installations possessing exclusive federal jurisdiction in 1962, so each installation must be evaluated on a case-by-case basis.[67] In instances of exclusive federal jurisdiction, states cannot enforce or execute legislation on an installation, exacerbating the burden on the military to provide special education services.[68]

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[63] *See* 10 U.S.C. § 2164(a) (granting authority to provide educational programs when state programs are not available); *see also, e.g.*, 10 U.S.C. § 2164(f)(B) (granting substantive and procedural rights to infants and toddlers with disabilities); 10 U.S.C. § 2164(b) (providing guiding factors to determine whether to establish a DoDEA school, including: "(A) The extent to which such dependents are eligible for free public education in the local area adjacent to the military installation[; and] (B) [t]he extent to which the local educational agency is able to provide an appropriate educational program for such dependents[,]" but failing to address any criteria to determine whether appropriate EIS are provided and available).

[64] *See* AR 405-20, *supra* note 59, para. 4(b) (stating that "[t]he regulatory powers of the State may be exercised [in a concurrent jurisdiction area], but not in such a manner as to interfere with Federal functions").

[65] *Id.* para. 5.

[66] *Id.* para. 4(d).

[67] JONATHAN M. GAFFNEY & MAINON A. SCHWARTZ, CONG. RSCH. SERV., R47291, POTENTIAL ENFORCEMENT OF STATE ABORTION LAWS ON FEDERAL PROPERTY 2 (2022) (citing GEN. SERVS. ADMIN., INVENTORY REPORT ON JURISDICTIONAL STATUS OF FEDERAL AREAS WITHIN THE STATES AS OF JUNE 30, 1962 (1964), https://publiclandjurisdiction.com/wp-content/uploads/2020/01/JURISD1.pdf).

[68] AR 405-20, *supra* note 59, para. 4(a); *see also* Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 605, § 24 (recognizing the need for special education services provided by the Federal Government for military dependents).

C. Current Implementation of the Individuals with Disabilities in Education Act within the Army

Department of Defense Instruction 1342.12 mandates that the Army provide special education services and early intervention.[69] The IDEA is implemented on Army installations by two leading agencies: for school-aged children with special needs, the DoDEA is responsible for providing special education and related services;[70] for children under the age of three, EDIS programs are managed and operated by the military treatment facilities (MTFs) and provide EIS.[71]

1. School-Aged Implementation

Department of Defense Instruction 1342.12 requires the DoDEA to provide special education services within the Army. DoDEA follows these guidelines at each Army installation and is "committed to promoting inclusive education, which is defined as the participation of all students, including those with disabilities, limited English proficiency, identified gifts and talents, and other special needs in the general education program, as appropriate."[72] For students transferring into a DoDEA school, the Military Interstate Compact enables and guarantees that the school will continue to implement any previous IEPs until it conducts a new evaluation and subsequently establishes a new IEP.[73] Due to the DoD's oversight and responsibility for the special education implementation of school-aged children, the Army focuses less on providing services and more on supporting Families navigating the school systems.

The responsibility to manage and oversee special education in DoDEA schools is at the DoD level, and the Army supports implementation with school liaison officers and other support, as needed, from the Installation

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[69] DODI 1342.12, *supra* note 18, paras. 1(a)(1), 1(a)(3).
[70] *See id.* encl. 2, para. 3.
[71] *See id.* para. 4 (placing EDIS responsibility on Secretaries of the Military Departments); *see also* U.S. ARMY MEDICAL COMMAND, REG. 40-53, EDUCATIONAL AND DEVELOPMENTAL INTERVENTION SERVICES: EARLY INTERVENTION SERVICES para 1-9(a) (31 Jan. 2014) [hereinafter MEDCOM REG. 40-53] [note that access to this regulation requires a DoD Common Access Card].
[72] *Information for Parents*, DEP'T OF EDUC., https://www.dodea.edu/education/student-services/special-education/information-parents (last visited June 12, 2025).
[73] U.S. DEP'T OF DEF., INSTR. 1342.29, INTERSTATE COMPACT ON EDUCATIONAL OPPORTUNITY FOR MILITARY CHILDREN encl. 4, para. 2(b)(3)(a) (Jan. 31, 2017).

or Garrison Command.[74] School liaison officers assist parents in navigating resources for their children, including providing "information about the local educational options and enrollment processes" as well as answering questions regarding special education.[75] While this support model is also present for infant and toddler implementation of the IDEA, the Army has increased responsibilities in ensuring it provides EIS for military Families on an installation.

2. Infant and Toddler Implementation

Department of Defense Instruction 1342.12 and the related manual provide only general guidance to the military departments regarding EIS, which the military departments implement through additional service-specific regulations.[76] Department of Defense Instruction 1342.12 requires that military departments "[p]rovide EIS to infants and toddlers with disabilities and their families, and related services to children with disabilities as required by [the] Instruction at the same priority that medical care is provided to active duty military members."[77] While no Army Regulation specifically addresses special education services, the Army Medical Command published Medical Command Regulation 40-53 (MEDCOM Reg. 40-53), which defines requirements and instructs commands on implementing EIS.[78]

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[74] School liaison officers are part of an installation morale, welfare, and recreation (MWR) program. U.S. DEP'T OF ARMY, REG. 215-1, FEDERAL LEGISLATIVE JURISDICTION para. 8-15(a)(1) (24 Sept. 2010). MWR services fall under the management and supervision of the Garrison Commander. *Id.* para. 2-4(b).

[75] *When do I Need and SLO*, ARMY MWR, https://www.armymwr.com/School-support/commanders-1/when-do-i-need-slo (last visited Apr. 13, 2025).

[76] *See* DODI 1342.12, *supra* note 18, encl. 2, paras. 3(b), 4(a) (noting that the Director, DoDEA, is responsible for evaluating special education needs and providing a FAPE for eligible children, while Secretaries of the Military Departments are individually responsible for establishing programs and providing EIS where appropriate). There are no service-specific regulations for special education because the DoD provides all school-age services, which are regulated by DODM 1342.12. *See generally id.* para. 2(a)(3) (applying the policies and requirements to "[a]ll schools operated under the oversight of the [DoDEA] . . .").

[77] *Id.* encl. 2, para. 4(e).

[78] *See generally* MEDCOM REG. 40-53, *supra* note 71. DODI 1342.12 requires Secretaries of the Military Departments to establish "educational and developmental intervention services (EDIS) to ensure infants and toddlers with disabilities are identified and provided EIS where appropriate . . . ." DODI 1342.12, *supra* note 18, encl. 2 at para. 4(a).

Through the Army model, the MTF provides EIS as the lead agent, working with other community agencies to ensure Families obtain necessary services.[79] Specifically, the Army EIS program intends to provide "early childhood special education and educationally related allied health services pursuant to IDEA . . . " providing services in "the child's natural environment—including homes, schools, day care facilities, or other settings where young children typically spend their time."[80] Ultimately, MEDCOM Reg. 40-53 places responsibility on the MTF Commanders to ensure installations correctly implement DODI 1342.12 and provide EIS.[81]

While the MTF Commander takes responsibility for implementing EIS on military installations, it is clear from MEDCOM Reg. 40-53 that several other entities must be involved. At a minimum, the regulation contemplates potential mediation, with mediators not employed by the MTF, to resolve disputes in the EIS provision.[82] MEDCOM Reg. 40-53 also encourages the MTF to coordinate and incentivize parent training, partnership activities, and support groups with the installation Child Youth School & Services organization or other local support groups.[83] In order to achieve these ends, the regulation contemplates using memorandums of agreement or understanding between various organizations and entities engaging in partnering activities.[84] The provision of EIS on an installation requires complex coordination; whether an entity is on or off the installation, there appear to be significant occassions for friction both for the installation and Families.[85] Navigating these services can be time-

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[79] MEDCOM REG. 40-53, *supra* note 71, para. 2-1 (noting that the military treatment Facility (MTF) will take the lead but coordinate with other organizations, including Army Community Services and Child Development Services).

[80] *Id.* para. 2-2.

[81] *Id.* para. 1-9(c). While installation MTFs theoretically monitor and implement services, the EDIS website currently lists only nine locations within the continental United States that coordinate the provision of EIS for eligible military dependents. *See EDIS Locations: CONUS & Territory*, DEFENSE MEDIA ACTIVITY, https://www.edis.army.mil/EDIS-Locations/Maps/ (last visited Apr. 13, 2025).

[82] MEDCOM REG. 40-53, *supra* note 71, at para. 4-1(b).

[83] *Id.* at para. 4-2(a). The regulation also suggests coordinating with spouse associations and morale, welfare, and recreation (MWR) programs to subsidize activities and events for affected populations. *Id.* para. 4-2(b).

[84] *Id.* para. 4-3(a).

[85] Appendix G outlines a detailed process for dispute resolution to resolve inevitable friction in the execution of services, encouraging mediation but with an opportunity for

consuming and stressful, ultimately detracting from the purpose of the IDEA and the Army mission.

III. Importance of Legal Support for Individuals Providing Care and Education for Infants and Toddlers with Disabilities

Improving care and legal support for infants and toddlers with disabilities is critical to support Army quality of life initiatvies.[86] First, it is essential to note that efforts to support military Families enrolled in EFMP are necessary steps toward improving early intervention outcomes for children. Additionally, increased support for children with Special needs directly aligns with the Army's recruiting and retention efforts.[87] Lastly, increased support for Families with special needs ensures that the Army's recent increased childcare needs align with increased support for EFMP Families.

A. Early Intervention Improves Outcomes for Children and Society

Some of the most significant impacts of increased support, including legal support, for early intervention are the impacts on a child's development and decreased burdens on society. The DoD must remain committed to lessening these burdens. As stated by Congress in the findings of the IDEA:

> [T]here is an urgent and substantial need [] to enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to

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legal hearings requiring the calling of witnesses, evidence presentation, and argument. *Id.* at app. G. While the legal support may come from outside of the installation administrative law office, it is crucial for advising attorneys to understand the complexity of providing EIS.

[86] *See Who We Are: The Army's Vision and Strategy*, U.S. ARMY, https://www.army.mil/about/ (last visited Apr. 13, 2025). "Recognizing that our Soldiers, Civilians and families should have the best quality of life possible, the Army is reviewing the full range of its care, support, and enrichment programs, with an initial focus upon: housing and barracks, healthcare, childcare, spouse employment and permanent change of station moves." *Id*.

[87] *See Family Life*, U.S. ARMY, https://www.goarmy.com/army-life/family-living.html (last visited June 12, 2025) (highlighting the benefits for Family members and care placed on Families by the Army).

> recognize the significant brain development that occurs during a child's first 3 years of life; [and . . .] to reduce the educational costs to our society, including our Nation's schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age[.][88]

Overall, a child's early experiences may have lifelong impacts on their development and function.[89] While many specific outcomes for a child are difficult to measure due to the disparity in disabilities upon entrance into early intervention,[90] participating families report perceived improved outcomes.[91] Beyond direct, measurable benefits for the children these

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[88] 20 U.S.C. § 1431(a)(1–2). The need to enhance development and lessen burdens were two among five key findings, the others of which include:

> (3) to maximize the potential for individuals with disabilities to live independently in society; (4) to enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities; and (5) to enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of all children, particularly minority, low-income, inner city, and rural children, and infants and toddlers in foster care.

20 U.S.C. § 1431(a)(3–5).

[89] *See* CTR. ON THE DEVELOPING CHILD AT HARVARD UNIV., *supra* note 15.

[90] *See* KATHLEEN HEBBELER ET AL., EARLY INTERVENTION FOR INFANTS AND TODDLERS WITH DISABILITIES AND THEIR FAMILIES: PARTICIPANTS, SERVICES, AND OUTCOMES 3-14 to 3-15 (2007) (following from a 10-year evaluation of participants in early intervention, "the strongest predictors of health status at 36 months were health status at [early intervention] entry. . . ."); *see also id.* at 3-15 to 3-24 (evaluating outcomes in overall health and functioning of vision, hearing, use of limbs, and communication).

[91] *Id.* at 3-15 ("76% of families indicated that [early intervention] had a lot of impact [on their child], with another 20% indicating some impact, and only 4% indicating no impact."). Another study evaluating the outcomes of EIS on families found that:

> parents perceived many positive family outcomes at the end of early intervention. Most reported that their family was better off as a result of the help and information received. Parents felt competent in their parenting role as well as in their ability to work with professionals and advocate for services. . . . Most were hopeful about the future and expected that their child's life situation and that of their family would be excellent or very good.

programs serve, there are significant societal benefits from promoting and supporting EIS programs.

Data suggests there are many socioeconomic benefits achieved by supporting early intervention,[92] even without considering the potential impacts of disability, increased lifelong academic success, improved behavior and emotions, improved health, and lessened burdens on the welfare and labor systems stem from early intervention.[93] One study of early intervention benefits determined that "the estimates of benefits per child served, net of program costs, range from about $1,400 per child to nearly $240,000 per child."[94] In addition to the direct benefits to children and subsequent societal benefits, increasing legal support for EFMP Families directly supports the Army's strategic goals.

B. Supporting the Army's Retention and Readiness Efforts

The Army has faced significant recruiting shortfalls in the past year, and supporting Army Families will help encourage recruitment and retention moving forward.[95] Before 2021, the Army had no formal survey process or data to understand why Soldiers were leaving the military.[96] However, since the launch of the Department of the Army Career Engagement Survey (DACES) in 2021, issues related to Family support

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Donald B. Bailey, Jr, et al., *Thirty-Six-Month Outcomes for Families of Children Who Have Disabilities and Participated in Early Intervention* 116 PEDIATRICS 1346, 1351 (2005).

[92] *See* GAO-24-106019, *supra* note 16, at 30 (finding that "[p]roviding early intervention through support and services is not only required by IDEA, but is also widely recognized as cost effective").

[93] *See* RAND LABOR AND POPULATION, PROVEN BENEFITS OF EARLY CHILDHOOD INTERVENTIONS, RB-9145-PNC 2 (2005) (citing findings that early intervention provided benefits in "cognition and academic achievement, behavioral and emotional competencies, educational progression and attainment, child maltreatment, health, delinquency and crime, social welfare program use, and labor market success").

[94] *Id.* at 3.

[95] *See* David Vergun, *DOD Addresses Recruiting Shortfall Challenges*, U.S. DEP'T OF DEF. (Dec. 13, 2023) https://www.defense.gov/News/News-Stories/Article/Article/3616786/dod-addresses-recruiting-shortfall-challenges/ (noting that "during fiscal year 2023, the military services collectively missed recruiting goals by about 41,000 recruits").

[96] U.S. Army Public Affairs, *New Survey Examines Why Soldiers Decide to Stay in or Leave the Army*, U.S. ARMY (Nov. 19, 2021), https://www.army.mil/article/252098/new_survey_examines_why_soldiers_decide_to_stay_in_or_leave_the_army.

have been an annual driving factor in voluntary separations.[97] It is also significant that for the enlisted population surveyed in the 2023 DACES, 29.4 percent of the enlisted Soldiers cited "resources available to help care for my family" as one of the top ten reasons to stay in the military.[98] The FY21 NDAA and subsequent issuances by the military reflect the desire to support Families to support retention and future recruiting.[99]

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[97] *See, e.g.*, Loryana L. Vie et al., U.S. DEP'T OF THE ARMY, FIRST ANNUAL REPORT: DEPARTMENT OF THE ARMY CAREER ENGAGEMENT SURVEY 10 (2021) [hereinafter 2021 DACES Report] (concluding that "the most cited reasons for considering leaving the Army centered on the various ways Army service impacts [Service members'] relationships and Families"); Loryana L. Vie & Adam D. Lathrop, U.S. DEP'T OF THE ARMY, SECOND ANNUAL REPORT: DEPARTMENT OF THE ARMY CAREER ENGAGEMENT SURVEY 19 fig.1 (2022) (highlighting the "Top 'Extremely Important' Reasons to Leave the Army" which included: "1. Effects of deployments on Family or personal relationships[;] 2. Impact of Army life on significant other's career plans and goals[;] 3. Impact of military service on my Family's well-being[;] 4. The degree of stability or predictability of Army life[; and] 5. Impact of Army life on Family plans for children"); Loryana L. Vie et al., U.S. DEP'T OF THE ARMY, THIRD ANNUAL REPORT: DEPARTMENT OF THE ARMY CAREER ENGAGEMENT SURVEY 9 (2023) [hereinafter 2023 DACES Report] (finding that "five of the top six 'Extremely Important' reasons to leave the Army center on family").

[98] *See* 2023 DACES REPORT, *supra* note 97, at 32 app. B tbl.B4. When considering the importance of statistics related to enlisted Soldiers, it is critical to understand that as of October 2022, enlisted Soldiers comprised 356,440 out of 463,083 active component Army Soldiers. Army DCS, G1 (DAPE-PRS), Army Component Demographics, at slide 1 (Oct. 31, 2022) (PowerPoint presentation) (on file with author); *see also id.* at 45 (noting that "30 out of 35 [Service members enrolled in EFMP] (86%) reported that the Army's ability to provide resources to help care for their Family was a positive influence (i.e., a 'Somewhat' or 'Extremely Important' reason to STAY in the Army) and that the Army's ability to address their Family's EFMP needs influenced their response"); *Cf.* Anne Marshall-Chalmers, *U.S. Military Kids with Autism Lack Treatment Under Tricare*, THE WAR HORSE (Oct. 19, 2023), https://thewarhorse.org/us-military-kids-with-autism-lack-treatment-under-tricare/ (detailing how for many Families, a lack of resources for their child's special education or medical needs may lead to voluntary separation from the service).

[99] Specifically, the Senate Armed Services Committee Executive Summary of the Fiscal Year 2021 National Defense Authorization Act (FY21 NDAA) cites:

> The committee's top priority is, and always has been, supporting the more than 2.1 million men and women who bravely serve our nation in our Armed Forces. They, along with military families and the civilian workforce, are the backbone of America's national security. The [FY21] NDAA prioritizes their health and wellbeing — ensuring our troops have the resources, equipment, and training needed to succeed in their missions. The bill recognizes that family readiness

Recognizing the increased need to support Families, the Army is working to increase the availability of child care, and increasing services and legal support to Families enrolled in EFMP will support these efforts.

C. Matching Child Care Needs

The proposed expansion of legal support matches the military's increased availability of childcare programs for Service members and their Families in recent years. As supported by President Biden's 2023 Executive Order, "[w]hile the Congress must make significant new investments to give families in this country more breathing room when it comes to care, executive departments and agencies (agencies) must do what they can within their existing authorities to boost the supply of high-quality early care and education . . . ." [100] The call for significant improvements and oversight of the EFMP across the military departments came in addition to the FY21 NDAA provisions for additional research into childcare availability and capacity across the services.[101] Recognizing the continued importance of ensuring EFMP support, particularly in the child development centers (CDCs), Congress has most recently established a pilot program to hire special needs inclusion coordinators at select CDCs to: "(1) coordinate intervention and inclusion services at the center; (2) provide direct classroom support; and (3) provide guidance and assistance relating to the increased complexity of working with the

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> strengthens our force overall, and advocates for military spouses and children.

STAFF OF S. ARMED SERVS. COMM., 116TH CONG., EXEC. SUMMARY ON THE FISCAL YEAR 2021 NAT'L DEF. AUTHORIZATION ACT 2 (2021). *See also Strengthening Our Support Memo*, *supra* note 4.

[100] Exec. Order No. 14,095, 88 Fed. Reg. 24669 sec. 1 (Apr. 18, 2023).

[101] *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 585(b), 134 Stat. 3388, 3654–55 (requiring the Secretaries of the Military Departments to submit reports to Congress on the department's five installations "experiencing the most extreme imbalance between demand for child care and availability of child care"). Following calls for action, Congress subsequently approved the military to build 14 new CDCs at various installations. Karen Jowers, *Congress Approves Construction of 14 More Military Child Care Centers*, MILITARY TIMES (Dec. 16, 2022), https://www.militarytimes.com/news/pentagon-congress/2022/12/17/congress-approves-construction-of-14-more-military-child-care-centers/.

behaviors of children with special needs."[102] While these efforts to increase the availability and quality of child care are laudable, these increases, and the proposed expansions of legal support, will be negligible unless the DoD and the Army take steps to address issues regarding the eligibility and availability of EIS for military Families.

IV. Eligibility Issues Within the Department of Defense and the Army

Generally speaking, special education and related services on a military installation are only present when an installation operates a DoDEA school. Currently, 317 military installations exist in 48 states and the District of Columbia across the contiguous United States.[103] However, since the transfer of most DoDEA schools to local education agencies in the early 1970s,[104] the DoDEA operates schools in only seven of those states.[105] The intent of transferring schools was to provide additional care for military dependents by the states.[106] Nevertheless, the push to transition responsibility for education back to the states has inadvertently created barriers to the smooth and efficient delivery of EIS for military dependents. To resolve this issue, the DoD and Army should interpret current statutory language to require MTFs to provide EIS for all

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[102] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 576(c), 136 Stat. 2395, 2605 (2022).

[103] *See Military Installations*, MILITARY ONE SOURCE, https://installations.militaryonesource.mil/view-all (last visited June 13, 2025) (noting that the website, while an official DoD website, does not list every installation but only those approved by the military departments).

[104] *See* RICHARD K. WRIGHT, A REVIEW OF DEPARTMENT OF DEFENSE EDUCATION ACTIVITY (DODEA) SCHOOLS I-1 through I-2 (Institute for Def. Analyses, Vol. 1 2000) (citations omitted)*; see also id.* at A-2 through A-3.

[105] *DoDEA Schools Worldwide*, DEP'T OF DEF. EDUC. ACTIVITY, https://www.dodea.edu/about/about-dodea/dodea-schools-worldwide (last visited June 12, 2025). The DoD also operates schools in all overseas locations, as required. *Id.*; *see also* 20 U.S.C. §§ 921–932.

[106] *See* WRIGHT, *supra* note 104, at A-I (noting that the DoD transferred schools to state local education agencies due to "(a) pressure from the U.S. Department of Education on states and localities to acknowledge responsibility for the education of military dependents; (b) population growth near installations; and (c) the integration of the public schools"); *see also DoDEA's 75 Year History*, DEP'T OF DEF. EDUC. ACTIVITY, https://www.dodea.edu/about/about-dodea/dodeas-75-year-history (last visited June 12, 2025) (noting that in 1985, Public Law 99-176 required the Secretary of Defense to submit a plan to transfer all Section 6 schools to the local education agencies, which the DoD subsequently submitted in 1986).

dependents living on an installation and provide EIS at each installation where the military operates a CDC.

A. Statutory and Regulatory Gaps Related to Early Intervention Services

While current statutory language requires an analysis of whether a state can provide comparable educational services for military dependents, no such requirement exists to evaluate the provision of EIS. The DoD's current authority to establish and operate schools for DoD Dependents is codified in 10 U.S.C. 2164, which states:

> If the Secretary of Defense makes a determination that appropriate educational programs are not available through a local educational agency for dependents of members of the armed forces and dependents of civilian employees of the Federal Government residing on a military installation in the United States (including territories, commonwealths, and possessions of the United States), the Secretary may enter into arrangements to provide for the elementary or secondary education of the dependents of such members of the armed forces and, to the extent authorized in subsection (c), the dependents of such civilian employees.[107]

The statute grants infants and toddlers with disabilities "all substantive rights, protections, and procedural safeguards" available under IDEA, but nothing within the statute discusses the responsibility to provide EIS or the criteria that should dictate the provision of EIS on a military installation.[108] Despite this gap in the statutory language, the DoD addresses the provision of EIS through its implementing policies and regulations.

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[107] 10 U.S.C. § 2164(a)(1). *But cf.* 20 U.S.C. § 927(c) (authorizing and requiring the DoD to provide developmental pre-school programs to eligible dependents when not otherwise available for dependents overseas, without discretion).

[108] 10 U.S.C. § 2164(f)(B)*; see also* 10 U.S.C. § 2164(b) (providing guiding factors to determine whether to establish a DoDEA school, including: "(A) The extent to which such dependents are eligible for free public education in the local area adjacent to the military installation[; and] (B) The extent to which the local educational agency is able to provide an appropriate educational program for such dependents[,]" but failing to address any criteria to determine whether appropriate EIS are provided and available).

Specifically, DoDI 1342.12 notes that: "It is DoD policy that [] [i]nfants and toddlers with disabilities and their families who (but for the children's age) would be entitled to enroll in a DoDEA school in accordance with sections 921-932 of [20 U.S.C. 921-932] or [10 U.S.C. 2164] shall be provided EIS."[109] In most instances, eligibility to attend a DoDEA school depends on whether a dependent resides on or off a government installation with a DoDEA school.[110] Overseas eligibility to attend a DoD school specifically includes children of officers and employees of the United States overseas, children of employees of certain contractors overseas, and other children when "the Secretary determines that enrollment of such children is in the national interest."[111] Within the United States, eligibility to attend a DoDEA school is limited to a "dependent of a Federal employee residing in permanent living quarters on a military installation at any time during the school year . . ." and dependents of "a United States Customs Service employee who resides in Puerto Rico, but not on a military installation. . ." with few exceptions.[112] While the DoDI links the provision of EIS to dependents who "would be entitled to enroll in a DoDEA school[,]" the instruction does not address whether the entitlement to EIS depends explicitly on the availability of a DoDEA school or simply the eligibility to attend.[113]

When read literally, the military provides EIS only in the nine states and territories of the United States and in overseas locations where DoDEA schools currently operate.[114] Mirroring the availability of DoDEA

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[109] DoDI 1342.12, *supra* note 18, at para. 4(a).

[110] U.S. DEP'T OF DEF. EDUC. ACTIVITY, ADMIN. INSTR. 1344.01, ELIGIBILITY AND ENROLLMENT REQUIREMENTS FOR DODEA SCHOOLS para. 4(1)(a) (Jan. 19, 2023) [hereinafter DoDEA AI 1344.01].

[111] 20 U.S.C. § 923(d)(1).

[112] 10 U.S.C. § 2164(c). *But see, e.g.*, 10 U.S.C. § 2164(c)(B) (providing exceptions for "a dependent of a United States Customs Service employee who resides in Puerto Rico, but not on a military installation . . . in accordance with the same rules as apply to a dependent of a Federal employee residing in permanent living quarters on a military installation"); 10 U.S.C. § 2164(a)(3) (allowing the Secretary of Defense to grant eligibility to enroll in a DoDEA school even though a dependent does not reside on a military installation when: "the dependents reside in temporary housing . . . (I) because of the unavailability of adequate permanent living quarters on the military installation to which the member is assigned; or (II) while the member is wounded, ill, or injured").

[113] DoDI 1342.12, *supra* note 18, para. 4(a). *Contra*, DoDI 1342.12, *supra* note 18, para. 2 (stating the Instruction "[a]pplies to infants and toddlers with disabilities and to children with disabilities who are eligible, *in accordance with this Instruction*, to receive EIS or special education and related services from the DoD") (emphasis added).

[114] DEP'T OF DEF. EDUC. ACTIVITY, *supra* note 105.

schools, currently: "EDIS programs exist at eight Army installations in the contiguous United States, one in Puerto Rico, and eight overseas military communities (scattered throughout four European countries and Korea)."[115] Such a reading of the DODI directly contradicts the purpose and spirit of the IDEA to ensure the development and potential of infants and toddlers with disabilities.[116] Additionally, such a limited and literal reading of the DODI would create inconsistencies in other applications throughout the Instruction.[117] With the limited availability of DoDEA

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[115] *Educational & Developmental Intervention Services*, DEFENSE MEDIA ACTIVITY, https://www.edis.army.mil/About/ (last visited June 12, 2025).

[116] *See* 20 U.S.C. § 1400(d).

> There is an urgent and substantial need to: (1) Enhance the development of infants and toddlers with disabilities to minimize their potential for developmental delay and to recognize the significant brain development that occurs during a child's first 3 years of life. (2) Reduce educational costs by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age. (3) Maximize the potential for individuals with disabilities to live independently. (4) Enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities.

DODM 1342.12, *supra* note 45, encl. 3, para. 1(a).

[117] A literal interpretation carried over into even the next paragraph of the Instruction would eliminate the requirement for the DoD to "engage in child-find activities for all children age birth to 21, inclusive" at installations that do not possess a DODEA-operated school. DODI 1342.12, *supra* note 18, at para. 4(b). The glossary definition supports a restrictive interpretation, defining the child-find as:

> An outreach program used by DoDEA, the Military Departments, and the other DoD Components to locate, identify, and evaluate children from birth to age 21, inclusive, who may require EIS or special education and related services. All children who are eligible to attend a DoD school under sections 921-932 of Reference (b) or Reference (c) fall within the scope of the DoD child-find responsibilities. Child-find activities include the dissemination of information to Service members, DoD employees, and parents of students eligible to enroll in DoDEA schools; the identification and screening of children; and the use of referral procedures.

Id. at 9. However, the Instruction does not define eligibility. *Id.* at 9–12. A restrictive interpretation also appears to contradict the requirement for the Assistant Secretary of Defense for Manpower and Reserve Affairs to develop a "DoD-Wide comprehensive child-find system" without reference to DoDEA school locations or eligibility. *Id.* at encl. 2, para. 1(d).

schools, despite an expanding availability of child care on military installations, the DoDI should not be read literally. Instead, the DoDI should be adjusted and interpreted to require the provision of EIS when a DoD dependent resides on a military installation and meets the relevant disability or developmental delay eligibility requirements.

B. Recommended Adjustments to the Provision of Early Intervention Services

To support compliance with the IDEA, the DoD should adjust the language of DoDI 1342.12, and the Army could interpret DoDI 1342.12 to require EIS and EDIS programs at all installations.[118] The terms "eligibility" or "entitlement" should be defined and evaluated based on whether an individual meets the disability or developmental eligibility requirements to start services and whether the individual would be eligible or entitled to attend a DoDEA school if offered at that installation.[119] The proposed eligibility expansion would replace the current definition of eligibility in the DoDI, which is more directly a requirement of "availability" and whether an individual lives in one of the nine states and territories within the United States that operate DoDEA schools.[120] By

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[118] A significant shift from the nine Army installations currently operating EDIS programs. DEFENSE MEDIA ACTIVITY, *supra* note 115.

[119] DoDI 1342.12, *supra* note 18, at glossary. The Instruction defines infants and toddlers with disabilities as:

> Children from birth up to 3 years of age, inclusive, who need EIS because[: they] are experiencing developmental delays as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: cognitive development, physical development including vision and hearing, communication development, social or emotional development, adaptive development; or [they] have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay.

Id. at 10.

[120] DoDEA AI 1344.01, *supra* note 110, para. 4(1)(a) (establishing eligibility for "Dependent students of members of the U.S. Armed Forces serving on active duty and full-time DoD civilian employees residing in permanent living quarters on a military installation in the Contiguous U.S. [] *if the installation is served by DoDEA schools in accordance with Section 2164 of Title 10, United States Code*") (emphasis added). The

adjusting the eligibility requirements, the DoD will better operate within the intent of the IDEA by linking EIS to the least restrictive environment, integrating the process for referrals and the provision of EIS, and ensuring that military dependents receive special education care when residing on a military installation.

1. Link the Provision of Early Intervention Services to the Least Restrictive Environment

While it is logical for the DoD to only provide school-age special education services at the DoD schools, the same thought process does not apply when designing early intervention programs. The IDEA entitles school-age children to a FAPE provided in the least restrictive environment, which is most often a classroom or school setting.[121] While early intervention also requires providers to serve children in their least restrictive environment, the definition varies significantly from the definition of a least restrictive environment for a school-aged child.[122] On a military installation, the least restrictive environment for a dependent from birth through the age of three is likely either in the installation housing area where the child resides with their Family or in the CDC, where the child attends daycare or preschool programming. First, the DoD should provide EIS for all eligible children who reside on base to ensure there is no gap in services when the state is otherwise unwilling or unable to provide services based on the jurisdiction of the installation. Second,

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exceptions to this Instruction include other limited military dependents who live in temporary housing because of the unavailability of on-post housing, the Service member is wounded, ill, or injured. *Id.* para. 4(1)(b). Other exceptions exist for dependents of certain deceased Service members and students of foreign armed forces who live on a military installation. *Id.* paras. 4(1)(c–d). The Instruction also authorizes enrollment for "[d]ependent students of West Point Athletic Association contract employees who reside on the military installation" and virtual enrollment for students returning from an overseas location where they were previously enrolled in a DoDEA school. *Id.* para. 4.2.

[121] 20 U.S.C. § 1412(a)(5) (establishing the least restrictive environment requirement, in which disabled children "are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes . . . cannot be achieved satisfactorily").

[122] 20 U.S.C. § 1432(4)(G) (defining early intervention services that "to the maximum extent appropriate, are provided in natural environments, including the home, and community settings in which children without disabilities participate").

the DoD should consider expanding eligibility for any child enrolled in the installation CDC to ensure all children receive EIS in the least restrictive environment. Lastly, the DoD should consider providing EIS to all eligible military dependents, regardless of where they live or receive care.

Extending EIS to eligible children residing on a military installation is a logical application of the IDEA, Part C requirements to military installations. Under the IDEA, "it is in the national interest that the Federal Government have a supporting role in assisting state and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law."[123] In March 2023, Secretary of Defense Lloyd Austin noted that the "Department [of Defense] is deeply committed to ensuring that family members with exceptional needs have access to superb care, support, and expertise."[124] Ensuring EIS for eligible dependents on military installations is one of the first steps to fulfill this commitment.

The next logical application of the IDEA, Part C, to the military is providing EIS to eligible children attending daycare on the installation. While many Families choose not to live on a military installation, there is often a significant shortage of military housing, or of quality housing, which drives their decision to do so.[125] Additionally, beginning in 1996, the government started privatizing the majority of military housing areas, so "residing in government quarters" is likely not the most suitable

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[123] 20 U.S.C. § 1400(c)(6).

[124] *Strengthening Our Support Memo*, *supra* note 4, at 3.

[125] *See, e.g.*, Karen Jowers, *Gaps in Military Housing Improvements Lead to Frustration, Confusion*, MILITARY TIMES (Apr. 15, 2023), https://www.militarytimes.com/news/your-military/2023/04/15/gaps-in-military-housing-improvements-lead-to-frustration-confusion/ (reporting anguish by Service members with the execution of the privatized housing projects and updates to protect tenants); Paul J. Selva, *When it Comes to Housing, We are Failing Military Families*, SEATTLE TIMES (May 8, 2023), https://www.seattletimes.com/opinion/when-it-comes-to-housing-we-are-failing-military-families/ (suggesting that 70 percent of military Families do not live on a military installation due to a lack of available housing); Francis Torres, *Answering FAQs on Housing America's Military Families*, BIPARTISAN POLICY CTR. (Mar. 24, 2023), https://bipartisanpolicy.org/blog/faqs-housing-military-families/ (documenting concerns among military Families with long waitlists for housing and poor quality of homes on installations); Letter from Elizabeth Warren & Thomas Tillis, U.S. Senators, to Lloyd Austin, Secretary of Defense (Oct. 6, 2023), https://www.warren.senate.gov/imo/media/doc/2023.10.04%20Letter%20to%20DoD%20on%20EFMP.pdf (voicing concerns about the inadequacy and quality of housing for Service members and their Families who require housing accommodations for a disability).

criterion for consideration.[126] The DoD should instead establish eligibility criteria based on a child's enrollment in a daycare program on an installation. The eligibility to enroll in a CDC mirrors the eligibility to attend a DoDEA school in many aspects, except for the requirement to live on an installation.[127] In a time when there is a housing shortage on installations but a significant push to provide childcare on installations, the DoD should focus on providing EIS within those facilities.[128]

Ideally, the DoD could expand EIS eligibility even further to all military Families with a disabled child. According to 10 U.S.C. Section 2164(a), the Secretary of Defense may provide elementary and secondary education when "appropriate educational programs are not available" for Service members living on an installation.[129] The statute authorizes the Secretary of Defense to allow dependents of Service members to attend DoD educational programming when installation housing is unavailable and "the circumstances of such living arrangements justify extending the enrollment authority to include the dependents."[130] Thus, if state EIS programs are unavailable or inadequate, the military could provide services to eligible dependents. It is arguable, from recent Government Accountability Office (GAO) data, that most states are under-supported and understaffed in their EIS programs; this could allow the military to potentially fill the gap in services for eligible dependents rather than rely on the states to provide services.[131] However, there may still be challenges associated with such an expansion.

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[126] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105866, PRIVATIZED MILITARY HOUSING: UPDATE ON DOD'S EFFORTS TO ADDRESS OVERSIGHT CHALLENGES 3–4 (2022), https://www.gao.gov/assets/gao-22-105866.pdf (noting that "[a]s of March 2022, 14 private housing companies own and operate 78 privatized family housing projects—34 for the Army, 31 for the Air Force, and 13 for the Navy and the Marine Corps").

[127] *See* U.S. DEP'T OF DEF., INSTR. 6060.02, CHILD DEVELOPMENT PROGRAMS (CDPS) para. 4(d) (C2, Sept. 1, 2020); *see also* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283, § 589C, 134 Stat. 3659 (establishing a pilot program to expand DoDEA eligibility to military Families living off-post).

[128] *See* sources cited *supra* note 125 (noting the shortfall of available housing on military installations).

[129] 10 U.S.C. § 2164(a).

[130] 10 U.S.C. § 2164(a)(3)(B)(ii).

[131] GAO-24-106019, *supra* note 16, at 14–15 (citing "Officials from the Infant and Toddler Coordinators Association. . . noting that *all* states have described provider shortages as an enduring challenge for providing early intervention services to eligible children" (emphasis added)).

Expanding EIS to military Families who do not live on an installation may pose challenges to providing EIS in the least restrictive environment. For example, depending on how far from an installation a Family lives, whether by choice or due to housing shortages, an EIS provider would either need to travel to provide services or have the Family transport the child to the installation to receive services. Either option poses logistical challenges for the Family and the EDIS provider.[132] Due to the limited number of EDIS providers and the number of Service members who currently live outside of an installation,[133] providing services outside of a military installation is likely an untenable goal. However, irrespective of the level or amount of EIS expansion by the DoD, the expansion for any category of military Families will provide better integration of medical care and referrals related to EIS.

2. Integrate Referrals and Provision of Services

Although early intervention does not include medical services,[134] primary care providers are crucial to successful referrals, diagnoses, and evaluations for children receiving EIS. Active-duty Service members must enroll in Tricare Prime and receive care from their local MTF when available.[135] While Service members are not required to enroll dependents in Tricare, there may be significant cost barriers to retaining alternative

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[132] President Biden stated in his April 2023 Executive Order, "Military families consistently cite access to high-quality child care as an impediment to military spouse employment and family economic security. Difficulty accessing care also poses a challenge for both spouses—and, as data shows, particularly for women in dual military couples—to continuing their service if they have caregiving responsibilities." Exec. Order No. 14,095, 88 Fed. Reg. 24669 sec. 1 (Apr. 18, 2023). Managing transportation to and from child care or the home for these appointments would likely only exacerbate these challenges. Additionally, with Army EDIS providers currently only serving "eight installations in the contiguous United States," expansion to all installations would require a significant expansion of EDIS personnel to support any expanded EIS eligibility. *EDIS About*, DEFENSE MEDIA ACTIVITY, https://www.edis.army.mil/About/ (last visited June 12, 2025).

[133] *See* ANDREW TILGHMAN, CONG. RSCH. SERV., R47728, MILITARY HOUSING 2 (2023) (citing data provided by the Office of the Assistant Secretary of Defense for Legislative Affairs to CRS, August 28, 2023, on file with the CRS) (finding that approximately 58 percent of all Service members live in community housing outside of a military installation).

[134] *See* 20 U.S.C. § 1432(4)(E)(viii) (defining EIS to include medical services *only for diagnostic or evaluation services*) (emphasis added).

[135] TRICARE, https://www.tricare.mil/prime (last visited June 12, 2025).

medical insurance.[136] Thus, primary care providers at an MTF are often responsible for making referrals to EDIS or a state EIS program when they suspect a child is eligible for services.[137] Delays in primary care appointments or referrals to early intervention can hinder a child's entrance into the appropriate program.[138] Alongside referral responsibilities, primary care providers may also play a significant role in supporting a child's IFSP as part of the interdisciplinary team.[139] Primary care providers are just one of many individuals who ensure children receive the services they need to succeed.

3. Ensure that Children Receiving Care on an Installation Receive Special Education Services

The final and most important reason for increasing the DoD's provision of EIS is to ensure that military dependents receive the early intervention and related services they need from birth through the age of three. For military Families living on an installation that operates a DoDEA school, the MTF commander, through the EDIS program manager, is ultimately responsible for providing EIS.[140] However, as previously discussed, there are no EDIS programs on installations without DoDEA schools, despite the fact that multiple CDCs may operate on those installations.[141] The purpose of EDIS is to provide a seamless provision of

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[136] Les Masterson, *How Much Does Health Insurance Cost in 2025?*, FORBES (Mar. 10, 2025, 1:33pm), https://www.forbes.com/advisor/health-insurance/how-much-does-health-insurance-cost/ (providing an estimated cost of health insurance between $445-505 per month in the United States, for an individual between the ages of 21-30 years old).

[137] *See* DODI 1342.12, *supra* note 18, at 11 (including pediatric clinics in the definition of a primary referral source); Bailey, *supra* note 91, at 1346 (noting the role of pediatricians in identifying and referring children with disabilities for early intervention) (citing American Academy of Pediatrics Committee on Children with Disabilities, *The Pediatrician's Role in the Development and Implementation of an [IEP] and/or an Individual Family Service Plan (IFSP),* 104 PEDIATRICS 124, 124–27 (1999)).

[138] *See* DODM 1342.12, *supra* note 45, encl. 3, para. 6(b) (requiring the initial IFSP meeting to be convened no later than 45 days after a child's referral for EIS); *see also* 20 U.S.C. § 1436(c) (requiring the IFSP to be developed "within a reasonable time after the assessment . . . is completed").

[139] Bailey, *supra* note 91, at 1351 (concluding there is a need to integrate pediatricians into early intervention, particularly for children with disabilities).

[140] *See* MEDCOM REG. 40-53, *supra* note 71, para. 1-9(c).

[141] *See* sources cited *supra* note 115 (noting that only nine Army installations in the United States/Territories currently provide EDIS services).

EIS, but on installations without a DoDEA school, parents are left to their own devices to manage the coordination of services with the state and other agencies on the installation.[142] Failing to provide service coordination can negatively impact children and Families receiving EIS.

Limiting access to EDIS to installations with a DoDEA school can impact a child's eligibility for early intervention and increase stress for Families. In its 2023 report on early intervention programs within the United States, the GAO evaluated the eligibility standards of all 50 states, outlying areas, and freely associated states.[143] In addition to identifying that almost all states have different eligibility standards, the GAO noted that many states have significant staffing shortages in their early intervention programs, making it difficult for children to receive services.[144] Expanding EDIS and EIS eligibility within the military would provide a unified standard for dependents, regardless of their living or childcare situation, when they move from one duty location to the next.[145] Moreover, providing one standard across the military and one organization to coordinate services will relieve additional burdens on Service members and Families related to finding and coordinating care.[146]

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[142] *See* MEDCOM REG. 40-53, *supra* note 71, para. 4-3.

> Although the MTF remains the lead agent for EIS, the overall program should be community based. The mission and structure for many of the required program components already exist within other agencies in the community (for example, ACS, Child and Youth Services (CYS), and so forth). The EDIS programs will not duplicate already existing programs and services on the installation or in the civilian community that are available to EDIS-enrolled Families at little or no cost. However, EDIS will work in collaboration with these agencies to ensure a seamless system of services for children and Families eligible for EDIS.

Id.

[143] GAO-24-106019, *supra* note 16, at app. II (listing the varying standards for EIS eligibility by jurisdiction).

[144] *Id.* at 12–15.

[145] Under the proposed expansion of eligibility, all dependents would fall under the applicability of DODI 1342.12 and receive EIS if eligible based solely on their developmental delays or disabilities. DODI 1342.12, *supra* note 18, para. 2(b); *see also id.* at glossary.

[146] Michael J. Guralnick, *Why Early Intervention Works: A Systems Perspective*, 24 INFANTS & YOUNG CHILDREN 6, 18 (2011).

The only logical reason to link EIS provision to whether an installation also provides a DoDEA school is to ease the transition between EIS and school-age special education according to an IEP, but this reasoning ignores the reality of the military. While some children may no longer require special education services by the time they reach the age of three, many will need to transfer to a pre-school or pre-kindergarten program.[147] Keeping a child in the same system (for example, transferring a DoD IFSP to a DoD IEP or transferring a state IFSP to a state IEP) may make the transfer easier and enable a smoother records transition.[148] However, this argument improperly assumes that a child will remain in the same location at the time they are eligible to transfer to an IEP, a minuscule likelihood for military children.[149]

A stronger argument against expanding EIS is that dependent children with disabilities may then be eligible to receive services from both the state and the DoD, duplicating efforts and costs. For example, if the DoD expanded services to all Service members, or even those who use the CDC, a Service member who lives off post would then be eligible to receive EIS from the state because they live in community housing outside of an installation, and also receive EIS through the DoD. For those dependents,

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> Even when professional help is obtained by parents as their child's developmental problems become apparent, the recommendations that follow can be complex, confusing, and even contradictory. Without question, recruiting and organizing professionals can often be an overwhelming task even for the most conscientious of parents, and service coordination continues to be a major challenge in the EI field. All of this is made far more difficult for the many children at risk and those with established disabilities who face more frequent and certainly more complex health issues than children without these vulnerabilities. Indeed, parental adjustment to ensure the health of vulnerable children and their safety is a constant challenge, easily stressing the entire system of family patterns of interaction.

Id. (citations omitted).

[147] 20 U.S.C. § 1435(c); *see also* 20 U.S.C. § 1436(d)(7–8).

[148] 20 U.S.C. § 1436(d)(7–8) (noting that the statewide system must include plans in the IFSP to transition to pre-school). The DoD provides additional guidance on transitioning between an IFSP and an IEP within the DoDEA. *See* DODM 1342.12, *supra* note 45, at encl. 3, para. 7.

[149] U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105015, DOD PROGRAMS AND SERVICES FOR MILITARY-DEPENDENT STUDENTS WITH DISABILITIES 1 (2018) [hereinafter GAO-22-105015], https://www.gao.gov/products/gao-22-105015 (noting that the average military child will transfer schools nine times before graduation from high school).

it would mean potentially twice the early intervention programming but subsequent costs incurred by both the state and DoD.[150] On the other hand, despite the potential duplication of efforts to support infants and toddlers, there are many benefits to providing this option for military Families. Many states have a sliding fee for individuals to receive EIS, and expanding eligibility would enable Service members to choose to receive EIS from the DoD at no cost.[151] Expanding eligibility for EIS could also reduce interruptions in care and improve record management when a Service member transfers to a new duty station and has the option to continue EIS with the DoD.

Overall, there are significant benefits to expanding eligibility for EIS for military children, including supporting the intent and spirit of the IDEA, integrating the referral process, and ensuring military children receive services. The DoD ought to adjust its interpretation and the language of the DODI to maximize eligibility for dependents from birth through the age of three. Regardless of whether the policies, regulations, and interpretations change, the Army can take additional action now to improve legal support to Service members and Families enrolled in EFMP.

V. The Mandate to Provide Special Education Attorneys

As part of a larger requirement for the DoD to improve the EFMP, the FY21 NDAA specifically mandated the implementation of special education-trained attorneys at each installation.[152] The impetus for this mandate stems from years of frustration among DoD Families concerning implementing the military EFMPs across the Services.[153] In 2018, the

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[150] *See* 20 U.S.C. § 1431(b)(2) (noting that the policy is to provide "financial assistance to the States" to establish and implement EIS programs and help "facilitate the coordination of payment for early intervention services" but implying it does not cover the costs of the program in its entirety).

[151] *See* 20 U.S.C. § 1432(4)(B) (defining early intervention services "provided at no cost except where Federal or State law provides for a system of payments by families, including a schedule of sliding fees").

[152] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 582(b)(7), 134 Stat. 3653.

[153] *See, e.g.,* Jennifer Barnhill, *Military Spouses Take EFMP Concerns to Congress*, MILITARY FAMILIES MAG. (Feb. 11, 2020), https://militaryfamilies.com/military-news/military-spouses-take-efmp-concerns-to-Congress/ (explaining that military spouses turn to EFMP when their children do not receive adequate special education because, at the

GAO conducted a study to review services plans, which document the support required for Families with an EFMP-enrolled Family Member.[154] The study focused on support provided to Families with special needs as they navigated relocation to another installation and found that:

> DOD's most recent annual reports to Congress do not indicate the extent to which each Service provides services plans or allocates sufficient resources for family support providers. According to GAO's analysis, the Military Services have developed relatively few services plans, and there is wide variation in the number of family support providers employed, which raises questions about potential gaps in services for families with special needs[.][155]

For example, while the Army had 43,109 Family members enrolled in the EFMP at the time of the study, only 5,004 service plans had been created for those Families.[156] Comparatively, while the Navy had 17,533 eligible Family members enrolled in the EFMP, only 31 service plans were created.[157] In recognizing the need to increase support for Families entitled

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time the article was published, legal services were only available in a limited amount for Families of Marines); *Exceptional Family Member Program—Are The Military Services Really Taking Care Of Family Members?: Hearing Before the Subcomm. on Mil. Pers. of the H. Comm. on the Armed Forces*, 116th Cong. 59 (2020) (detailing frustrations from Congresspersons and Family members on the efficacy and support of the EFMP).

[154] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-348, MILITARY PERSONNEL: DOD SHOULD IMPROVE ITS OVERSIGHT OF THE EXCEPTIONAL FAMILY MEMBER PROGRAM 3–7 (2018), https://www.gao.gov/assets/gao-18-348.pdf.

> A services plan describes the necessary services and support for a family with special needs, as well as documents and tracks progress toward meeting related goals. It also helps families identify family support services and plan for the continuity of these services during the relocation process by providing a record for the gaining installation. According to DOD, the most effective plan will meet its service goals and identify resources and information for the family.

Id. at 5 n.13.

[155] *Id.* at GAO Highlights.

[156] *Id.* at 12 tbl.3.

[157] *Id.*

to such services, among others, Congress implemented a requirement for attorneys trained in special education across the military departments.

A. The Mandate Two-Step

Section 582(b)(7) of the FY21 NDAA enacts:

> [a] requirement that the Secretary of each military department provide legal services by an attorney, trained in education law, at each military installation— (A) the Secretary determines is a primary receiving installation for military families with special needs; and (B) in a State that the Secretary determines has historically not supported families enrolled in the EFMP.[158]

While the mandate appears to require a plethora of attorneys trained in special education, the Secretaries of the military departments must evaluate these two criteria before the requirement is effective.

The first question is whether an installation is a "primary receiving installation for military families with special needs" in accordance with the mandate.[159] However, there are no accompanying definitions or standards for the Secretaries of the Military Departments to make this determination.[160] Also lacking definition or standardization in the mandate is whether the severity or degree of disability of a Family member impacts an installation's status. The 2018 GAO report provides a starting point, having determined how many installations from the departments have Family members enrolled in EFMP. [161] However, the military should conduct additional research to outline the number of individuals at each

[158] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 582(b)(7), 134 Stat. 3653.
[159] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 582(b)(7)(A), 134 Stat. 3653.
[160] A 2022 GAO study found that the DoD Impact Aid for Children with Severe Disabilities program provided funding to civilian school districts when those districts served at least two military-connected students with "extensive mental, physical and/or behavioral impairment, or a combination of multiple impairments, likely to be permanent in nature and greatly compromising an individual's ability to function independently in the community, perform self-care, and obtain employment." GAO-22-105015, *supra* note 149, at 8 (citing the DoD Impact Aid for Children with Severe Disabilities program application).
[161] GAO-18-348, *supra* note 154, at tbl.3.

specific installation. Moreover, assessments may be impacted or impractical based on the fluid nature of service in the military.[162] While one installation may or may not be a "primary receiving installation for military families with special needs" during one calendar year, that status may change from yearly based on personnel moves and separations from the military.[163] Lastly, it may be important to consider whether the military should give additional weight to an installation based on whether it contains primarily operational units or training and force-generating units.[164] However, again, classifying the installation status is only the first step in determining whether an attorney trained in special education is required.

The second aspect for the Secretaries of the military departments to consider is whether the state concerned has historically supported Families enrolled in the EFMP.[165] Similar to the classification of installations, there is no definition or standardization of how Secretaries of the military departments should evaluate states regarding their support for EFMP Families. The 2021 GAO report on school options for military Families briefly addresses the availability of non-DoD schools near military installations, but the data does not begin to provide an analysis of whether a given state supports EFMP Families.[166] Additionally, it is essential to recognize that EFMP encompasses all military dependents and may

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[162] *See* GAO-22-105015, *supra* note 149, at 1 (citing U.S. Gov't Accountability Off. GAO-21-80, K-12 Education: U.S. Military Families Generally Have the Same Schooling Options as Other Families and Consider Multiple Factors When Selecting Schools (2021), [hereinafter GAO-21-80] https://www.gao.gov/products/gao-21-80).

[163] GAO-22-105015, *supra* note 149, at 1.

[164] *See* STAFF OF S. ARMED SERVS. COMM., 116TH CONG., EXEC. SUMMARY ON THE FISCAL YEAR 2021 NAT'L DEF. AUTHORIZATION ACT 2 (2021) (recognizing that "family readiness strengthens our force overall" and "[reemphasizing] a focus on training to ensure our serve members can conduct their missions safely"). The executive summary implies an understanding that Soldiers are more focused on the mission when their Families are taken care of. However, the summary does not prioritize any particular mission over another. *Id.* at 2, 15.

[165] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283, § 582(b)(7)(B), 134 Stat. 3653.

[166] GAO-21-80, *supra* note 162, at 22–25. Although the 2021 GAO report on schooling options for military Families mentions private school choice programs, it only briefly mentions the impact of enrollment on special education services and how those choices may impact state support. *Id.* at 14. Additionally, while the 2018 GAO report on EFMP oversight by the DoD provides data for the number of exceptional Family members by installation, it does not provide any additional information or context on state-related support available. *Id.* at app. II.

include individuals who are not yet in school or have completed all schooling, so reviewing school-related data alone may not be sufficient.[167] Lastly, as discussed previously, there may be jurisdictional limitations on a state's ability to provide support services for a Family enrolled in EFMP, depending on the specific location.[168] Once an installation is designated a "primary receiving installation for military families with special needs[,]" and the Secretary of the military department determines the state has historically not supported Families enrolled in EFMP in that state, the military department must provide an attorney trained in special education to support that installation.[169]

B. The Army Application

Although the FY21 NDAA mandate to provide additional expertise concerning special education law gives weight to its importance, the Army Judge Advocate Generals Corps (JAGC) began taking measures in 2020 to expand its attorneys' special education law expertise.[170] Acknowledging the importance of supporting clients in this legal practice area, the Army Judge Advocate Legal Service established a policy to maintain an attorney trained in special education law at every

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[167] AR 608-75, *supra* note 12, para. 1-9(b) (noting that one purpose of the EFMP is: "[t]o assess, document, and code the special education and medical needs of eligible Family members in all locations, and forward these coded needs to the military personnel agencies in [accordance with the regulation] for consideration during the assignment process").

[168] *See* AR 405-20, *supra* note 59, para. 4(a) (explaining state obligations and limitations in an area of exclusive federal legislative jurisdiction).

[169] It is important to note that nothing in the FY21 NDAA restricts a military department from providing special education attorneys without meeting these criteria. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283, § 582(b)(7), 134 Stat. 3653.

[170] *See* Devon L. Suits, *Special Education Legal Support Now Available to EFMP Families*, U.S. ARMY (Aug. 20, 2020), https://www.army.mil/article/238337/special_education_legal_support_now_available_to_efmp_families (noting that over 140 attorneys, paralegals, and EFMP providers across the Armed Services completed an online training course hosted by William & Mary Law School, including 40 Army legal practitioners). This article discusses only Army actions taken to train attorneys in special education law; the Air Force, Navy, and Marine Corps have also taken significant steps to increase their services' expertise in special education law. *See* GAO-22-105015, *supra* note 149, at 15–18 (explaining that all of the services have contracted with William and Mary Law School Special Education Advocacy Clinic, and the Air Force, Navy, and Marine Corps have all hired civilian attorneys to provide specific expertise to their respective legal assistance clients on special education and disability law).

installation.[171] At a minimum, the policy states that an attorney at each installation legal assistance office will "provide legal counseling on education subjects, including, but not limited to document review with respect to individual education plans, and plans pursuant to 10 U.S.C. [Section] 794 (504 plans)."[172] As the Army continues to develop its special education legal programming, the JAGC strives to support attorneys by establishing increased training opportunities and information repositories, but largely underdeveloped legal support related to EIS remains.

In order to provide the legal expertise needed at each installation, the JAGC currently offers several training opportunities. One option is an online, self-paced introduction to special education advocacy course.[173] This course is open to any member of the JAGC but requires a Judge Advocate General University account to enroll and gain access to the materials.[174] Topics covered during the introduction to special education advocacy course include: overviews of the IDEA, Section 504, Family Educational Rights and Privacy Act (FERPA);[175] eligibility; disabilities; evaluations; Section 504 of the 1973 Rehabilitation Act; IEPs and meetings; IEPs and FAPE; least restrictive environment; related services; transportation; functional behavior assessments; discipline; manifestation determination review; bullying; transition planning; extended school year; special education and COVID; [176] conflict resolution; remedies; and

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[171] Memorandum from Dir. of Soldier and Family Legal Services to Judge Advocate Legal Service Legal Assistance Practitioners et al., subject: Legal Assistance Services Related to Education Law (28 Jan. 2021).

[172] *Id.* para. 3.

[173] *Introduction to Special Education Advocacy (ISEA) Course*, JAGU, https://jagu.llc.army.mil/webapps/blackboard/execute/announcement?method=search&context=course_entry&course_id=_1390_1&handle=announcements_entry&mode=view (last visited Jan. 11, 2024) (requiring course admission to access materials) [hereinafter ISEA Course]. As of the date of this paper, the course is broken into 21 lessons, with 48 videos and accompanying slides, as well as supporting resource documents for each lesson topic. *Id.*

[174] *Id.*

[175] 20 U.S.C. § 1232(g). The Family Education Rights and Privacy Act (FERPA) governs the rights of parents "to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of [20 U.S.C. § 1232(g)][]" and other access by all parties to educational records. *Id.*

[176] The lesson "special education and COVID" mainly addresses the significant procedural impacts and considerations of special education in an online or virtual learning environment. *Lesson 18: SPED & COVID – ISEA Course*, JAGU https://jagu.llc.army.mil

transferring schools.[177] Aside from the online programming, classes covering the basics of special education law were added to the JAGC's Officer Basic Course, starting in 2023, as part of the overview of legal assistance practice areas.[178] As of the 2024 Spring semester, graduate course students receive one hour of instruction related to special education law and could elect to receive two additional hours of class instruction on special education law, depending on the available elective classes during

/webapps/blackboard/content/listContent.jsp?course_id=_1390_1&content_id=_274372_1&mode=reset (last visited Jan. 11, 2024) (requiring course admission to access materials). Most schools returned to in-person learning following the end of the COVID-19 pandemic. *See* NAT'L CTR. FOR EDU. STATISTICS, U.S. EDUCATION IN THE TIME OF COVID 1 (2022) (noting that 98 percent of public schools planned to return to in-person learning for the 2021 fall semester). However, these topics are still helpful for military attorneys to understand, as remote learning still occurs. Natasha Singer, *Online Schools are Here to Stay, Even After the Pandemic*, N.Y. TIMES (Apr. 11, 2021), https://www.nytimes.com/2021/04/11/technology/remote-learning-online-school.html.

[177] *ISEA Course*, JAGU, https://jagu.llc.army.mil/webapps/blackboard/execute/announcement?method=search&context=course_entry&course_id=_1390_1&handle=announcements_entry&mode=view (last visited June 11, 2025) (requiring course admission to access materials). The Army does not have a special education law training contract with the William and Mary Law School, after the school temporarily discontinued its program. *See Special Education Advocacy Clinic*, WILLIAM AND MARY LAW SCHOOL, https://law.wm.edu/academics/programs/jd/electives/clinics/clinics_list/specialed/ (last visited June 8, 2025) (noting a "brief interlude in which the clinic was not offered" but that the clinic began again in the Fall 2023 semester). However, the materials available on the Army's online advocacy course largely mirror the topics and materials discussed in the William & Mary course. *Announcements – ISEA Course*, JAGU, https://jagu.llc.army.mil/webapps/blackboard/execute/announcement?method=search&context=course_entry&course_id=_1390_1&handle=announcements_entry&mode=view (last visited June 11, 2024) (requiring course admission to access materials).

[178] Interview with Major Amanda McMenamin, Professor, The Judge Advocate General's Legal Center and School, in Charlottesville, Va. (Mar. 15, 2024) [hereinafter Interview with Major McMenamin]. Active Duty, Reserve, and National Guard judge advocates must attend the officer basic course as part of their qualifications to practice law as an Army judge advocate. THE JUDGE ADVOC. GEN.'S LEGAL SERVICES, U.S. ARMY, MISC. PUB. 1-1, PERSONNEL POLICIES para. 7-2(b) (2023) [hereinafter JALS PUB 1-1]. During the officer basic course, students attend classes conducted over 55 training days and "stress[] military law in a law school environment." *Id.* While the course does not aim to provide expertise in any given area, students should be familiar with potential topics they will need to understand and the resources and sources of law they should consult when the issue presents itself. JUDGE ADVOCATE OFFICER BASIC COURSE, U.S. ARMY, STUDENT HANDBOOK 7 (14 Sept. 2023).

their attendance.[179] Lastly, the administrative law department at the Judge Advocate General's Legal Center and School teaches two hours of special education law during the annual Legal Assistance Course, which is open to attendance by Judge Advocates Legal Services (JALS) personnel in legal assistance billets across the Army.[180] In conjunction with these training opportunities, the JAGC also established a repository of military and state-specific resources for JALS personnel advising on special education.

The Introduction to Special Education Advocacy course webpage has links to various resources for practicing attorneys.[181] General topic areas for resources include: jurisdiction-specific resources; templates; military-specific materials; external websites; training videos; legal assistance policy division guidance; disabilities and accommodations; and assistance beyond education.[182] While the available information is not exhaustive, it provides a clear starting point for judge advocates navigating issues that arise concerning special education. Additionally, the JAGC is working within the organization to build and retain expertise, including hiring the

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[179] *See, e.g.*, THE JUDGE ADVOC. GEN.'S SCHOOL, U.S. ARMY, CIR. 351-6, JUDGE ADVOCATE OFFICER GRADUATE COURSE para. 7 (2023) [hereinafter TJAGSA CIR. 351-6] (detailing the course requirements for graduation from the graduate course); 72d Graduate Course, Electives Catalog (27 Oct. 2023) (providing course descriptions for each elective offered to students of the graduate course). Active Duty judge advocates, and some select Reserve and National Guard judge advocates, are required to attend the graduate course following promotion to the rank of major. JALS PUB 1-1, *supra* note 178, at para. 7-5(a). At the graduate course, students earn an ABA-reviewed Master of Laws degree in Military Law from the Judge Advocate Generals Legal Center and School. TJAGSA CIR. 351-6, *supra*, para. 15 (2023). One purpose of the course is to provide students with "[a] deeper knowledge of substantive law, legal systems and institutions, and the defense establishment, and a dedication to lifelong learning[,]" which supports expanding the course to include instruction in the area of special education. TJAGSA CIR. 351-6, *supra*, para. 3(b)(2). *See* MAJ Amanda McMenamin, Family Law Hot Topics (Jan. 31, 2024) (PowerPoint presentation) (on file with author). Interview with Major McMenamin, *supra* note 178.

[180] Interview with Major McMenamin, *supra* note 178. It is important to note that the curriculum for each course changes based on the preferences and priorities of the faculty member responsible for training students on legal assistance and client services. *Id.* Although course materials discussing special education are currently offered, those lessons could be altered in future years. *Id.*

[181] *ISEA Course*, JAGU, https://jagu.llc.army.mil/webapps/blackboard/execute/announcement?method=search&context=course_entry&course_id=_1390_1&handle=announcements_entry&mode=view (last visited Jan. 11, 2024) (requiring course admission to access materials).

[182] *Id.*

first Army civilian attorney, an expert specializing in education law, to assist with complex cases involving Army Families.[183] Despite efforts to increase knowledge and resourcing for attorneys, there are notably no specific resources for Families with children under the age of three that require special education services under Part C of the IDEA.

The Army's efforts to provide special education-trained attorneys have been continuous; however, there are still gaps to fill, specifically when assessing efforts to support Families requiring EIS for their children.[184] One factor contributing to the lack of support for Families of children under the age of three may be the absence of evaluations on the efficacy of resources for that population.[185] Many DoD and GAO reports address the EFMP and support for special education for school-age children and the issues facing military Families of school-age children, but those reports do not address special education before the age of three.[186]

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[183] E-mail from Melissa Halsey, Chief, Legal Assistance Policy Division, to Legal Assistance Policy Division Personnel et al. (Dec. 19, 2023, 08:46 EST) (on file with author). As of 2024, the Army had approximately 57,777 exceptional Family members. E-mail from Jennifer Young, Special Education Policy Advisor, Legal Assistance Policy Division, to Author (Mar. 11, 2024, 13:29 EST) (on file with author). Compared to 34,885 in the Air Force, 9,150 in the Marine Corps, and 17,533 in the Navy. GAO-18-348, *supra* note 154, at 12 tbl.3. Comparatively, while the Air Force has one civilian attorney serving as the EFMP legal assistance coordinator, the Marine Corps has four civilian special education attorneys at various locations who specialize in disability-related law, and the Navy has two attorneys specializing in special education law. GAO-22-105015, *supra* note 149, at 16–18.

[184] The DoD Office of Special Needs provides information on EIS resources through its online platform, *Military One Source*, and recommends contacting the EFMP Family support provider on the military installation for additional information. *Education & Employment: Early Intervention Services*, MILITARY ONE SOURCE, https://www.militaryonesource.mil/benefits/early-intervention-services/ (last visited Feb. 13, 2024). The website provides a brief overview of EIS and how EIS can help children, and the site directs individuals to either request services through the EDIS program at the MTF or through the state's EIS program, depending on whether they live on an installation with a DoDEA school. *Id.* The website also provides a link to assist individuals in finding their state's EIS program contacts. *Education Directory for Children with Special Needs*, MILITARY ONE SOURCE, https://efmpeducationdirectory.militaryonesource.mil /early-intervention-directory (last visited Feb. 13, 2024).

[185] *See generally, e.g.*, GAO-18-348, *supra* note 154; GAO-22-105015, *supra* note 149; GAO-21-80, *supra* note 162.

[186] *See generally, e.g.*, GAO-18-348, *supra* note 154; GAO-22-105015, *supra* note 149; GAO-21-80, *supra* note 162. *But see* Exec. Order No. 14,095, 88 Fed. Reg. 24669 sec. 4(a)(iv) (Apr. 18, 2023) (requiring updates under the order to "identify and disseminate evidence-based practices for serving children with disabilities and their families in high-quality early childhood education programs, including Head Start").

The GAO's most recent report on data collection enabling early intervention programs to reach more infants and toddlers did not address program efficacy on military installations or within the DoD.[187] Similarly, while organizations such as the American Bar Association Standing Committee on Legal Assistance for Military Personnel have provided training and materials on special education and the military, early intervention services are practically missing from the training.[188] Another reason for the lack of data and resources regarding special education needs before the age of three may be the DoD's limited oversight and involvement in the execution of EIS programs.[189] Unlike special education and related services that the DoDEA schools provide, the military departments individually manage EIS programs.[190] For the Army, providing EIS, tracking, and accountability are the sole responsibilities of the MTFs and regional coordinators, which leaves significant opportunities for disparate treatment based on the installation providing services.[191] Regardless of the source, the Army must take action to expand

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[187] *See generally* GAO-24-106019, *supra* note 16 (assessing barriers and inequities in access to early intervention within the United States, but notably lacking any assessment or data collection related to services provided by the Department of Defense).

[188] *See* Cheri Belkowitz, Sharon J. Ackah, Christina Jones, Brianna Crews & Brenda M. Shafer, Special Education and the Law: A Military Perspective (Apr. 6, 2022) (unpublished PowerPoint presentation) (on file with author); *see also* Grace E. Kim, Vickie M. O'Brien, COL (Ret.) Elizabeth L. Schuchs-Gopaul, Educational Issues for Military Families with Special Needs (Oct. 15, 2020) (unpublished PowerPoint presentation) (on file with author).

[189] While DODI 1342.12 requires the Assistant Secretary of Defense for Health Affairs to provide standards for staffing, oversight, and measures for EIS program outcomes, no current DHA publications address these requirements. *See Defense Health Agency Publications Library*, DEFENSE HEALTH AGENCY, https://www.health.mil/Reference-Center/DHA-Publications (last visited Jan. 9, 2024); *see also* E-mail from Venus Thompson, Publication Systems Branch, Defense Health Agency, to Author. (Jan. 10, 2024, 12:45 EST) (on file with author).

[190] *See generally, e.g.*, U.S. DEP'T OF NAVY, CHIEF, BUREAU OF MEDICINE AND SURGERY INSTR. 1755.1A CHANGE TRANSMITTAL 1, EDUCATIONAL AND DEVELOPMENTAL INTERVENTION SERVICES AND EARLY INTERVENTION SERVICES encl. 1 (11 Jan. 2023); U.S. DEP'T OF AIR FORCE, POL'Y DIR. 40-6, EDUCATIONAL AND DEVELOPMENTAL INTERVENTION SERVICES para. 3.1 (31 July 2018); U.S. MARINE CORPS, ORDER 1754.4C, EXCEPTIONAL FAMILY MEMBER PROGRAM ch. 3 (8 Oct. 2020); U.S. MARINE CORPS, ORDER 1755.3A, SCHOOL LIAISON PROGRAM para. 4(b)(4) (1 July 2021).

[191] *See* MEDCOM REG 40-53, *supra* note 71, para. 1-9(c)(8)(f) (noting MTF commander responsibility to ensure EDIS program managers conduct self-assessments of DoD standards).

legal training and support concerning special education entitlements from birth through the age of three to close these support gaps.

VI. Proposed Expansion of Legal Training and Support

The statutory and regulatory guidance regarding EIS and special education make it clear that the Army must work to provide services to eligible dependents from birth through the age of 21.[192] While the Army is well on its way to fulfilling these requirements for children eligible to attend DoDEA schools, efforts must recognize the necessity to support children from birth until they are eligible for special education under Part B of the IDEA.[193] Efforts to improve support should include expanding training for legal assistance attorneys and adding special education training for commanders. Beyond educating and training attorneys and commanders, the Army should increase its efforts to ensure Families enrolled in EFMP know and understand their rights related to special education services.

A. Expanded Legal Training and Support for Legal Assistance Attorneys

While the current training and resources for legal assistance attorneys sufficiently prepare them to advise Families regarding special education needs for school-aged children, those materials should address the relevant rights of children under the age of three. At a minimum, the JAGC should consider expanding training to include modules related to early intervention and increasing attorney expertise within the Army.

Using the existing JAGU platform, the introduction to special education advocacy course could easily be adjusted to include training on EIS. [194] Specifically, EIS modules should cover topics such as:

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[192] *See* 10 U.S.C. § 2164(f) (confirming that all children eligible to enroll in a DDESS retain their substantive and procedural rights related to special education and EIS); *see also* 20 U.S.C. § 927(c) (requiring DoDEA schools overseas to provide services for eligible toddlers, infants, and children in compliance with Part B and Part C of the IDEA).

[193] *See* 20 U.S.C. § 1435 (establishing requirements for providing EIS funded through the IDEA); *see also* DoDI 1342.12, *supra* note 18, para. 4(a) (establishing DoD policy to provide EIS for eligible infants and toddlers).

[194] *ISEA Course*, JAGU, https://jagu.llc.army.mil/webapps/blackboard/execute/

identification and screening; evaluations; eligibility; IFSP development and implementation; least restrictive environment; related services; transportation; and the transition from receiving EIS to receiving special education through an IEP.[195] Although some topics appear to overlap with the existing modules, it is vital to understand the differences between the definitions and services provided pursuant to an IFSP versus those provided pursuant to an IEP.[196] In addition to expanding training topics, the Army should consider expanding the expertise of its attorneys.

As of 2023, approximately 57,777 Family members are enrolled in EFMP, and the Army should hire additional subject matter experts in disability and special education law to actively support this population.[197] Hiring additional attorneys would support the burden of ensuring Families understand their legal rights and entitlements related to EIS or special education.[198] Perhaps more importantly, additional attorneys could assist in the event a school or EIS provider violated those rights, preparing for and representing Families in administrative complaints, mediation, or due process hearings.[199] Acknowledging that personnel resources are often limited, hiring additional attorneys with expertise in special education law

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announcement?method=search&context=course_entry&course_id=_1390_1&handle=announcements_entry&mode=view (last visited June 11, 2025) (requiring course admission to access materials) (listing available special education lessons on the website which, in name, appear to mirror relevant topics related to EIS including: eligibility; evaluations; least restrictive environment; related services; transportation; and transition planning).

[195] These topics align with the main procedures discussed in DODM 1342.12. *See generally* DODM 1342.12, *supra* note 45, at encl. 3.

[196] Early intervention services are established and prescribed in Part C of the IDEA, while Part B prescribes special education services, which have varying requirements and burdens on the state. *Compare* 20 U.S.C. ch. 33, subch. II, *with* 20 U.S.C. ch. 33, subch. III.

[197] E-mail from Jennifer Young, Special Education Policy Advisor, Legal Assistance Policy Division, to Author (Mar. 11, 2024, 13:29 EST) (on file with author). These numbers are up from the reported 43,109 Family members enrolled in EFMP in 2018. GAO-18-348, *supra* note 154, at 12 tbl.3.

[198] While all 57,777 potential EFMP clients will unlikely need assistance at once, a 1:57,777 expert-attorney ratio may be untenable for the JAGC long-term. *See generally* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS comment 2 to rule 1.3 (28 June 2018) [hereinafter AR 27-26] (stating that "[a] lawyer's workload should be managed by both lawyer and supervisor so that each matter can be handled competently").

[199] *See* DODM 1342.12, *supra* note 45, at encl. 6 paras. 4(h–i); *see also id.* at encl. 6, para. 5(e) (holding that representation by counsel is authorized for due process hearings, although at each party's own expense).

may help alleviate burdens on installation legal assistance offices to understand these processes.[200]

Nevertheless, there may be some concerns with increasing the number of attorneys in the JAGC. Congress mandated creating and staffing the Office of Special Trial Counsel as part of the NDAA for Fiscal Year 2022.[201] To meet this requirement, the JAGC is already obligated to expand personnel billets.[202] In an age where there is a fight for personnel,[203] it may be impractical to seek additional attorney billets for special education. In the alternative, the JAGC should find ways to improve training and provide opportunities to build expertise related to special education and early intervention among judge advocates. Aside from efforts to obtain additional expertise in the field, the Army should continue advancing its support to Families enrolled in the EFMP by training administrative law attorneys on issues related to early intervention and special education.

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[200] *See* Vergun, *supra* note 95*; see also* Exec. Order No. 14,095, 88 Fed. Reg. 24669 sec. 1 (Apr. 18, 2023) (finding that "Military families consistently cite access to high-quality child care as an impediment to military spouse employment and family economic security. Difficulty accessing care also poses a challenge for both spouses—and, as data shows, particularly for women in dual military couples—to continuing their service if they have caregiving responsibilities").

[201] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 531, 135 Stat. 1541, 1692 (2021).

[202] *See* Memorandum from Sec'y of Army to Gen. Counsel, Dep't of Def., subject: Fiscal Year 2022 National Defense Authorization Action (FY22 NDAA), Section 539F(a)(1) Brief – Office of the Special Trial Counsel (7 Feb. 2022) (establishing a need for increased personnel resources to adequately resource the Office of the Special Trial Counsel).

[203] *See* Vergun, *supra* note 95. It is also important to note that these increases in allocations for JAGC personnel are occurring when Congress has reduced the end strength authorization for the Army. *See*, *e.g.*, National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 401(1), 135 Stat. 1673 (authorizing an end strength of 485,000 for fiscal year 2022); James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 401(1), 136 Stat. 2551 (authorizing an end strength of 452,000 for fiscal year 2023); National Defense Authorization Act for Fiscal Year 2024, H.R. 2670-100, § 401(1) (2023) (authorizing an end strength of 445,000 for fiscal year 2024).

B. Expanded Legal Training for Administrative Law Attorneys and Commanders

While legal assistance attorneys must prepare to advise Service members and their Families on special education issues, administrative law attorneys must prepare to advise commanders and other installation entities on their legal obligations related to special education. While it is imperative that Families have access to trained attorneys when consulting on special education and early intervention, the command may resolve many issues or problem areas if the attorneys advising the command and installation contribute to the process.[204] Potential expansion areas include requiring administrative law offices to train attorneys on special education law and establishing training for commanders and staff involved in the screening, evaluation, and provision of EIS and special education services.

In order to advise on any matter, judge advocates must be competent in their legal knowledge of the issue.[205] At a minimum, it would be helpful for administrative law attorneys to go through the same online training course required for legal assistance attorneys.[206] Understanding these modules may assist judge advocates in advising entities on the installation and assisting the Defense Office of Hearings and Appeals in the event of an investigation or complaint.[207] In addition to legal training for the attorneys, the Army must train commanders on requirements related to special education.

Commanders have limited formal opportunities for legal education, but addressing special education obligations should be added to the

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[204] DoDI 1342.12 requires secretaries of the military departments to "[t]rain command personnel to fully understand their legal obligations to ensure compliance with and provide the services required by this Instruction." *See* DoDI 1342.12, *supra* note 18, at encl 2, para. 4(h).

[205] "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." AR 27-26, *supra* note 198, at rule 1.1.

[206] *ISEA Course*, JAGU, https://jagu.llc.army.mil/webapps/blackboard/execute/announcement?method=search&context=course_entry&course_id=_1390_1&handle=announcements_entry&mode=view (last visited June 11, 2025) (requiring course admission to access materials).

[207] *See* DoDI 1342.12, *supra* note 18, at encl. 2 para. 4(f) (requiring the secretaries of the military departments to "[p]rovide counsel . . . or request counsel from the Defense Office of Hearings and Appeals . . . to represent the Military Department in impartial due process hearings and administrative appeals . . . for infants and toddlers birth up to 3 years of age, inclusive, with disabilities who are eligible for EIS").

training curriculum for garrison and MTF commanders.[208] Garrison commanders need to understand their role in supporting EIS on an installation. Since providers conduct EIS in the least restrictive environment, such as a home or daycare, garrison commanders may also encounter issues related to provider access to an installation, housing issues, or issues at a CDC that they must address and appropriately resolve.[209] Concurrently, MTF commanders play a critical role in supervising the screening, evaluation, and implementation of EIS, and they should understand the key players within their organization and the resources required to execute all requirements.[210] Beyond educating and training attorneys and commanders, the Army should also increase its efforts to ensure Families enrolled in EFMP understand their rights related to special education services.

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[208] Battalion and brigade commanders attend the Senior Officer Legal Orientation course at the Judge Advocate General's Legal Center and School in Charlottesville, VA. The course is a week-long course designed to orient future commanders to the various legal issues they may face during their command and provide a baseline understanding of expectations and available support from the legal channels. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-338, MILITARY TRAINING: THE SERVICES NEED TO ENSURE THAT ALL COMMANDERS ARE PREPARED FOR THEIR LEGAL RESPONSIBILITIES 20–29 (2021), https://www.gao.gov/products/gao-21-338; *see also* Interview with Major McMenamin, *supra* note 178.

[209] *See, e.g.*, U.S. DEP'T OF DEF., DOD MANUAL 5200.08, 3 PHYSICAL SECURITY PROGRAM: ACCESS TO DOD INSTALLATIONS MANUAL sec. 3 (2 Jan. 2019) (outlining installation access requirements and multiple instances where an installation commander may have discretion to allow access or credentialing); INSPECTOR GEN., U.S. DEP'T OF DEF., NO. DODIG-2022-004, EVALUATION OF THE DEPARTMENT OF DEFENSE'S IMPLEMENTATION OF OVERSIGHT PROVISIONS OF PRIVATIZED MILITARY HOUSING 6 (2021) (finding that in the Department of the Army, "[the] Garrison Commander serves as the Secretary of the Army's local representative to the landlords. The Garrison Commander assists with landlord and tenant disputes that the Property Manager or Garrison Housing Manager cannot resolve. The Garrison Commander also maintains order and discipline, health, safety, security, and protection of the project."); U.S. DEP'T OF ARMY, REG. 608-10, CHILD DEVELOPMENT SERVICES para. 2-3(a) (11 May 2017) [hereinafter AR 608-10] (noting that "[garrison] commanders are responsible for the management and operational supervision of all programs and services within CDS delivery systems.").

[210] *See* MEDCOM REG. 40-53, *supra* note 71, para. 1-9(c) (detailing the responsibilities of MTF commanders, including ensuring full compliance with DODI 1342.12 and MEDCOM REG. 40-53, allocating resources, staffing, ensuring appropriate prioritization of evaluations, handling medical privileges, and appointing and supervising EDIS managers).

C. Expanded Outreach to Families Enrolled in the Exceptional Family Member Program

An important area of expansion for the Army's special education efforts is increasing outreach and engagement with eligible EFMP Families. Despite the large number of Families enrolled in EFMP[211] and the availability of special education-trained attorneys in legal assistance offices,[212] the Army received less than 200 referrals for special education-related issues from 2020 to 2023.[213] While the EDIS program is responsible for drafting agreements and coordinating services with community agencies on and off the installation, additional opportunities for legal programming may be helpful in spreading awareness.[214] For example, installations should consider adding required briefings to all Service members with a Family member enrolled in EFMP during installation in-processing.[215] Another opportunity to reinforce the availability of resources is when a Family member is referred to, or enrolled in, EFMP.[216] In order to reach more Families, MTF commanders could require providers to refer Families to legal assistance for a consultation or initial brief on resources simultaneous with enrolling the Family member in EFMP.[217] To ensure legal support for Family members

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[211] E-mail from Jennifer Young, Special Education Policy Advisor, Legal Assistance Policy Division, to Author (Mar. 11, 2024, 13:29 EST) (on file with author).

[212] Suits, *supra* note 170. This paper discusses only Army actions taken to train attorneys in special education law; the Air Force, Navy, and Marine Corps have also taken significant steps to also increase their service's expertise in special education law; *see* GAO-22-105015, *supra* note 149, at 15–18 (citing that all of the services have contracted with William and Mary Law School Special Education Advocacy Clinic, and the Air Force, Navy, and Marine Corps have all hired civilian attorneys to provide specific expertise to their respective legal assistance clients on special education and disability law).

[213] E-mail from Melissa Halsey, Chief, Legal Assistance Policy Division, to Legal Assistance Policy Division Personnel et al. (Dec. 19, 2023, 08:46 EST) (on file with author).

[214] MEDCOM REG. 40-53, *supra* note 71, para. 4-3(a).

[215] Service members are required to in-process at each installation upon their arrival. U.S. DEP'T OF ARMY, REG. 600-8-101, PERSONNEL READINESS PROCESSING para. 2-1 (6 Mar. 2018). Part of a Service member's in-processing includes an "appropriate welcome orientation[,]" which often involves briefs from different services and resources on the installation. *Id.* at 2-1(a).

[216] *See* AR 608-75, *supra* note 12, para. 3-1(a) (detailing current steps required by the EFMP case coordinator and physicians during enrollment).

[217] *Id.*

and guarantee they are aware of their rights to legal support, the Army should require program coordinators and managers to notify Family members of available legal assistance services at the start of the IFSP process or prior to a meeting with a multidisciplinary inclusive action team.[218] These recommended efforts would increase support for Families enrolled in EFMP, an essential precursor to improving care for infants and toddlers with disabilities.

VII. Conclusion

The DoD must expand eligibility for EIS, at a minimum, to all military dependents living on an installation and consider expanding eligibility to all military dependents in general. In the absence of such changes, the Army must continue its efforts to expand legal support for Families with special needs. While efforts to improve education and support for individuals with disabilities have evolved over the past several decades,[219] the military ought to do more. The need for continuous improvement is evident, given recent attention towards special education services for military dependents by the President, Congress, and senior DoD officials.[220] One of the most important aspects of these recent efforts has been advancing legal services for Families enrolled in the EFMP.[221] And despite the broad language of the FY21 NDAA,[222] the Army has made significant efforts to improve legal support to Families enrolled in the EFMP.[223] However, efforts to support children with disabilities from birth through the age of three are still lacking. While the statutes on special

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[218] *See* AR 608-10, *supra* note 209, para. 4-2(a)(4) (detailing requirements for a Special Needs Resource Team (SNRT)); *see also* U.S. DEP'T OF ARMY, DIR. 2015-44, UPDATED POLICY FOR ARMY CHILD, YOUTH, AND SCHOOL SERVICES PROGRAMS encl., para. 10 (14 Dec. 2015) (changing the term SNRT to "Multidisciplinary Inclusion Action Team").

[219] *See generally, e.g.*, 20 U.S.C. §§ 1400–1444.

[220] *See, e.g.*, Exec. Order No. 14,095, 88 Fed. Reg. 24669 (Apr. 18, 2023) (recognizing the impacts of care on Families); James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 576, 136 Stat. 2605 (establishing special needs coordinators in child development centers); *Strengthening Our Support Memo*, *supra* note 4 (prioritizing support to EFMP Families for the DoD).

[221] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 582, 134 Stat. 3653.

[222] *Id.*

[223] *See* Legal Assistance Services Related to Education Law Memo, *supra* note 171 (mandating special education law as a practice area for legal assistance attorneys).

education authorize the DoD to provide EIS for infants and toddlers with disabilities, current policies limit services to a minority of eligible dependents.

Ensuring special education support for military dependents from birth through the age of three must be an essential tenant of the Army's quality of life initiatives.[224] First and foremost, ensuring children receive EIS provides significant long-term benefits for both the child and society at large, and the DoD should seek to limit the impact a parent's service in the military has on whether a child receives these benefits.[225] Next, in an era where the military is struggling to recruit and retain personnel, it is critical to understand that ensuring care for these dependents could positively impact whether an individual joins or stays in the military.[226] Additionally, the growing need for quality childcare in the military supports the argument that there is a growing need to ensure that special education supports, specifically EIS, are in place to support those Families.[227] In the fight for people, the DoD must seek to provide this beneficial support for Service members and their Families.[228]

The DoD must resolve gaps in special education policies to maximize EIS for eligible military dependents. The DoD currently provides EIS for dependents living on a military installation that operates a DoDEA school, but this limits the DoD provision of EIS to only a small subgroup of military Families.[229] Instead, the DoD should authorize and provide EIS for all military Families living on an installation, and the DoD should consider expanding EIS to include all military Families who have an infant or toddler with a disability. Actions speak louder than words, and while the DoD has clearly stated its overarching policy to support military Families, the DoD must ensure that all policies, instructions, and manuals align with this goal.

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[224] *See* sources cited *supra* note 86.

[225] CTR. ON THE DEVELOPING CHILD AT HARVARD UNIV., *supra* note 15.

[226] *See* 2023 DACES REPORT, *supra* note 97.

[227] *See* Exec. Order No. 14,095, 88 Fed. Reg. 24669 sec. 1 (Apr. 18, 2023) (noting that "Congress must provide the transformative investments necessary to increase access to high-quality child care—including preschool and Head Start—and long-term care services, as well as high-quality, well-paying jobs that reflect the value the care workforce provides to families and communities").

[228] RAND LABOR AND POPULATION, *supra* note 93, at 3 (2005) (estimating the net benefit to society when EIS was provided to children ranged from approximately $1,400 to $240,000 per child).

[229] *See* sources cited *supra* note 115 (noting that EDIS services are only available at 9 Army installations within the United States and its Territories).

Regardless of whether the DoD ultimately adjusts its policy for EIS, there are actions the Army can take now to increase support and care for military children with special needs. Army Families need legal support to understand their rights and protections related to EIS, and the Army must expand training for legal assistance attorneys to cover topics related to early intervention. Similarly, commanders and their legal advisors must understand the requirements for early intervention and how to properly implement EIS on an installation. Thus, the Army must expand training to commanders and administrative law attorneys. Lastly, the Army should coordinate and expand outreach efforts early in the diagnosis to reach as many Families as possible.

Military Families are often seen as the "backbone" of the military, supporting Service members as they answer the Nation's call to serve.[230] It is vital to ensure that DoD and Army policies and regulations support even the youngest Family members in return.

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[230] *See* AMY MILLIKAN BELL, ET AL., ARMY PUBLIC HEALTH COMMAND, HEALTH OF THE ARMY FAMILY 70 (2021) (citing military spouses as the backbone of the Armed Forces); *see also* Congressman Sanford D. Bishop Jr., Opinion, *Supporting the Backbone of Our Military*, HOUSE.GOV, (Sept. 17, 2014), https://bishop.house.gov/media-center/op-ed/supporting-the-backbone-of-our-military) (stating that "the strength of our military is drawn from the resilience of their families"). "We have an all-volunteer force—and it continues only because of generations of Americans who see the honor, dignity, and patriotism of [military service]. How can we hope to keep our military strong if we don't give our families, survivors, and caregivers what they need to survive?" Jill Biden, First Lady, Remarks by First Lady Jill Biden for the Next Phase of Joining Forces in Virtual White House Event, WHITE HOUSE (Apr. 7, 2021), https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2021/04/07/remarks-by-first-lady-jill-biden-for-the-next-phase-of-joining-forces-in-virtual-white-house-event/.

Military Legal Assistance with Special Education Law

▶22 OCTOBER 2026

▶MS. LINDSEY WEST
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1

SPED Program Takeaways

1. Understand basics and foundation of the program
2. Identify history and why the program was started
3. Improve advocacy for military families

2

Special education basics

RECALL:

IDEA — Individuals with Disabilities Education Act

FAPE — Free and Appropriate Public Education
Special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title. 20 U.S.C. § 1412(a).

IEP — Individualized Education Program

Written document created in a team meeting consisting of parents and the District. Outlines a student's educational program and must include specific components.

3

Coming in as a Civilian Attorney – I did not know….



What is DoDEA?

The Department of Defense Education Activity (DoDEA) which runs 160 schools, both domestic and overseas, attended by appx 66,000 students.

4

DIFFERENT SYSTEMS

- Military Families can enroll their children in a State's public school system or in the DoDEA System
- Implementation of Special Education Law under the IDEA can look very different in the Federal DoDEA System versus the State Public School System
- Military Practitioners are now trained to be prepared for and to understand both systems

5

Key DoDEA Differences in the Special Education Process

- **Regulatory Framework:**
- DODEA operates under the Department of Defense, which has its own set of regulations and policies that govern special education services. These regulations are detailed in 32 CFR Part 57 and are part of the Code of Federal Regulations (CFR).

6

Key DoDEA Differences in the Special Education Process

- **Note:** Same Law (IDEA) with Federal Regulations

1. Families must enroll in the military's **Exceptional Family Member Program** (EFMP). It's a program for service members who have a family member with a disability. (But not if your child's IEP is provided in a public school.) One purpose of enrolling is to make sure that the military considers your child's needs when making assignments.
2. DoDEA uses the same IEP form in all its schools. In public schools, forms vary from state to state.
3. The Family Education Right to Privacy Act (FERPA) doesn't apply to DoDEA school records. It only applies to schools that get funding from the Department of Education. FERPA protects the privacy of student records. It also gives parents the right to inspect and review them. (See Case Study for Implications of this in Practice)
4. The civil rights law, Section 504, isn't valid in foreign countries. A 504 Plan provides some services and accommodations for kids who need support but who don't need special education services. DoDEA has an Accommodations Plan instead. The plan is comparable to a 504 plan.

7

Key DoDEA Differences in the Special Education Process

- **Transfers between Schools**

- If a child is moving to a DoDEA school from a public school, the DoDEA has 30 days to either reevaluate the child or adopt the current IEP. In the meantime, it must provide those comparable services.
- The situation is similar if the child transfers from one DoDEA school to another. The new school has 30 days to either adopt the current IEP or to create a new one. It must provide comparable services in the meantime.

8

Key DoDEA Differences in the Special Education Process

Special Education Programs Available to DODEA Students

DODEA offers four special education programs to K–12 students (not all programs are offered at every DODEA school). Each of these programs have distinct staff positions associated with them. These programs include

1. a program for students with mild to moderate learning impairments (LIMM),
2. a program for students with moderate to severe learning impairments (LIMS),
3. a program for students with severe to profound learning impairments (LISP), and
4. a program for students with emotional impairments (EI).

Source: GAO review of Department of Defense Education Activity (DODEA) documentation. | GAO-25-107053

9



DoDEA Struggles with IDEA Compliance

- Special Education: Improved Allocation of Resource Could Help DOD Education Activity Better Meet Students' Needs. GAO Report 17 April 2025

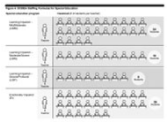
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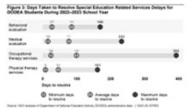
DODEA not compliant with the IDEA

Special Education: GAO Report 17 April 2025

Military families can find it hard to get special education services for their children with disabilities—especially in overseas locations.

- Lack of SPED teachers.
  Calculation (Headcount vs minutes), Nationwide Sped Staffing Shortages, High Turnover Rate, Slow Federal Hiring
- Lack of Related Service Providers.
  "A regional DODEA official also told us that EDIS would not be able to offer occupational therapy or physical therapy services n one country for the first semester of the 2024-2025 school year due to a lack of staff, even though some students' IEPS may require these services."
- Insufficient training. Crisis Management/ Uniform Policy
  First, at 12 of 14 schools, paraeducators (staff providing extra help to students) reported receiving little to no onboarding training for special education. For example, paraeducators across all three DODEA regions told GAO they had not received DODEA-required crisis training, despite working with students with behaviors needing crisis response.





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RECOMMENDATIONS FROM GAO REPORT

1. Revise its special education staffing formulas to incorporate students' service minute requirements specified in IEPs among the factors it considers.
2. Ensure that any special education paraeducators who work with students who may need behavioral supports receive crisis training.
3. Provide supplemental instructional materials to special education teachers agencywide to help them adapt the general education curriculum for students with IEPs.
4. Make more specialized reading interventions accessible across all DODEA locations to students with specific learning disabilities, including dyslexia, that impact their ability to read.
5. Communicate DoDEA time frame for its new procedural guidance on special education and what resources staff should use to interpret the DOD policy while that guidance is being developed.



12

SPECIAL EDICATION ASSISTANCE

DODEA CASE STUDY

- **Facts:** 5-year-old kindergartener with a disability excelling in pre-school and now regressing.
- Behaviors that were extinguished in pre-school were worsening and new maladaptive behaviors were presenting. The current IEP required about 2.5 hours of specialized instruction per day.



13

SPECIAL EDICATION ASSISTANCE

DODEA CASE STUDY

- **HOW DID THE CASE COME TO ME??**

- Advocacy group referred the parents (a Soldier and his spouse) to the Ft. Stewart Legal Assistance Office after the initial Due Process Mediation was unsuccessful
- This means that procedurally, Mom filed the Due Process Complaint on her own and the School would not offer a proper resolution when the Parents were *Pro Se*
- My Office had never engaged in Due Process Litigation before so we reached out to Legal Assistance Policy Division and Ms. Jennifer Young, Special Education Attorney for the Army, who agreed to be the lead attorney on the case



14

SPECIAL EDICATION ASSISTANCE

DODEA CASE STUDY

- **WHAT HAPPENED??**

Met with the client in the legal assistance office after client had already filed her Due Process Complaint and attended one mediation session.

Clients biggest complaints:

1. Believed the teachers providing special education minutes to her child per the IEP were unqualified.
2. Believed school was withholding information and documentation regarding her child related to his IEP
3. Believed that her child was not getting all special education hours required by the IEP

Initial Actions:

Reviewed client's Complaint and the child's IEP that was the subject of the dispute.

School would not provide the Child's education file to the parents or to the Legal Assistance Office. After multiple demands, School Administrators eventually provided some of the file to the Parents in piece-mail fashion.

15

SPECIAL EDICATION ASSISTANCE

DODEA CASE STUDY

- **WHAT HAPPENED ?? *(Cont)***

Made recommendations and redlines for the IEP, which client used at a second pre-hearing mediation. The School was still unwilling to settle.

After the second unsuccessful mediation, we filed a new Due Process Compliant on December 10, 2024 on the client's behalf.

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SPECIAL EDICATION ASSISTANCE

DODEA CASE STUDY



The December 10, 2024 Complaint

12/10/2024 Compliant alleged that DoDEA :

1. Failed to implement Student's May 10, 2024, IEP by not providing Student with his required special education minutes.

2. Prevented meaningful parental participation by failing to disclose that Student's special education was provided by individuals that did not hold the licensure, alternative licensure or required qualifications to provide special education.

3. Failed to properly consider positive behavioral interventions and update Student's IEP when DoDEA had notice that Student's behavior was impeding his learning and the learning of others, and

4. Failed to provide the necessary specificity regarding Student's required services preventing meaningful parental participation and denying Student educational benefit.

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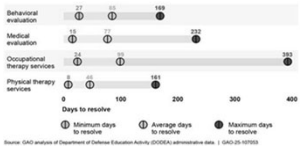
Special Education Assistance

DODEA CASE STUDY

1) Failed to provide Student with his required special education minutes.
2) Prevented meaningful parental participation by failing to disclose that Student's special education was provided by individuals that did not hold the licensure, alternative licensure or required qualifications to provide special education.
3) Failed to properly consider positive behavioral interventions and update Student's IEP when DoDEA had notice that Student's behavior was impeding his learning and the learning of others, and
4) Failed to provide the necessary specificity regarding Student's required services preventing meaningful parental participation and denying Student educational benefit.

- ❑ Lack of SPED teachers. Calculation (Headcount vs minutes), Nationwide Sped Staffing Shortages, High Turnover Rate, Slow Federal Hiring
- ❑ Lack of Related Service Providers.
- ❑ Insufficient training. Crisis Management Uniform Policy

Recall from GAO Report:



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SPECIAL EDICATION ASSISTANCE

DODEA CASE STUDY

- **Why was this case important to pursue?**
  - The Complaint was important to pursue as DoDEA was utilizing a practice of providing unqualified staff to provide instruction to children with disabilities, which ultimately denied children their necessary special education minutes during the school day.

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Due Process
Public Schools -vs- DoDEA Schools

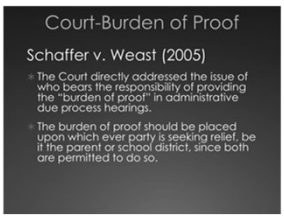
Public Schools	DoDEA Schools
20 U.S.C. § 1415	32 C.F.R. § 57.10
Right to hearing	Federal hearing system
Judicial review available	Limited precedent



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Burden of Proof

- Schaffer v. Weast (2005)
- Burden on party seeking relief
- Applies across systems



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Remedies

- Compensatory education
- Tuition reimbursement, Forest Grove v. T.A. (2009)
- Applies Across Systems



22

PCS Challenges

- Service interruptions
- IEP transfer delays
- Documentation gaps



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STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

Thursday
October 22, 2026

Housing, Housing, Where Am I Going To HUDing Live?

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October 22, 2025

HOUSING, HOUSING, WHERE AM I GOING TO HUD'ING LIVE?

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**Special thank you to SNA members Emily Starr and Patricia Nelson-Reade for allowing us to use some of their materials from their HOTMA presentation for the SNA in 2024

I. Overview of HOTMA

A. What is HOTMA

- Housing Opportunity Through Modernization Act of 2016.
- Modernizes HUD income, asset, and rent rules across HUD housing programs:
  - Public Housing (administered by state Public Housing Agencies (PHA's).
  - Housing Choice Voucher Program (f/k/a Section 8 and governed by HUD but administered by the PHA's)
  - Project-Based Rental Assistance Program a/k/a Multifamily Housing

B. Why HOTMA matters now

- First major overhaul of income/asset rules in decades.
- Direct impact on SNT beneficiaries in subsidized housing.

C. Practical Status Today

- July 1, 2025 - Income exclusions applied to all PHA's, section 8 and multifamily housing programs (with very few exceptions) – existing tenants & new applicants. [1]
- January 1, 2027 - remaining income and asset rules apply to existing and new applicants for all PHA's, section 8 and multifamily housing, ***except that*** for existing tenants, PHAs and Multifamily Housing owners have discretion to ***not enforce*** the new statutory asset limitation at recertification. However, that discretion does not apply to new applicants.
- Inconsistent application of HOTMA rules across housing authorities.
- Some variation remains among local PHAs regarding interpretation of trust distributions and documentation requirements.

[1] PIH 2026-19

APPENDIX A: SUMMARY OF COMPLIANCE REQUIREMENTS

Provisions	Relevant Public Housing Agencies (PHAs)	Required Compliance Date
Ceasing enrollment into Earned Income Disregard	All PHAs	January 1, 2024
Use of HUD-9886-A	All PHAs	No later than February 1, 2025
Income exclusions, as described in Notice PIH 2024-38	All PHAs	No later than July 1, 2025
Definitions specified in Notice PIH 2024-38	All PHAs	No later than July 1, 2025
De minimis errors	All PHAs	No later than July 1, 2025
All other provisions of sections 102 and 104 of the Housing Opportunity Through Modernization Act of 2016 (HOTMA)	PHAs that are neither Moving to Work (MTW) PHAs nor PHAs using the HUD Family Reporting Software (FRS)	January 1, 2027
	Initial MTW PHAs	To be communicated by HUD
	MTW Expansion PHAs	To be communicated by HUD
	FRS PHAs	To be communicated by HUD

HUD Notice PIH 2026-15 – chart pg A-1

D. Importance for Special Needs Planning

- HOTMA significantly changed how trust distributions, including distributions from special needs trusts (SNTs), are treated when determining a recipient's income for HUD housing eligibility and rent calculations.

- Expanded definition of income = increased rents & greater reliance on trust funds.

- Rental increases = increased stress to beneficiaries and disabled clients.

II. Principal HOTMA Income and Asset Eligibility Rules

A. Income Eligibility

- Definition:

  "all amounts, not specifically excluded by regulations, received from all sources by each member of the family 18 years or older."[2]

  - Family = persons residing together
  - unearned income by dependents under 18 years of age.
  - imputed income on net family assets in excess of $50,000 (adjusted annually). Based on current passbook savings rate.

- Examples[3]:

[2] 24 C.F.R. § 5.609(a)

[3] Income and Income Exclusions Resource Sheet

- Earned income (wages, salary, seasonal & temp work, etc.)
- All Social Security benefits (SSI, SSDI, Retirement)
- Pensions
- Interest and dividends
- Trust income distributed to a beneficiary (except payments of medical expenses for a minor)
- Regular payments from insurance or settlements
- Regular gifts of money

- Generally, rent is computed as 30% of income.

- Income Exclusions: (Not an exhaustive list)

  - Distributions of trust principal from revocable or irrevocable trusts so long as the trust is not considered part of net family assets (see HOTMA's new treatment of trusts below);
  - ABLE account interest
  - Nonrecurring or sporadic income (gifts, temp work, one-time lump sum payments)
  - State & federal income tax refunds
  - Imputed income from transferred assets if net family assets total more than $50,000.
  - VA Aid and Attendance to the veterans only
  - Lawsuit judgments or settlements based on a claim of malpractice, negligence or other breach of duty that *resulted in disability* whether received as a lump sum or periodically
  - Retroactive SSI, Social Security or VA disability benefits
  - Certain educational assistance
  - Lump sum additions to net family assets such as lottery winnings
  - Reimbursements for health or medical expenses
  - Lump sum insurance payments and settlements for personal or property losses
  - Payments for care of foster children/adults and income of foster children and adults and live in aide

B. Asset Eligibility

- Asset Limit[4]
  - Net Family Assets:

    "Net cash value of all assets owned by the family after deducting reasonable costs that would be incur for disposing of real property, savings, stock, bonds and other forms of investments."[5]

  - Families are generally ineligible for public housing or vouchers if net family assets exceed $100,000 (adjusted for inflation).
  - 2 year lookback applies to family assets disposed of for less than fair market value prior to application or recertification.
  - New rules apply to new applicants.
  - Housing authorities can determine how to apply the new rules to existing residents.
- Real Estate Limit
  - A family is ineligible for Section 8 if they own real estate suitable for occupancy.[6]
    - Must have a present ownership interest
    - Legal right to occupy property **AND**
    - Right to sell property
  - Trusts not controlled by the housing recipient excluded.
  - Right to use and occupy ≠ ownership.

[4] HOTMA Resident Fact Sheet: Asset and Real Property Limitations

[5] 24 CFR 5.603(b)

[6] 24 CFR 5.618(a)

- Relevant Asset Exclusions: (not an exhaustive list)

    - Necessary personal property;
    - Non-necessary personal property <=$50,000 total;
    - Any retirement account recognized by the IRS;
    - ABLE accounts and education accounts (529 plans and Coverdell);
    - Trust principal if not under control of the beneficiary, any family member or household (applies to SNT's, irrevocable and some revocable trusts);
    - Tax refunds or refundable tax credits for 12 months after receipt;
    - Civil action or settlement proceeds based on malpractice, negligence or other breach of duty for an incident resulting in *disability*.

III. What Changed? - The REAL Impact of HOTMA

A. HOTMA changed how PHAs calculate income, deductions, and interim reexams

- New rules redefine what counts as income and when PHAs must recalculate it.

- Medical and disability-related deductions now apply only after a higher threshold.

- Income increases trigger mandatory interim reexams.

B. HOTMA requires PHAs to count income more consistently and reduce certain deductions — which directly increases "adjusted income," and therefore rent

- HOTMA tightened income definitions and eliminated several flexible exclusions.

- Reduced deductions mean higher adjusted income.

- Higher adjusted income automatically increases the tenant's rent share.

- Changes apply across Public Housing, Housing Choice Vouchers (section 8) and Multifamily programs.

C. Key HOTMA Changes Affecting Disabled Households

- Medical Expense Deduction Threshold Increased:
  - The medical/attendant care deduction threshold rose from 3% → 10% of annual income, phased-in over next 3 years:
    - Year 1 (2027): 5%
    - Year 2 (2028): 7.5%
    - Year 3 (2029): 10%
  - This means many disabled households lose part or all of their medical deduction, increasing rent.
- Example (simple math):
  - Before HOTMA:
    - Threshold: 3% × $15,000 = $450
    - Unreimbursed medical expenses: $1,200
    - Deductible: $1,200 – $450 = $750
    - Adjusted Income: $15,000 - 750=$14,250
    - Rent: $14,250 x 30% = $4,275/12 = $356.25 per month
  - After HOTMA:
    - Threshold: 10% × $15,000 = $1,500
    - Medical expenses: $1,200
    - Deductible: $0
    - Loss of deduction: $750
    - Rent: $15,000 x 30% = $4,500/12 = $375.00 per month
  - **Impact:** rental increase = $18.75 per month/$225 per year.
- Standard disabled/elderly deduction changed:
  - A flat deduction HUD subtracts from household income before calculating rent.
  - Increased under HOTMA and adjusted for inflation.
  - Only one disabled/elderly deduction per household (head or co-head of household, spouse, person 62+ or disabled).
  - Pre-HOTMA: $400

- HOTMA launch (2024): $525
- 2026 inflation adjustment: $550
- 2027 inflation adjustment: ~$575

- Example (simple math):
  - Before HOTMA:
    - Gross income: $15,000
    - Minus disability deduction: $400
    - Adjusted income: $14,600
    - Rent: 14,600 x 30% = $4,380/12 = $365 per month
  - After HOTMA:
    - Gross income: $15,000
    - Minus disability deduction: $550
    - Adjusted income: $14,450
    - Rent: 14,450 x 30% = $4,335/12 = $361 per month
  - **Impact**: Rent goes down by $4 per month.
  - The disability deduction increases annually, but this is small compared to the loss of medical deductions.

D. Mandatory interim reexams for income increases:

- PHAs interim reexams when adjusted income increases by 10% or more.
- Unearned income increases (SSI, SSDI, trust distributions, annuities) trigger rent increases.
- This means rent can rise mid-year, not just at annual recertification.

E. Disabled households are disproportionately affected because:

- They rely heavily on medical deductions, reduced by HOTMA.
- They may have small increases in unearned income, which now trigger interim reexams.
- More restrictive treatment of trust income for those with an SNT.

F. Cross-program impact

- HUD vs. SSI vs. Medicaid:
    - All three programs define and calculate income differently.
    - What works for one program may not work for another.
    - Planning must be triangular, not linear.

G. HOTMA as a stress multiplier

- Rising rents in subsidized housing causing disabled and elderly individuals increased stress which leads to increased health issues which leads to greater need for ever decreasing benefits.
- Trustees of SNT's become the "shock absorbers" between rising housing costs and fixed Social Security/Medicaid benefits.

IV. Case Study:

Brendan is 67. He lives in subsidized multi-family housing. Receives SSDI of approximately $2,100, Medicaid (paying a premium) and SNAP benefits.

He has a ROTH IRA of $140,000 and a traditional IRA of $20,000. He also has about $40,000 in the bank.

In addition, he is the joint owner, with mom, of Series EE bonds totaling $350,000 (mom's SSN is listed on the bonds). Until recently the bonds were held in mom's safe deposit box. She has now given them to Brendan to hold but advised she is not planning to sell now.

Lastly, he is the trustee and beneficiary of an irrevocable trust his mother created that states that he and his brother can each receive $50,000 annually from the trust (discretionary distribution). The trust was never reported on any applications for housing, SNAP or Medicaid.

Based on annual expenses, he has a shortfall (for which he needs to use his assets) of about $50,000.

QUESTIONS

1. **Do the bonds count and/or need to be reported to any agency?**

   - As of January 1, 2027 the full $350,000 in bonds will count as an asset and will need to be reported unless further action is taken. Jointly owned assets are presumed fully accessible unless Brendan can prove he has no legal access to the bonds (can't liquidate them). Because mom indicated she is not willing to sell right now and her consent would be needed to liquidate, Brendan can argue that the bonds are an inaccessible asset. Query whether the fact that they are under mom's SSN precludes access for Brendan?
   - Series EE bonds are liquid assets and co-owners generally have full redemption rights. Query - Does it make a difference if the bond ownership is AND rather than OR? If the bonds are registered under mom's SSN and reportable on her income tax return, how much, if any, of the income could be attributable to Brendan for housing purposes?
   - Brendan now physically holds the bonds = strong evidence that he can access them to liquidate? Can he simply give them back to his mother?
   - Brendan will lose his subsidized housing if he still owns the bonds as of January 1, 2027.
   - Medicaid imposes a $2,000 asset limit on recipients over age 65 (with some exceptions). Although Medicaid only counts ½ of the value of the bonds ($175,000) because they are jointly owned with mom, Brendan is still over the asset limit and must report the bonds. Brendan would lose his Medicaid coverage but for the fact that he is on CommonHealth which does not have an asset limit in Massachusetts. But if he were on standard Medicaid or a waiver program, he would lose coverage.
   - The bonds do not impact SNAP eligibility. There is no asset limit for SNAP.

2. **Does the $50,000 trust distribution need to be taken and reported? Is it reportable even if not taken?**

   - Because Brendan is the trustee and beneficiary, he has control over the trust assets under 24 CFR 5.603(4) and therefore, his share of the trust may be considered a "family asset". But, depends on how much, if any, of the $50,000 distribution is considered trust "income". If it is all principal, then it is not.
   - It needs to be reported if taken.
   - Puts him over assets for Medicaid (unless in a program with no asset limits like CommonHealth in Massachusetts).

- No impact on SNAP eligibility if he doesn't take the distribution. But could be treated as income if taken.

3. **How would withdrawals from his retirement monies impact benefits? Are the retirement funds countable as an asset as is or once withdrawn (either MRD or lump sum)?**

    - For housing:
        - the principal can remain excluded until the MRDs are required to be taken.
        - The MRD's will be countable income and will increase his rent.
        - Are the Roth and Traditional IRA's treated differently under HOTMA?
        - However, if the distribution is large enough, and increases assets, will this be a problem?
    - For Medicaid: For people 65+:
        - Retirement accounts are countable assets unless in payout status.
        - Withdrawals count as income.
        - Brendan is over the $2,000 limit regardless.
    - For Snap: Distributions could count as income.

4. **Should the $50,000 trust amount be taken instead of dipping into the IRA's where the principal is non-countable for housing and for the most part non-taxable?**

    - From a housing/Medicaid perspective:
        - If he takes the $50,000:
            - Housing: periodic withdrawals counts as income, raising rent and increase assets. Query – what if the distribution is from principal or non-recurring from the trust? But may still have the "family asset" hurdle.
            - Medicaid: counts as income, loss of eligibility.
            - SNAP: counts as income, reducing benefits.

- If he does NOT take it:
    - Housing: generally, the trust funds would not be a countable asset but query the "family asset" hurdle? Can he appoint an independent co-trustee to make his distribution?
    - Medicaid: trust is still countable because he is trustee + beneficiary.
    - SNAP: not counted
- IRA Withdrawals: Query – does it make a difference if the withdrawal is from the Roth or the Traditional IRA?
    - Housing: periodic withdrawals (including RMDs) count as income, raising rent. Non-recurring lump sums do not count as income but increase assets. Query - should Brendan take the traditional IRA as a lump sum so that it counts as principal and not income? Should he retain both IRAs or just the Roth given that they are excludable assets?
    - Medicaid: withdrawals count as income. IRA itself is a countable asset. Will lose Medicaid eligibility.
    - SNAP: withdrawals count as income

5. Can any excess funds be used to fund an ABLE account?

- Yes, but only up to $20,000 for 2026 and assuming Brendan was disabled prior to age 46.
- Query – with regard to income distributions from the trust and/or IRA's to an ABLE account (income from an ABLE account not counted), will housing/Medicaid still deem the income to Brendan because the source of the income was the trust and/or the IRA's.
- Query – if an ABLE account is not an option, can he establish a pooled trust?

6. **As an aside, when mom dies (she is stable now), he will inherit at least $2 million outright. Assuming asset limits are not imposed and, even if they are, that he is grandfathered under the old rules, how will the inheritance impact continued eligibility for housing/Medicaid?**

    - Brendan may be able to retain housing benefits.

    - He may be able to retain his Medicaid benefits if on a program like CommonHealth in Massachusetts that does not impose an asset limit. Otherwise, he will lose his Medicaid benefits.

    - If the new HOTMA asset limit of $100,000 applies to him, then he will need to disenroll and find alternative housing and other medical insurance.

        - Further queries - what about decanting the trust?
        - Should he resign as trustee?

V. Alternative housing pathways for disabled adults

A. Group Homes

- Models:
    - I/DD group homes
    - Mental health residences
    - Medically fragile homes
- Funding:
    - Medicaid HCBS waivers
    - State I/DD agencies
    - Sometimes HUD-funded properties
- Pros:
    - Structured support
    - Regulatory oversight
    - Predictable staffing
- Cons:
    - Limited choice of roommates
    - Institutional feel
    - Long waitlists
    - Variable quality

B. Shared Living Arrangements (See Abigail's story by SNA member Victoria Sulerzyski attached)

- Concept:
    - Adult foster care
    - Host homes
    - Live-in caregiver models
- Funding:
    - Medicaid HCBS waiver
    - State programs
    - Sometimes private pay
- Pros:
    - Relationship-based support, community integration, often more personalized.
- Cons:
    - Fragility of arrangements if caregiver moves, burns out, or dies; oversight varies widely.
- Other Considerations:
    - Contracting and boundaries:
        - Who is the tenant?
        - Who holds the lease?
        - How does the SNT interact with the arrangement (paying stipends, rent, supports)?

C. Accessory dwelling units (ADUs)

- Policy trend:
    - Many states and municipalities are liberalizing ADU zoning to address housing shortages.

- Use for disabled adults:
    - Semi-independent living near family and potential for live-in supports.
- Funding strategies:
    - Family equity
    - SNT financing
    - State housing grants
    - Sometimes local incentives
- Other Considerations:
    - Ownership and succession:
    - Who owns the property (family, SNT, LLC)?
    - What happens when parents die or move?
    - How do you protect the disabled adult's tenancy long-term?

D. Creative tenancy models

- Examples:
    - Co-housing communities with support overlays.
    - Roommate arrangements with shared supports.
    - SNT-owned property leased to beneficiary with voucher support.
- Pros:
    - High autonomy
    - Tailored community
    - Flexible design
- Cons:
    - Complex coordination
    - Legal structuring
    - Ongoing governance

VI. Pulling It All Together: What Trustees, Families & Practitioners Need To Know

A. Trustees as “housing strategists,” not just money managers

- Core responsibilities under HOTMA:
  - Understand how distributions affect housing, SSI, Medicaid and other public benefits simultaneously.
  - Understand the nuances in the income/assets rules under HOTMA.
  - Consider having a housing plan for each beneficiary, not just a financial plan.
  - Use ABLE accounts, first party SNT’s, pooled trusts, and other tools strategically.

Q&A

THANK YOU!

ABIGAIL'S STORY AS RELAYED BY HER MOM AND FELLOW SNA MEMBER VICTORIA SULERZYSKI

When she was 14 years of age, I asked my Developmental Disabilities Administration ("DDA") case manager to go out and see what was available for Abby given her medical fragility and multiple disabilities. When she came back with a list of group homes, we went out to investigate. I did not care for any and the only one that really came close was on the eastern shore of Maryland. I knew trying to get private duty nurses to the eastern shore is a huge battle so that really was not an option for us. That is when the "think out of the box" idea was birthed. My mother-in-law had passed away and we decided to take her home and bump out the back and put a new addition on it that resembles the outline of her cottage at the Maryland School for Blind.

I gathered together a couple of years prior to transition at 21 years of age, a DDA provider agency, case manager for her Medicaid nursing (through the Rare and Expensive Case Management program ("REM")), case manager of her DDA and a supervising nurse for DDA. We met several times over the course of the last couple of years to make sure that transition would be seamless and she was covered in the new home 24/7. The state of Maryland was in all of these meetings and agreed on the plan then as we went to implement it, they only approved 137 hours of private duty nursing ("PDN") a week instead of 168 (which is 24/7). That is where the appeal and the lawsuit began. We did transition Abby into the home and Dave and I did the 31 hours until the case wound its way through the appellate system and we came out victorious.

At the beginning, we were under DDA's "supported living" program. That means that the DDA provider provides all of the caregivers but not the nurses because the nurses are REM nurses. Abigail's DDA budget would be paid to the DDA provider. We created an LLC and Abigail pays rent to the LLC each month out of her SSI. We own the house and we are responsible for all the maintenance on the house, the cleaning, the yard work, etc. Abigail had a roommate for 2.5 years until she died. We have identified a new roommate but DDA has not approved her request for an AON so that family has appealed. So, Abigail lives by herself with her nursing and her DDA caregivers. She is about 1 mile from our home.

Abigail's DDA caregiver takes Abigail out into the community using a car that we have provided to the house. We have also made sure that we have enough liability insurance to cover the house. Since Abigail is the "employer" under self-direction under the waiver program, she pays out of her budget workers' compensation, unemployment and taxes, etc. of the DDA caregivers that work with Abigail. Abigail also currently has a day-to-day administrator that coordinates all the care at the house, a support broker who is really the HR of Abigail's budget and a financial DDA operator that handles all the paperwork and payment of the required taxes, insurance, employee payments. They also ensure that they do not go over Abigail's DDA budget.

When Abigail did have a roommate, we worked as a family unit to do what was best for the girls. It was really lovely. The two families would have events at the house, would

throw parties for Halloween, birthdays, Christmas, etc. They would go out into the community together, do arts and crafts together, listen to music, play indoor bowling, go to bowling, have music therapy, etc. It was quite collaborative and the girls were close.

Since the house only had two people in it and it is a shared living type of space, there is no need to be a licensed DDA provider. Each state is different so families should make sure they know the rules surrounding that. It was easy to create the space, partner with the right DDA partners to make this happen. Without the REM nurses we would be at a lost so it was also crucial, and continues to be crucial, that the DDA caregivers and the REM nurses work as a team.

We chose this because we are active parents and want to oversee Abigail's care but give her interdependence. She is less than 1 mile away and if we need to we can walk there. She is very happy and enjoys what she does every day.

Here is a link to Abigail's case: https://case-law.vlex.com/vid/in-re-sulerzyski-302-935269038.

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Stetson Law

2026 National Conference on Special Needs Planning and Special Needs Trusts
October 2026

HOUSING, HOUSING, WHERE AM I GOING TO HUD'ING LIVE?

Presented by:
Michelle M. Mulvena, Esq. &
Laura Silver Traiger, Esq.

Special Thanks to SNA members Emily Starr & Patricia Nelson-Reade for sharing your materials

1

What is HOTMA?

Housing Opportunity Through Modernization Act of 2016

- Modernizes HUD income, asset, and rent rules across HUD housing programs:
  - Public Housing (Administered by state Public Housing Agencies or PHA's)
  - Project-Based Rental Assistance Program aka Multifamily Housing

Why it matters Now:

- First major overhaul of income/asset rules in decades
- Direct impact on SNT beneficiaries in subsidized housing

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Practical Status Today

- July 1, 2025 – Income exclusions applied to all PHA's, section 8 and multifamily housing programs (with very few exceptions) - existing tenants and new applicants.
- January 1, 2027 – remaining income and asset rules apply to existing and new applicants for all PHA's, section 8, and multifamily housing, **except** that for existing tenants, PHA's and Multifamily Housing owners have discretion to not enforce the new statutory asset limitation at recertification. However, that discretion does not apply to new applicants.
- Inconsistent application of HOTMA rules across housing authorities.
- Some variation remains among local PHA's regarding interpretation of trust distributions and documentation requirements.

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APPENDIX A: SUMMARY OF COMPLIANCE REQUIREMENTS

Provisions	Relevant Public Housing Agencies (PHAs)	Required Compliance Date
Ceasing enrollment into Earned Income Disregard	All PHAs	January 1, 2024
Use of HUD-9886-A	All PHAs	No later than February 1, 2025
Income exclusions, as described in Notice PIH 2024-38	All PHAs	No later than July 1, 2025
Definitions specified in Notice PIH 2024-38	All PHAs	No later than July 1, 2025
De minimis errors	All PHAs	No later than July 1, 2025
All other provisions of sections 102 and 104 of the Housing Opportunity Through Modernization Act of 2016 (HOTMA)	PHAs that are neither Moving to Work (MTW) PHAs nor PHAs using the HUD Family Reporting Software (FRS)	January 1, 2027
	Initial MTW PHAs	To be communicated by HUD
	MTW Expansion PHAs	To be communicated by HUD
	FRS PHAs	To be communicated by HUD

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Importance of Special Needs Planning



- HOTMA significantly changed how trust distributions, including distributions from special needs trusts (SNTs), are treated when determining a recipient's income for HUD housing eligibility and rent calculations.
- Expanded definition of income - increased rents and greater reliance on trust funds.
- Rental increases - increased stress to beneficiaries and disabled clients.

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Principal HOTMA Income and Asset Eligibility Rules

Income Eligibility

Definition: *"all amounts, not specifically excluded by regulations, received from all sources by each member of the family 18 years of older."*

- Family = persons residing together
- Unearned income by dependents under 18 years of age
- Imputed income on net family assets in excess of $50,000 (adjusted annually). Based on current passbook savings rate.

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Examples

- Earned income (*wages, salary, seasonal and temporary work, etc.)*
- All Social Security benefits (*SSI, SSDI, Retirement*)
- Pensions
- Interest and dividends
- Trust Income distributed to a beneficiary (*except payments of medical expenses for a minor*)
- Regular payments from insurance or settlements
- Regular gifts of money
- Generally, rent is computed as 30% of income

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Income Exclusions:

Not an exhaustive list

- Distributions of trust principal from revocable or irrevocable trusts, so long as the trust is not considered part of net family assets
- ABLE account interest
- Nonrecurring or sporadic income (gifts, temp work, one-time lump sum payments)
- State and Federal income tax refunds
- Imputed income from transferred assets if net family assets total more than $50,000
- VA Aid & Attendance *to veterans only*
- Lawsuit judgements or settlements based on a claim of malpractice, negligence, or other breach of duty that *resulted in disability*, whether lump sum or periodically
- Retroactive SSI, social security, or VA disability benefits
- Certain educational assistance
- Lump sum additions to net family assets such as lottery winnings
- Reimbursements for health or medical expenses
- Lump sum insurance payments and settlements for personal or property losses
- Payments for care of foster children/adults and income of foster children and adults, and live in aide

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Asset Eligibility

Asset Limit

Net Family Assets: *"Net cash value of all assets owned by the family after deducting reasonable costs that would be incurred for disposing of real property, savings, stock, bonds, and other forms of investments".*

- Families are generally ineligible for public housing or vouchers if net family assets exceed $100,000 (adjusted for inflation).
- 2-year lookback applies to family assets disposed of for less than fair market value prior to application or recertification.
- New rules apply to new applicants.
- Housing authorities can determine how to apply the new rules to existing residents.

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Asset Eligibility *continued*

Real Estate Limit

- A family is ineligible for Section 8 if they own real estate suitable for occupancy.
- **Must have a present ownership interest, legal right to occupy property **and** right to sell said property.*
- Trusts not controlled by the housing recipient excluded
- Right to use and occupy does not equal ownership

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Relevant Asset Exclusions:
Not an exhaustive list

- Necessary personal property
- Non-necessary personal property <- $50,000 total
- Any retirement account recognized by the IRS
- ABLE accounts and education accounts (*529 Plans and Coverdell*)
- Trust principal if not under control of the beneficiary, any family member, or household (*applies to SNT's, irrevocable, and some revocable trusts*).
- Tax refunds or refundable tax credits for 12 months after receipt
- Civil action or settlement proceeds based on malpractice, negligence, or other breach of duty for an incident *resulting in disability.*

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What changed?

The REAL impact of HOTMA

- **HOTMA changed how PHAs calculate income, deductions, and interim reexams.**
- New rules define what counts as income and when PHAs must recalculate it.
- Medical and disability related deductions now apply only after a higher threshold.
- Income increases trigger mandatory interim reexams.

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HOTMA requires PHAs to count income more consistently & reduce certain deductions – which directly increases "adjusted income" and therefore rent.

- HOTMA tightened income definitions and eliminated several flexible exclusions.
- Reduced deductions mean higher adjusted income.
- Higher adjusted income automatically increases the tenant's rent share.
- Changes apply across Public Housing, Housing Choice Vouchers (Section 8), and Multifamily programs.

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Key HOTMA Changes Affecting Disabled Household

Medical Expense Deduction Threshold Increased

- The medical/attendant care deduction threshold rose from 3% to 10% of annual income, phased in over the next 3 years:

  Year 1 (2027): 5%
  Year 2 (2028): 7.5%
  Year 3 (2029): 10%

- This means many disabled households lost part or all of their medical deduction, increasing rent.

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Example:

Before HOTMA

- Threshold: 3% x $15,000 - $450
- Unreimbursed medical expenses: $1,200
- Deductible: $1,200 - $450 - $750
- Adjusted income: $15,000 – 750 - $14,250
- Rent: $14,250 x 30% - $4,275 divided by 12 - **$356.25 per month**

After HOTMA

- Threshold: 10% x $15,000 - $1,500
- Medical expenses: $1,200
- Deductible: $0
- Loss of deduction: $750
- Rent: $15,000 x 30% - $4,500 divided by 12 - **$375.00 per month**

IMPACT: Rental increase = $18.75 per month / $225 per year.

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Standard disabled/elderly deduction changed:

- A flat deduction HUD subtracts from household income before calculating rent.
- Increased under HOTMA and adjusted for inflation.
- Only one disabled/elderly deduction per household (head or co-head of household, spouse, person 62+ or disabled).

Pre HOTMA: $400

- HOTMA launch (2024): $525
- 2026 inflation adjustment: $550
- 2027 inflation adjustment: $575

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Example:

Before HOTMA

- Gross income: $15,000
- Minus disability deduction: $400
- Adjusted income: $14,600
- Rent: $14,600 x 30% = $4,380 divided by 12 = **$365 per month**

After HOTMA

- Gross income: $15,000
- Minus disability deduction: $550
- Adjusted income: $14,450
- Rent: $14,450 x 30% = $4,335 divided by 12 = **$361 per month**

IMPACT: Rent goes down by $4 per month.

The disability deduction increases annually, but this is small compared to the loss of medical deductions.

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Mandatory interim reexams for income increases:

- PHAs interim reexams when adjusted income increases by 10% or more.
- Unearned income increases (SSI, SSDI, trust distributions, annuities) trigger rent increases.
- This means rent can rise mid-year, not just at annual recertification.

Disabled households are disproportionately affected because:

- They rely heavily on medical deductions, reduced by HOTMA.
- They may have small increases in unearned income, which now trigger interim reexams.
- Most restrictive treatment of trust income for those with an SNT.

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Cross-program Impact

HUD vs. SSI vs. Medicaid:

- All 3 programs define and calculate income differently.
- What works for one program may not work for another.
- Planning must be triangular, not linear.

HOTMA as a Stress Multiplier

- Rising rents in subsidized housing causing disabled and elderly individuals increased stress which leads to increased health issues which leads to greater need for ever increasing benefits.
- Trustees of SNT's become the "shock absorbers" between rising housing costs and fixed Social Security and Medicaid benefits.

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Case Study:

Brendan is 67. He lives in subsidized multi-family housing. Receives SSDI of approximately $2,100, Medicaid (*paying a premium*) and SNAP benefits. He has a ROTH IRA of $140,000 and a traditional IRA of $20,000. He also has about $40,000 in the bank.

In addition, he is the joint owner, with Mom, of Series EE bonds totaling $350,000 (*Mom's SSN is listed on the bonds*). Until recently the bonds were held in Mom's safe deposit box. She has now given them to Brendan to hold but advised she is not planning to sell now.

Lastly, he is the trustee and beneficiary of an irrevocable trust his mother created that states that he and his brother can each receive $50,000 annually from the trust (*discretionary distribution*). The trust was never reported on any applications for housing, SNAP or Medicaid.

Based on annual expenses, he has a shortfall (for which he needs to use his assets) of about $50,000.

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Questions:

- Do the bonds count and/or need to be reported to any agency?
- Does the $50,000 trust distribution need to be taken and reported? Is it reportable even if not taken?
- How would withdrawals from his retirement monies impact benefits? Are the retirement funds countable as an asset as is or once withdrawn (*either RMD or lump sum*)?
- Should the $50,000 trust amount be taken instead of dipping into the IRA's where the principal is non-countable for housing and for the most part non-taxable?
- Can any excess funds be used to fund an ABLE account?
- As an aside, when mom dies (*she is stable now*), he will inherit at least $2 million outright. Assuming asset limits are not imposed and, even if they are, that he is grandfathered under the old rules, how will the inheritance impact continued eligibility for housing/Medicaid?

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Alternative housing pathways for disabled adults

Group Homes

Models:

- I/DD group homes
- Mental health residences
- Medically fragile homes

Funding:

- Medicaid HCBS waivers
- State I/DD agencies
- *Sometimes* HUD funded properties

Pros:

- Structured support
- Regulatory oversight
- Predictable staffing

Cons:

- Limited choice of roommates
- Institutional feel
- Long waitlists
- Variable quality

22

Alternative housing pathways for disabled adults *continued*

Shared Living Arrangements *(See Abigail's story by SNA member Victoria Sulerzyski)*

Concept:

- Adult foster care
- Host homes
- Live-in caregiver models

Funding:

- Medicaid HCBS waivers
- State programs
- *Sometimes* private pay

Pros:

- Relationship-based support, community integration, often more personalized

Cons:

- Fragility of arrangements if caregiver moves, burns out, or dies; oversight varies widely.

Other Considerations – **Contracting and boundaries:**

- Who is the tenant?
- Who holds the lease?
- How does the SNT interact with the arrangement (*paying stipends, rent, support*)?

23

Alternative housing pathways for disabled adults *continued*

Accessory Dwelling Units (ADUs)

Policy trend:

- Many states and municipalities are liberalizing ADU zoning to address housing shortages
- Use for disabled adults: Semi-independent living near family and potential live-in supports

Funding strategies:

- Family equity
- SNT financing
- State housing grants
- *Sometimes* local considerations

Other Considerations:

- Ownership and succession
- Who owns the property (*family, SNT, LLC)*?
- What happens when parents die or move?
- How do you protect the disabled adult's tenancy long-term?

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Alternative housing pathways for disabled adults *continued*

Creative Tenancy Models

Examples:

- Co-housing communities with support overlays
- Roommate arrangements with shared supports
- SNT owned property leased to beneficiary with voucher support

Pros:

- High level of autonomy
- Tailored community
- Flexible design

Cons:

- Complex coordination
- Legal structuring
- Ongoing governance

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Pulling It All Together: What Trustees, Families & Practitioners Need To Know

Trustees as "housing strategists", not just money managers

Core responsibilities under HOTMA:

- Understand how distributions affect housing, SSI, Medicaid, and other public benefits simultaneously
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- Use ABLE accounts, first party SNT's, pooled trusts, and other tools strategically.

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Q & A

Thank you!

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Tax Basics for Those New to the Internal Revenue Code

Starting from the return you already file, and working toward special needs trusts and ABLE accounts

Presented by:
Benjamin Rubin JD LLM (Tax)

1

1st, a "little" about the speaker

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Benji Rubin (JD/LLM)

Having Mitchell as a brother profoundly shaped who Benji is today, & thus the area of law he chose to practice. His personal experiences as a sibling offer a unique perspective into the responsibilities that come with caring for a sibling with special needs, a concern that he shares with all brothers & sisters of individuals with special needs.

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- Former Director and Treasurer, The Arc of Illinois
- Past President & Director, of S.I.B.S., the Illinois Chapter of Sibling Leadership Network (National Sibling Association)
- Past Chair of the American Bar Association Elder Law and Special Needs Planning Group
- Past Chair of the American Bar Association Special Needs Planning Committee
- Director, Clearbrook Board of Directors
- Director, NSSRA (North Suburban Special Recreation Association) Foundation
- Director, DayOne Pact, trustee of special needs trusts & serves as guardian
- Director, SEDOL (Special Education District of Lake County) Foundation
- Director, Special Needs Alliance, the national, non-profit, membership by invitation, organization of special needs planning attorneys
- Continuing Legal Education Faculty Member (teaching other attorneys) of the Illinois Institute for Continuing Legal Education, as well as for the Illinois State Bar Association, & for the American Bar Association, on the topic of special needs trusts, and special needs legal & future planning

*

4

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"Legal and future planning for our fellow families of individuals with special needs, including intellectual disabilities, developmental disabilities, and/or mental illness, is not one thing we do, it's the only thing we do; it's not one area of our practice, it's our only area of practice."

5

January 27, 1981
MITCH

















MEMBER SNA
President 2017-2018

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6

Growing up as a "Sibling"…

- Helps put things in perspective in life
  - Different than parents…
  - Vacations…
  - Trips to the Store…
- Understanding our future responsibilities

MEMBER SNA SPECIAL NEEDS ALLIANCE Attorney for special needs planning

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Benji Rubin

President

S.I.B.S.

Supporting **I**llinois **B**rothers & **S**isters

Illinois Chapter of the national **Sibling Leadership Network**





MEMBER SNA SPECIAL NEEDS ALLIANCE Attorney for special needs planning

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The plan for the next fifty minutes

First twenty minutes	What you already know, and what is different	Start with the individual return. Then meet the trust return and work through the four ways it departs from what you are used to.
Next twenty-five	Special needs trusts and ABLE accounts	Which trusts are taxed to the beneficiary, which are taxed to the trust, what to do about it, and how ABLE accounts fit alongside.
Last five	Questions	And whatever did not get answered along the way.

The premise of this session is that trust taxation is not a separate subject. It is individual income taxation with a handful of changes, and if you know the changes you can follow almost any conversation about a trust return.

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PART ONE

From the 1040 to the 1041

What you already know, and the four things that change

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Start with the return you already file

Every income tax computation, for every kind of taxpayer, runs through the same five steps.

1.	**Add up income**	Wages, interest, dividends, rent, business profit, gain on a sale. Everything counts unless a rule says it does not.
2.	**Subtract deductions**	For an individual, the standard deduction or itemized deductions, plus a short list of items taken before that.
3.	**That leaves taxable income**	The number the rate schedule is applied to.
4.	**Apply the rates**	Graduated brackets. Long-term capital gain and qualified dividends get a lower schedule of their own.
5.	**Subtract credits, add surtaxes**	Credits come off the tax dollar for dollar. The 3.8 percent investment income surtax is added here.

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Two things worth pausing on

Not everything is income

The starting rule is that everything is income. The exceptions are specific, and several of them matter in this practice.

- Gifts and inheritances
- Life insurance paid on a death
- Damages for a physical injury, including most personal injury settlements
- Interest on municipal bonds
- Money coming out of an ABLE account for a qualified expense
- SSI and other needs-based benefits

Basis decides how much gain there is

Gain is what you sold it for, less your basis. Where basis comes from depends on how the asset was acquired.

Acquired by	Basis is
Purchase	What was paid for it
Gift during life	Whatever the donor's basis was
Inheritance	Value on the date of death

That third line is the one to remember. Inherited property gets a fresh start, so decades of built-up gain simply disappear. It is available only for property counted in the estate, which is why we will come back to it when we compare first-party and third-party trusts.

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Two kinds of income, two sets of rates

Ordinary income

Wages, interest, rent, business profit, retirement distributions, and gain on something held a year or less. Taxed at the graduated bracket rates. This is the default.

Long-term capital gain and qualified dividends

Gain on something held more than a year, plus most corporate dividends. Taxed at 0, 15 or 20 percent. This is the biggest rate break in the Code.

And a surtax on top of both

An additional 3.8 percent applies to investment income. For an individual it starts at $200,000 of income, or $250,000 for a married couple. Hold that number in mind. When we get to trusts, the same surtax starts at $16,000.

Why anyone cares about the difference

The top ordinary rate is 37 percent and the top capital gain rate is 20 percent. Seventeen points is worth arguing about!

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Now the part that is new: a trust can be a taxpayer

A trust is not a person, but the law can treat it as one. When it does, the trustee files a return called Form 1041, reports the trust's income, claims its deductions, and pays tax out of the trust. It runs through the same five steps you just saw, with its own rate schedule.

Four ways the trust return departs from the individual return

1	**The rate schedule is brutally compressed**	A trust reaches the top bracket at a fraction of the income an individual needs.
2	**The trust gets a deduction for money it pays out**	Income that reaches a beneficiary is taxed to the beneficiary instead.
3	**Capital gains often stay behind**	Even when the trustee sells an asset and hands over the cash.
4	**Some trusts are not taxpayers at all**	The law looks straight through them to a person, who reports everything on a 1040.

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Difference one: the brackets are compressed

A trust

Taxable income	Rate
Up to $3,300	10%
$3,300 to $11,700	24%
$11,700 to $16,000	35%
Over $16,000	37%

A single individual

Taxable income	Rate
Up to $12,400	10%
$12,400 to $50,400	12%
$50,400 to $105,700	22%
Over $640,600	37%

What that means in dollars

A trust is in the top bracket at $16,000 of taxable income. A single person does not get there until $640,600. The 3.8 percent surtax follows the same pattern: $16,000 for the trust, $200,000 for the individual.

Take $30,000 of income. A trust that keeps it pays about $9,030 in federal tax. A person with that same $30,000 and nothing else pays about $3,350. Nothing changed except who the taxpayer is. That gap, about $5,700 a year, is what the rest of this session is about.

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Difference two: paying money out moves the tax

A trust is a taxpayer that gets a deduction for what it distributes. Whatever the trustee pays out, the trust deducts and the beneficiary reports instead. So the trustee has a lever nobody has on a 1040: choosing, within the terms of the trust, whose return the income lands on.

Three things to know about it

- The deduction is capped at the trust's income for the year. Handing over principal does not create a deduction
- It counts as a distribution when the trustee pays someone else for the beneficiary's benefit, not only when cash goes to the beneficiary. Paying a caregiver or a tuition bill counts
- The income keeps its character on the way out. Interest arrives as interest, tax-exempt interest stays tax-exempt

The deadline is not December 31

A trustee can make a distribution in the first sixty-five days of the new year and elect to have it count against the prior year. In practice that means until about the sixth of March to look at the finished numbers and decide how much income to shift onto the beneficiary's return.

Trustees who do not know this rule exist overpay every single year. It is probably the most useful practical thing in this session.

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Difference three: capital gains usually stay behind

Distributing income moves the tax. Capital gain is the exception. When a trustee sells an appreciated asset, the gain is normally treated as belonging to the trust's principal, and it stays taxable to the trust even if the entire proceeds are handed to the beneficiary that same week.

The common surprise

A trustee sells stock to fund a large distribution, assumes the whole thing flowed through to the beneficiary, and finds the gain taxed at 37 percent plus the surtax at the trust level.

When it can be avoided

There are narrow routes to push gain out with the distribution, but they depend on the trust instrument, on state law, and on the trustee handling it the same way every year.

What to do with this

Decide the approach when the trust is funded rather than in the year of the first big sale, write it into the instrument if the trust will hold appreciating assets for decades, and make sure the accountant knows what was decided.

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Difference four: some trusts are not taxpayers at all

For certain trusts the law ignores the trust entirely and treats one person as owning everything inside it. That person reports the income on their own 1040 at individual rates. These are called grantor trusts, and the label is an income tax label only.

What makes a trust a grantor trust

- The person who funded it kept the power to revoke it
- Income can be paid to, or held for, the person who funded it
- Someone kept a power over who benefits, or a power to pull assets out

It turns on the powers written into the document, so it is not something the trustee elects year to year.

What it changes

Individual rates instead of compressed ones. The person's own standard deduction and credits apply. Sales between that person and the trust are ignored for tax purposes.

What it does not change

The trust can still be irrevocable, still protect assets from creditors, and still work perfectly for Medicaid and SSI. Grantor trust status is about who pays the income tax and nothing else.

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PART TWO

Special needs trusts and ABLE accounts

The same four differences, applied to the work you actually do

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Three kinds of trust, three different answers

	Third-party trust	First-party trust (d)(4)(A)	Pooled trust (d)(4)(C)
Whose money	A parent's, a grandparent's, anyone but the beneficiary	The beneficiary's own money. A settlement, an inheritance, back benefits	The beneficiary's own money, in a sub-account of a common fund
Medicaid payback	None	Required at death	Payback, or retention by the nonprofit
Who pays the income tax	The settlor while it is revocable. The trust itself once it is not	The beneficiary, on their own 1040	The beneficiary, on their own 1040
Counted in the beneficiary's estate	No	Yes	Yes, as to the sub-account

The third row is the whole story. A first-party trust is a grantor trust, so it is taxed to the beneficiary at individual rates. A third-party trust usually is not, so it pays at the compressed rates. Those are two very different problems.

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First-party trusts: taxed to the beneficiary

A first-party trust holds the beneficiary's own money, and trust income can be spent for the beneficiary. That combination makes it a grantor trust, with the beneficiary treated as the owner. Everything is reported on the beneficiary's own Form 1040.

Usually good news

- Individual rates, not compressed ones. No top bracket at $16,000 and no surtax at $16,000
- The beneficiary's standard deduction and credits apply. A beneficiary on SSI or SSDI often has little other income, so much of the trust's income is taxed at 10 or 12 percent, or not at all
- If the trust owns the home the beneficiary lives in, the exclusion on the sale of a residence is generally available

Two things to raise with the client

The beneficiary personally owes the tax even though the trustee holds the money, so the document has to let the trustee pay it.

Because it is not a separate taxpayer, this trust cannot use the disability trust exemption on the next slide.

A point of confusion worth heading off

Income being taxed to the beneficiary does not make it countable income for SSI. Tax rules and benefits rules are separate systems, and a tax form does not create a benefits problem by itself.

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Third-party trusts: where the compression hurts

- While the parent is alive and the trust is revocable, nothing separate happens. It is taxed to the parent
- When the parent dies, or when an irrevocable trust is funded, the trust becomes its own taxpayer and the compressed schedule applies
- A $900,000 trust earning four percent has about $36,000 of income. Left in the trust, most of it is taxed at 37 percent plus the surtax

Three ways to deal with it

1. Spend the money on the beneficiary	Every dollar the trustee spends for the beneficiary carries income out to a return with much better rates. This is the main tool and it is also, usually, the right thing to be doing anyway.
2. Claim the disability trust exemption	A trust for a disabled beneficiary that meets the requirements takes a $5,300 exemption instead of $100. The trustee checks a box on the return. It is worth roughly $1,900 a year.
3. Change what the trust owns	Tax-exempt bonds, growth assets held rather than traded, and tax-managed funds all reduce the income there is to argue about.

The exemption requires an irrevocable trust for a beneficiary who was under 65 when it was established and who SSA has determined to be disabled. Details in the materials.

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Spending: the tax rules and the benefits rules disagree

The tax rules reward the trustee for paying money out. The benefits rules restrict what can be paid, to whom, and in what form. Living with both is most of the trustee's job.

The tax side

Anything the trustee pays for the beneficiary's benefit moves income onto the beneficiary's return, where the rates are far better. Paying a caregiver, a dentist, a tuition bill or a therapist all count.

The SSI side

- Cash to the beneficiary reduces the check almost dollar for dollar
- Food or shelter paid on their behalf reduces it by a capped amount
- Medical, dental, transportation, recreation, education, phone and personal care generally do not affect it at all

Where they agree, and where the real failure happens

The spending that serves the beneficiary best is usually the spending that produces the deduction. A trustee actively using the trust generates the tax benefit as a byproduct.

The problem case is the cautious trustee who accumulates for fifteen years, pays the top rate every one of them, and leaves a smaller trust than the parents intended. Review the tax position and the benefits position in the same meeting, and use the sixty-five day rule to make the final call once the numbers are in.

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What happens at death

First-party trust

The money was the beneficiary's and they had the benefit of it for life, so it counts in their estate. That means the assets get a fresh basis at death and decades of built-up gain disappear.

With the estate tax exemption at $15 million, being counted in the estate costs almost nothing and the basis reset is a real benefit.

Third-party trust

The beneficiary never owned the assets, so nothing is counted in their estate. That is usually the point.

The cost is that appreciated property carries its old basis to whoever takes it next. Worth asking whether the trustee should realize some gain during life, or whether the document should be drafted differently.

Two more things about the end of a trust

The payback to the state in a first-party trust comes before any remainder passes, and paying it does not generate a deduction.

A retirement account left to a special needs trust can still be stretched over the beneficiary's life expectancy rather than the ten-year rule that hits most trusts post Secure and Secure 2.0. Where an IRA is going to one of these trusts, review the beneficiary designation and the trust language together, while the account owner is alive.

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ABLE accounts

What it is

- A savings account for a person with a disability, run through a state program, modeled on a 529 college account
- Money goes in after tax, grows without tax, and comes out tax-free if spent on a qualified disability expense
- One account per person. Most states will take out-of-state residents

Why it matters for benefits

- Up to $100,000 in the account is ignored for SSI, against the usual $2,000 resource limit
- For Medicaid the balance is generally ignored without that cap
- Money spent on qualified expenses other than housing is not income

What counts as a qualified expense

Education. Housing. Transportation. Employment training. Assistive technology and personal support. Health and wellness. Financial management. Legal fees. Funeral and burial. Basic living expenses.

The standard is anything related to the disability that helps maintain or improve health, independence or quality of life. It is far broader than most families assume, and broader than most expect.

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ABLE in 2026, and what just changed

The numbers

	2026
Contribution limit, all sources combined	$20,000
Gift tax annual exclusion, for comparison	$19,000
Extra amount a working beneficiary can add	Up to $15,650
Tax credit for a beneficiary's own contributions	Up to $1,000
Balance ignored for SSI	$100,000
Disability must have begun before age	46

What changed this year

- The onset age moved from 26 to 46 on January 1, which made several million more people eligible
- The contribution limit is no longer the same number as the gift tax annual exclusion
- The work contribution, the tax credit and rollovers from a 529 account were all going to expire and were made permanent

Worth flagging to anyone who funds these accounts

For twelve years the ABLE limit and the gift tax annual exclusion were the same figure and everyone used them interchangeably. They are now different. A donor who funds an account to the $20,000 maximum has made a $20,000 gift, has used $1,000 of lifetime exemption, and owes a gift tax return. At today's exemption that costs nothing, but the return still must be filed.

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Using an ABLE account alongside a trust

	ABLE account	Special needs trust
How much it holds	$20,000 a year, and $100,000 before SSI is affected	No limit
Who controls it	The beneficiary, with a debit card (unless there is a Guardian/Conservator)	The trustee
Tax on the earnings	None, if spent on qualified expenses	Compressed rates, or the beneficiary's rates if a grantor trust
Housing	Fine if paid directly.	Generally reduces the SSI check by ISM (up to 1/3)
Cost to set up and run	An online account and small fees	Drafting, trustee fees, annual returns
Payback at death	Possible, though several states have declined to enforce it	Yes for a first-party trust, none for a third-party trust

The structure that usually works for beneficiaries who are more independent

Keep the bulk of the money in a third-party trust, where there is no payback and no ceiling. Size the ABLE account to near-term spending and have the trustee refill it each year. The beneficiary gets real independence, the corpus stays protected, and the annual transfer is a distribution that carries income out to a better rate schedule.

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Six things to take with you

1. A trust return runs through the same five steps as your 1040. Four things change, and that is the whole framework.
2. A trust is in the top bracket at $16,000 of income. A person is not until $640,600.
3. Money the trustee spends for the beneficiary moves the income onto the beneficiary's return, where the rates are far better.
4. The trustee has until about March 6 to decide how much of last year's income to move. Most trustees do not know this.
5. A first-party trust is taxed to the beneficiary at individual rates. A third-party trust pays its own tax at the compressed rates.
6. ABLE accounts changed this year: onset before 46, a $20,000 limit, and no longer tied to the annual exclusion.

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Questions

The written materials carry the full outline, the Code sections behind everything discussed here, and a source list for the 2026 figures.

The 2026 numbers from this session

Trust top bracket and surtax begin	$16,000
Ordinary trust exemption	$100
Disability trust exemption	$5,300
Gift tax annual exclusion	$19,000
Estate tax exemption	$15,000,000
ABLE contribution limit	$20,000
ABLE balance ignored for SSI	$100,000
SSI monthly benefit, individual	$994
SSI resource limit, individual	$2,000

Offered for educational purposes. Not legal or tax advice, and not intended or written to be used for the purpose of avoiding penalties. Figures are 2026 amounts and are adjusted annually.

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STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

Thursday
October 22, 2026

Determining Services and Supports for Individuals with Cognitive Disabilities: Tools You Can Use RIGHT NOW

STETSON LAW

Center for Elder Justice

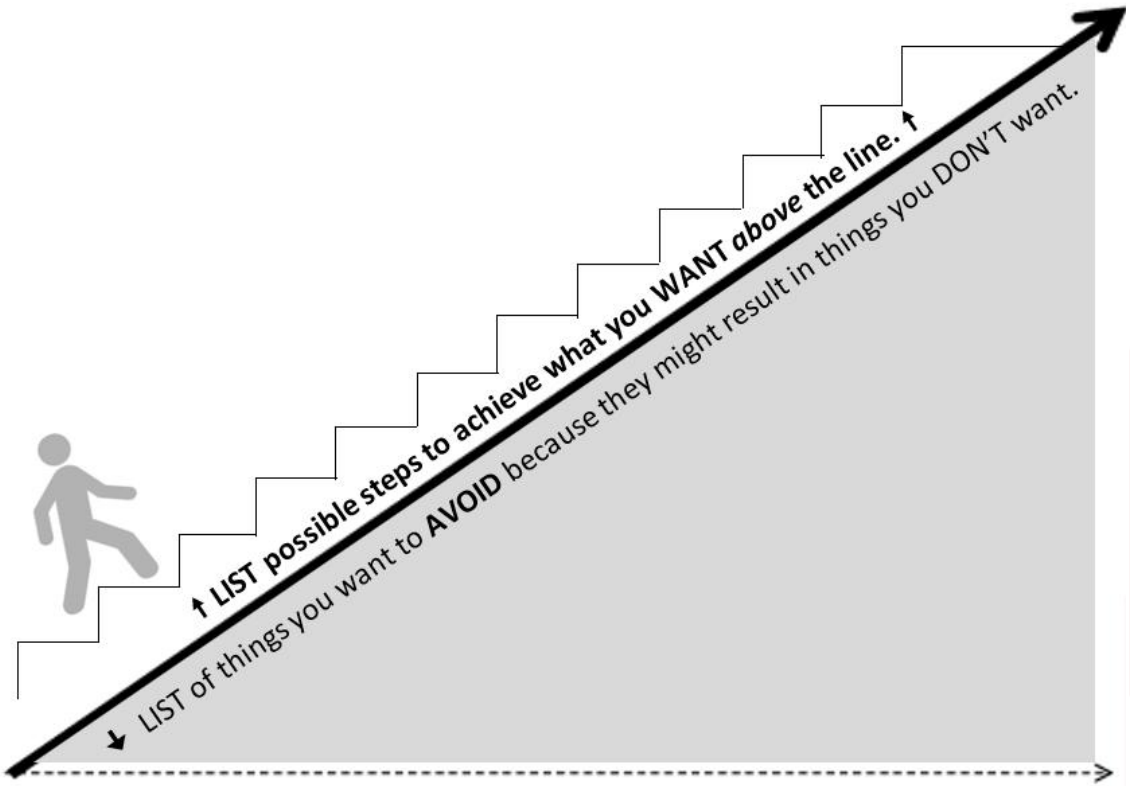
Access and Justice For All®

The Arc Colorado

Name:_____

Today's date:_____

What I WANT



What I DON'T Want

This tool was originally developed by the UMKC Institute for Human Development, UCEDD (lifecoursetools.com, 2016), and modified by The Arc of Colorado (thearcofco.org, 2025)

IDENTIFYING DECISION-MAKING SUPPORTS

This tool is designed to assist with identifying an individual's ability to make decisions and manage key areas of life. It is intended to assist with exploring options for integrated decision-making services & supports.

Name of Individual: _____

Name of individual completing this form: _____

Relationship to individual *(circle one):* Self Family Friend Guardian Other: _____

How long have you known the individual? _____

Step 1: If yes, put a checkmark in the GREEN column – this means the individual is good to go. If NO, put a mark in the yellow column. Step 2: When you have completed all the questions, explore integrated services & supports options for supported decision-making for all questions marked in the yellow column. Step 3: ONLY if NO integrated services or supports can be identified should substitute decision-making be considered for those specific areas of need.	 Can individual decide or direct this activity independently most of the time?	 Can individual decide or direct this activity with assistance most of the time?	 Does the individual requires substituted decision making support?
DAILY LIVING at HOME			
Can the individual make and communicate choices in regard to getting dressed in the morning (what to wear, appropriate attire for weather/event, etc.)?			
Can the individual make and communicate choices in regard to bedtime and/or morning routines (i.e. what time to go to bed, when to get up, bathroom, etc.)?			
Is the individual able to manage their money (i.e. give change, use a debit/credit card, etc.)?			
Is the individual able to identify and resist financial exploitation?			
HEALTHY LIVING			
Does the individual make decisions about where, when, and what to eat?			
Can the individual follow a prescribed diet and/or take medicines as directed?			
Does the individual understand the need to maintain individual hygiene and dental care?			
Can the individual make and communicate decisions regarding medical treatment, including understanding the consequences of not accepting treatment?			
Does the individual understand health consequences associated with high-risk behaviors *(substance abuse, overeating, high-risk sexual activities, etc.)*?			
Can the individual alert others and seek medical help for serious health problems?			
Is the individual able to decide and direct what kinds of support they need or want, and select who provides those services or supports?			

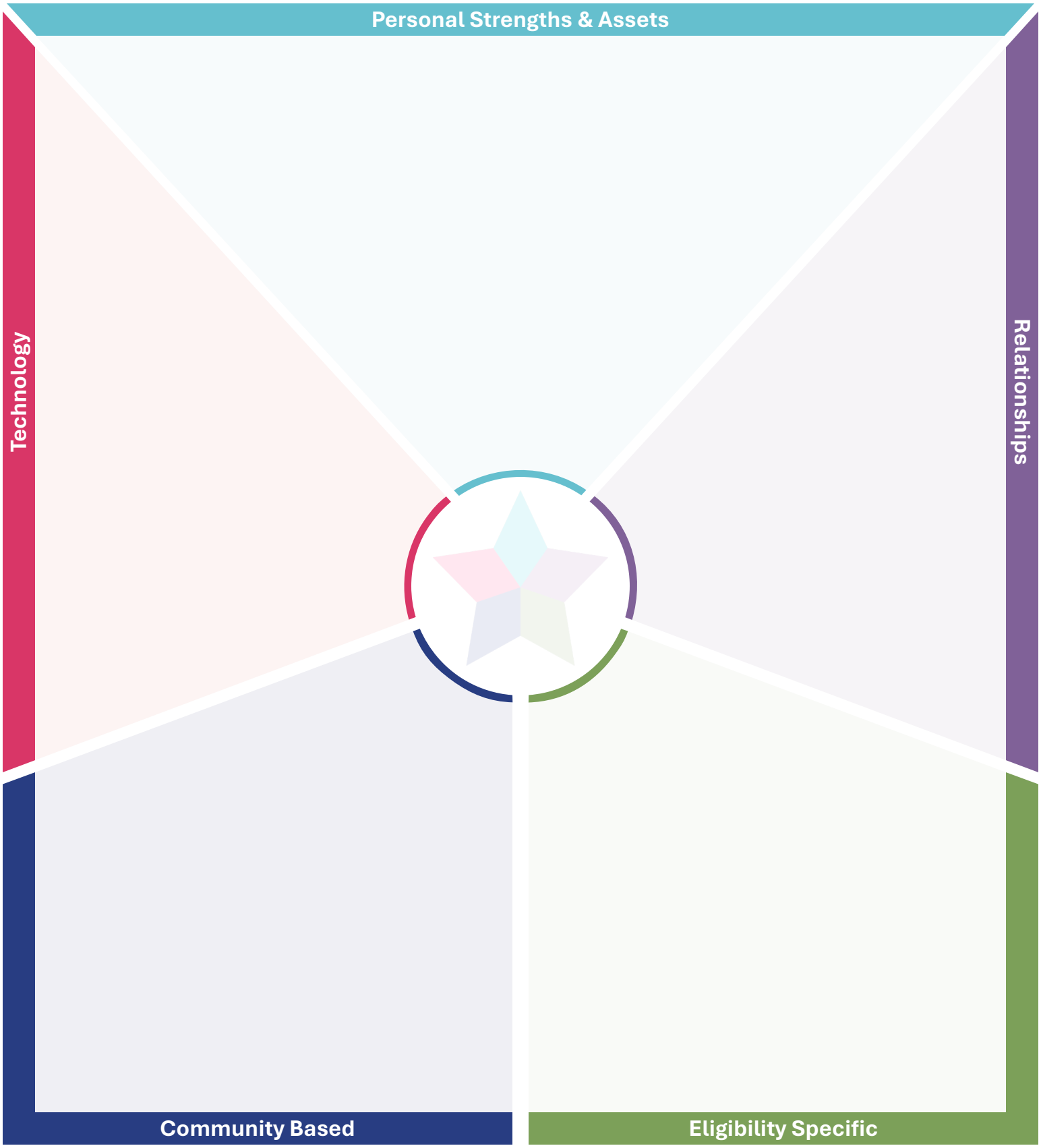
IDENTIFYING ALTERNATIVES TO GUARDIANSHIP			
SOCIAL RELATIONSHIPS			
Can the individual differentiate appropriate relationship behaviors as with family, friends, co-workers, intimate partners, etc. (*how we talk to and touch others*)?			
Is the individual able to make appropriate decisions concerning marriage and intimate relationships?			
Does the individual understand consent and permission in regards to sexual relationships?			
SAFETY & SECURITY			
Does the individual avoid common environmental dangers (*traffic, sharp objects, hot stove, poisonous products, etc.)*?			
Can the individual alert others and seek medical help for serious health problems?			
Is the individual able to recognize when someone is taking advantage of them, hurting them, or abusing them (physical, sexual, emotional) and protect themselves?			
Does the individual know who to contact if they are in danger, being exploited, or being treated unfairly (*police, DSS, Arc, Lawyer*)?			
COMMUNITY LIVING			
Is the individual able to be on their own without risk of serious harm or injury to themselves?			
Does the individual understand what is involved with managing a home that is safe *(home maintenance, sanitary conditions, secure, etc.)?*			
Is the individual able to access community resources critical to functioning successfully and safely in community settings (*post office, transportation, bank, grocery store, emergency services, church, etc.)*?			
CITIZENSHIP & ADVOCACY			
Is the individual able to identify someone they want to represent their interests and support them with decision making?			
Is the individual able to communicate approval to share information with parents, family members, and friends who are not legal guardians?			

IDENTIFYING DECISION-MAKING SUPPORTS			
SOCIAL RELATIONSHIPS			
Is the individual able to differentiate and make appropriate decisions concerning appropriate relationship behaviors with family, friends, intimate relationships (*how we talk and touch each other*)?			
SAFETY & SECURITY			
Does the individual avoid common environmental dangers (*traffic, sharp objects, hot stove, poisonous products, etc.)?*			
Can the individual alert others and seek medical help for serious health problems?			
Is the individual able to recognize when someone is taking advantage of them, hurting them, or abusing them (physical, sexual, emotional)?			
Does the individual know who to contact if they are in danger, being exploited, or being treated unfairly?			
DAILY LIVING at SCHOOL and in COMMUNITY			
Is the individual able to be on their own without risk of serious harm or injury to themselves?			
Is the individual able to identify and resist financial exploitation?			
CITIZENSHIP & ADVOCACY			
Is the individual able to identify someone they want to represent their interests and support them with decision making?			
Is the individual able to communicate approval to share information with parents, family members, and friends who are not legal guardians?			

IDENTIFYING DECISION-MAKING SUPPORTS			
OTHER			

Integrated Supports Star

My Name is:



Charting the LifeCourse Framework and Tools

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Integrated Supports Star

Prompts to help you fill out the Integrated Supports Star:
The Integrated Support Star helps anyone map out current services, solve specific problems, and plan next steps. It can be used to explore needs, find gaps, or plan how to get future support.

Personal Strengths & Assets

- Skills, personal abilities, knowledge or life experiences;
- Strengths, things a person is good at or others like and admire;
- Assets, personal belongings and resources

Technology

- Personal technology anyone uses;
- Assistive or adaptive technology with day to day tasks;
- Environmental technology designed to help with or adapt surroundings

Community Based

- Places such as businesses, parks, schools, faith-based communities, health care facilities;
- Groups or membership organizations;
- Local services or public resources everyone uses

Eligibility Specific

- Needs based services based on age, geography, income level, or employment status;
- Government paid services based on disability or diagnosis, such as special education or Medicaid

Relationships

- Family and others that love and care about each other;
- Friends that spend time together or have things in common;
- Acquaintances that come into frequent contact but don't know well

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7 Decision Making Options
For People With IDD

The Arc Aurora
www.thearcofaurora.org

THINK+change
TALKS TRAININGS TOOLS
A social enterprise of The Arc of Aurora
www.thinkchange.training

When a person with intellectual and developmental disabilities (IDD) turns 18, they are considered an adult and have the right to make decisions about their life, just like anyone else. But we all need help, sometimes! This handout explains the different ways someone with IDD can receive decision-making support in Colorado, **listed from the least to the most restrictive options.**

DID YOU KNOW?

Not everyone with IDD needs help making decisions. Many people with IDD can make their own choices, and might not need any of the options listed.

A person with IDD is not required to have a guardian when they turn 18. In many cases, people may say they are "their own guardian," meaning they can make their own decisions.

SETTING UP SUPPORT

The process to establish these support roles is different for each. Some are easy to set up, while others may require a court hearing or come with costs. There are **supportive roles that assist** the person in making their own decisions, and **surrogate roles that make** decisions on the person's behalf.

MULTIPLE SUPPORTERS

A person with IDD can have different people helping with different things. For example, one person might help with financial needs, while another helps with healthcare decisions.

ONE SIZE DOESN'T FIT ALL—AND THAT'S OKAY!

The right support looks different for everyone because everyone's needs are different. When in doubt, start with ***less*** restrictive options. It's okay to explore what works best.

01 Supported Decision-Making (SDM)

Supported Decision-Making (SDM) allows a person with IDD to choose trusted supporters to help them understand options and make decisions. Supporters can give advice and guidance—but the person still makes their own decisions. In Colorado, SDM agreements are voluntary and must be in writing. To download an agreement, visit: thinkchange.info/SDMexampleagreement

02 Authorized Representative (AR)

An AR (Authorized Representative) helps a person with IDD access the services and supports they need, as defined by the person with IDD. The person with IDD usually designates an AR through their service provider or Case Management Agency (CMA) and can be changed at any time. To become an AR in Colorado, contact the service provider or CMA for the process and paperwork.

03 Representative Payee

A Representative Payee helps manage Social Security benefits for someone who needs assistance with their finances. They can only manage Social Security funds, not other financial matters. To become a Representative Payee in Colorado, contact the local Social Security office, fill out Form SSA-11, provide ID, and go through an interview: https://www.ssa.gov/payee/

04 Medical Proxy (Healthcare Agent)

A Medical Proxy makes medical decisions for someone who can't make them themselves. Their role is limited to healthcare decisions only. To become a Medical Proxy in Colorado, the person must appoint an 'agent' in writing through a Medical Durable Power of Attorney (MDPOA), and forms are available through the Colorado Department of Public Health and Environment: https://cdphe.colorado.gov/palliative-care/advance-care-planning-for-patients-and-families

05 Power of Attorney (POA)

A Power of Attorney (POA) is a legal document that lets someone make decisions for another person, for example, like handling finances or medical care. The POA can have broad or limited authority, and it can remain in effect if the person becomes unable to make decisions. To create a POA in Colorado, fill out the form (notarization is recommended) available from the Colorado Bar Association: https://www.cobar.org/portals/cobar/repository/SLH/chap23.pdf

06 Conservator

A Conservator is a person appointed by the court to manage the finances and property of someone who cannot do so on their own. Conservators are responsible for handling money, assets, and property. To become a Conservator in Colorado, you must file a petition with the court, provide financial information about the person, and attend a court hearing.
Visit the Colorado Judicial Branch's website for more details:
https://www.coloradojudicial.gov/self-help/conservatorship-adults

07 Guardianship

A Guardian is a person appointed by the court to make personal and healthcare decisions for someone who is unable to make those decisions on their own. Guardians are often family members, friends, or professional organizations. The court determines how much decision-making authority the Guardian has. To become a Guardian in Colorado, you must file a petition with the court, attend a court hearing, file an annual Guardianship Report, and pay any required court and filing fees. For forms and more information, visit the Colorado Judicial Branch's website: https://www.coloradojudicial.gov/self-help/guardianship-adults

This 1-page guide gives an overview of these roles. For more detailed information or advice, visit the links provided and consider consulting a professional.
www.thearcofaurora.org | www.thinkchange.training

7 Opciónes de tomar deciciones

Para personas con IDD

Cuando una persona con discapacidad intelectual y del desarrollo (IDD en inglés) cumple 18 años, se la considera adulta y tiene derecho a tomar decisiones sobre su vida, como cualquier otra persona. Pero, a veces, ¡todos necesitamos ayuda! Este folleto explica las diferentes maneras en que una persona con IDD puede recibir apoyo para la toma de decisiones en Colorado, **enumeradas de la opción menos restrictiva a la más restrictiva.**

¿LO SABIA?

No todas las personas con IDD necesitan ayuda para tomar decisiones. Muchas personas con IDD pueden tomar sus propias decisiones y puede que no necesiten ninguna de las opciones enumeradas.

Una persona con IDD no está obligada a tener un tutor cuando cumple 18 años. En muchos casos, las personas pueden decir que son «sus propios tutores», lo que significa que pueden tomar sus propias decisiones.

ESTABLECER EL APOYO

El proceso para establecer estas funciones de manutención es diferente en cada caso. Algunas son fáciles de establecer, mientras que otras pueden requerir una vista judicial o conllevar costes. Hay **funciones de apoyo que <u>ayudan</u>** a la persona a tomar sus propias decisiones y **funciones de sustitución que <u>toman</u>** decisiones en su nombre.

APOYOS MÚLTIPLES

Una persona con IDD puede tener diferentes personas que le ayuden con diferentes cosas. Por ejemplo, una persona puede ayudar con las necesidades económicas y otra con las decisiones sanitarias.

LA TALLA ÚNICA NO SIRVE PARA TODOS, ¡Y NO PASA NADA!

El apoyo adecuado es diferente para cada persona, porque las necesidades de cada uno son diferentes. En caso de duda, empieza por las opciones **menos** restrictivas. No pasa nada por explorar lo que funciona mejor.

01 La Toma de Decisiones con Apoyo (SDM en inglés)

La Toma de Decisiones con Apoyo (SDM) permite a una persona con IDD elegir a personas de confianza que le ayuden a entender las opciones y a tomar decisiones. Las personas de apoyo pueden dar consejos y orientación, pero la persona sigue tomando sus propias decisiones. En Colorado, los acuerdos de SDM son voluntarios y deben hacerse por escrito. Para descargar un acuerdo, visite: thinkchange.info/SDMexampleagreement

02 Representante autorizado (AR en inglés)

Un AR (Representante Autorizado) ayuda a una persona con IDD a acceder a los servicios y apoyos que necesita, según lo definido por la persona con IDD. La persona con IDD suele designar a un AR a través de su proveedor de servicios o Agencia de Gestión de Casos (CMA) y puede cambiarlo en cualquier momento. Para convertirse en un AR en Colorado, póngase en contacto con el proveedor de servicios o CMA para el proceso y el papeleo.

03 Representante del beneficiario

Un representante del beneficiario ayuda a gestionar las prestaciones de la Seguridad Social de una persona que necesita ayuda con sus finanzas. Sólo pueden gestionar los fondos de la Seguridad Social, no otros asuntos financieros. Para convertirse en un representante del beneficiario en Colorado, póngase en contacto con la oficina local de la Seguridad Social, rellene el formulario SSA-11, proporcione un documento de identidad y pase una entrevista: https://www.ssa.gov/payee/

04 Apoderado médico (agente sanitario)

Un apoderado médico toma decisiones médicas por alguien que no puede tomarlas por sí mismo. Su función se limita únicamente a las decisiones sanitarias. Para convertirse en apoderado médico en Colorado, la persona debe nombrar a un «agente» por escrito mediante un poder médico duradero (MDPOA), y los formularios están disponibles a través del Departamento de Salud Pública y Medio Ambiente de Colorado: https://cdphe.colorado.gov/palliative-care/advance-care-planning-for-patients-and-families

05 Un poder notarial (POA en inglés)

Un poder notarial (POA, por sus siglas en inglés) es un documento legal que permite a alguien tomar decisiones por otra persona, por ejemplo, como la gestión de las finanzas o la atención médica. El poder puede tener una autoridad amplia o limitada, y puede seguir en vigor si la persona queda incapacitada para tomar decisiones. Para crear un poder en Colorado, rellene el formulario (se recomienda la notarización) disponible en el Colegio de Abogados de Colorado. https://www.cobar.org/portals/cobar/repository/SLH/chap23.pdf

06 Un Curador

Un curador es una persona designada por el tribunal para administrar las finanzas y los bienes de alguien que no puede hacerlo por sí mismo. Los curadores son responsables del manejo de dinero, bienes y propiedades. Para convertirse en curador en Colorado, debe presentar una petición ante el tribunal, proporcionar información financiera sobre la persona y asistir a una audiencia en el tribunal. Visite el sitio web del Poder Judicial de Colorado para obtener más detalles: https://www.coloradojudicial.gov/self-help/conservatorship-adults

07 Tutela

Un tutor es una persona designada por el tribunal para tomar decisiones personales y sanitarias en nombre de alguien que no puede tomarlas por sí mismo. Los tutores suelen ser familiares, amigos u organizaciones profesionales. El tribunal determina el grado de autoridad del tutor para tomar decisiones. Para convertirse en tutor en Colorado, debe presentar una petición ante el tribunal, asistir a una audiencia judicial, presentar un informe anual de tutela y pagar las tasas judiciales y de presentación requeridas. Para obtener formularios y más información, visite el sitio web del Poder Judicial de Colorado: https://www.coloradojudicial.gov/self-help/guardianship-adults

Esta guía de una página ofrece una visión general de estas funciones. Si desea información más detallada o asesoramiento, visite los enlaces indicados y considere la posibilidad de consultar a un profesional.

www.thearcofaurora.org | www.thinkchange.training

Determining Services & Supports for Individuals with Cognitive Disabilities: Tools You Can Use RIGHT NOW

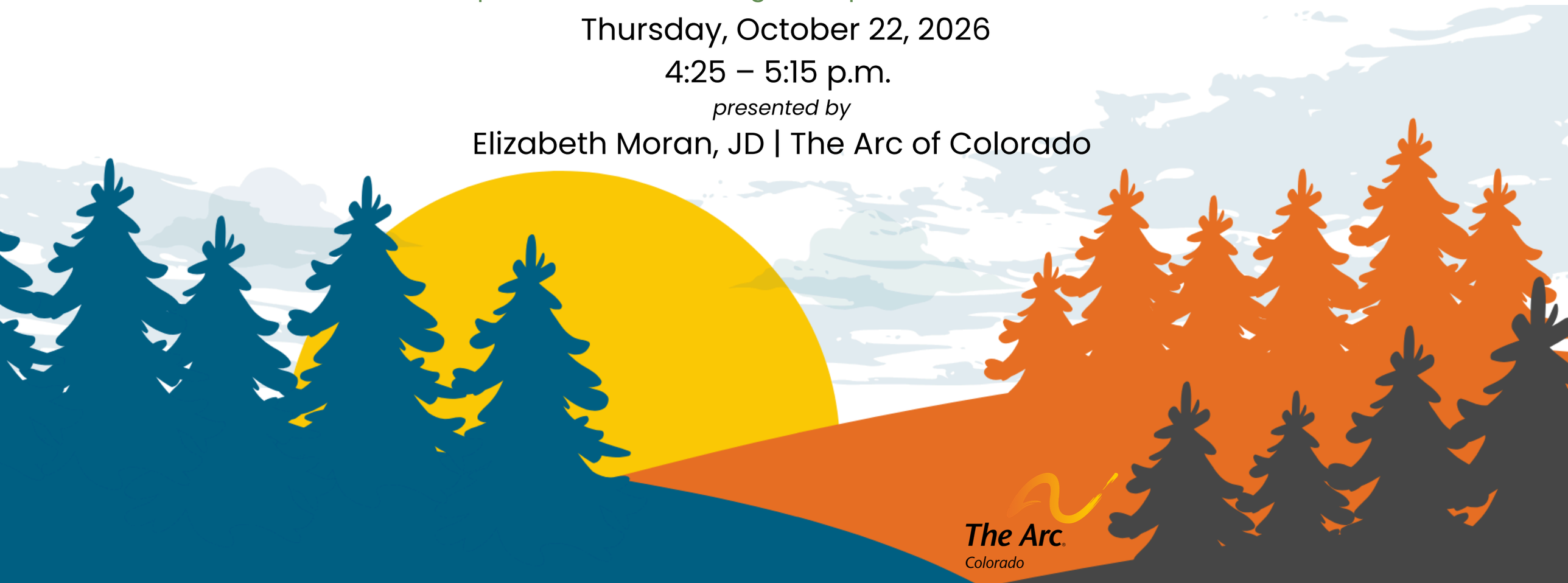
STETSON LAW | 2026 National Conference on Special Needs Planning and Special Needs Trusts

Thursday, October 22, 2026

4:25 – 5:15 p.m.

presented by

Elizabeth Moran, JD | The Arc of Colorado



Legal tools set the authority.
Services and supports deliver the outcome.

(Legal planning succeeds when support reaches the person)

A carefully drafted document can:

- establish authority/decision-maker
- preserve assets
- express preferences

Someone still needs to:

- arrange transportation
- support medication routines
- locate provider(s)
- …and follow up on day-to-day well-being, etc.

Think of your last client/case involving a person with a cognitive disability…

Did the legal document or order solve the everyday problem?

Today's Objectives

- **Spot common unmet needs** through a structured conversation during the legal intake and review.
- Apply **person-centered planning principles** to legal work.
- **Match specific needs** to an appropriate assessment or service system (and interdisciplinary approach).
- Use existing tools to **explore decision-making options and supports.**
- **Navigate the major publicly funded and community-based service systems.**
- **Create a plan** with responsible people, deadlines, and follow-up.

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Law Sets Authority, Supports Deliver Outcomes.

(Legal tools and daily supports work together)

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Legal planning	Everyday implementation
Guardianship or decision-making alternatives	Support to understand and carry out decisions
Powers of attorney and advance directives	Health care access and coordination
Special needs trusts and estate plans	Someone to identify, arrange, and monitor funded supports
Representative payee arrangements	Benefit management and attention to daily financial needs

What Happens When the Support Piece Is Missing?

Common failure points:

- Plan funds sit unused while needs go unmet
- Loss of benefits through missed deadlines or redeterminations
- Crisis-driven placements (hospital, nursing facility, or jail)
- Isolation, neglect, or exploitation
- Guardianship used as a fix for a service gap

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The Legal Framework Behind Supports

- **ADA** and the ***Olmstead*** decision address unnecessary segregation in public services (rights to services in the most integrated setting).
- Applicable guardianship law guides **consideration of less restrictive alternatives**.
- **Supported decision-making** recognition and legal effects vary by state.
- **Person-centered planning requirements** in **Medicaid home and community-based services (HCBS)**.



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Cognitive Disability is *Not* One Thing

(Diagnosis ≠ Decision-Making Ability ≠ Support Needs)

A spectrum of conditions and origins:

- Intellectual and developmental disabilities (IDD)
- Traumatic or acquired brain injury
- Dementia and neurocognitive disorders
- Serious mental illness with cognitive effects
- Co-occurring conditions

Question	What we need to understand
What does the person want?	Preferences, priorities, and desired outcomes
What help does the person need?	Everyday functioning and available supports
What legal authority is necessary?	Applicable legal standards and decision-specific evidence

The Seven Life Domains Checklist

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A checklist you can use at intake:

1. **Housing:** Where do they live? Is it safe and stable?

2. **Health:** Primary care, medications, dental, behavioral health

3. **Daily living:** Personal care, meals, hygiene, household tasks

4. **Money:** Income, benefits, bill-paying, vulnerability to exploitation

5. **Daily activity:** Work, school, day program, meaningful routine

6. **Relationships:** Family, friends, natural supports, isolation risk

7. **Safety:** Abuse or neglect risk, emergency plan, wandering, behaviors

Questions That Help Reveal Unmet Needs

- “What matters *most* to you right now?”
- "Who helps you on a typical day?"
  - "What happens if that person is sick or unavailable?"
- "What services do you receive now?
  - What have you been told you can't get?"
- "What does a good day look like for you?"
- "What worries you most?"
- “What would you like help with, and what would you like to keep doing yourself?”
- “What is becoming difficult or going wrong?”
- “Who helps you now, and what happens if they are unavailable?”
- “Who or what helps you do the things you like to do?”

Participation Depends on Accessible Communication

(don't forget about effective communication supports)

· Ask how (and when!) the person prefers to communicate.

· Explain one idea at a time. Use plain language.

· Use concrete language, pictures, or written choices.

· Allow processing time and breaks.

· Offer a supporter the person chooses.

· Ask the person to explain the next step in their own words/way.

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Functional Assessment Tools: What They Are

(we don't administer these, but we *should* know what they are)

Assessment type	What it may help describe
Adaptive behavior assessments such as Vineland or ABAS	Everyday adaptive skills
Supports Intensity Scale (SIS) Adult Version, for IDD	Pattern and intensity of support needs in IDD
Activities of daily living (ADL) and instrumental activities of daily living (IADL) screens	Personal care and household functioning
Cognitive screens such as MoCA, used by clinicians	Whether further clinical evaluation may be needed
State-specific functional or level-of-care assessments for Medicaid eligibility	Whether program criteria are met

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The Interdisciplinary Team

(who can answer what questions)

Question	Potential professional
What explains a new change in functioning?	Medical clinician
How does cognition affect complex tasks?	Neuropsychologist or other qualified evaluator
What would help this person function at home?	Occupational therapist
What communication supports would help?	Speech-language pathologist
Which services fit, and how can the person access them?	Social worker or care manager
Does the person meet a program's criteria?	Program-designated assessor

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The Service Landscape At-a-Glance

1. PUBLIC BENEFITS: INCOME AND HEALTH COVERAGE

2. LONG-TERM SERVICES AND SUPPORTS: MEDICAID WAIVERS AND STATE PROGRAMS

3. EDUCATION, EMPLOYMENT, AND REHABILITATION

4. COMMUNITY AND INFORMAL SUPPORTS



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Service systems have different entry points

(The system is fragmented. Eligibility is based on a mix: age, diagnosis, income, & functional needs.)

Need or circumstance	Starting point
Long-term assistance with daily activities	State Medicaid long-term services and supports intake
Intellectual or developmental disability (IDD)	State or local developmental disability system
Aging or dementia	Area Agency on Aging or Aging and Disability Resource Center
Acquired brain injury	Rehabilitation team and applicable state brain injury resources
Employment support	State vocational rehabilitation agency
Community access and independent living	Center for Independent Living
Mental and behavioral health needs	Local public behavioral health system or treating team
School services or transition	School district's special education team

Public Benefits: The Foundation

- **SSI:** needs-based income, with strict asset and income limits
- **SSDI / Childhood Disability / DAC**: based on work record (own or parent's)
- **Medicaid:** health coverage, and often the gateway to long-term services and supports
- **Medicare:** after the qualifying period
- **SNAP, housing assistance, and other income supports:** food and housing support under applicable program rules

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Home and Community-Based Services (HCBS)

Potential funding sources

- Medicaid state-plan services (“waiver”) and HCBS programs. Medicaid waiver programs include residential supports, personal care, supported employment, respite, behavioral supports, and more. Waitlists are common in many states. Eligibility usually requires:
  - a disability determination
  - a level-of-care assessment, and
  - financial eligibility
- Medicare or other insurance for covered care
- Aging, disability, and vocational programs
- Trust assets or private payment
- Community organizations and informal supports

ASK: Eligibility? Coverage? Provider? Start date?

Other Public Systems to Know:

Community-Based & Informal Supports

- **Vocational rehabilitation:** job training and placement
- **Special education and transition services (IDEA):** through age 21 or 22, depending on state
- **Aging network:** Area Agencies on Aging, Aging and Disability Resource Centers
- **Mental and behavioral health systems**
- **Brain injury programs and waivers**
- **Adult Protective Services**, a safety net and also a resource
- **Disability advocacy organizations** (The Arc, Centers for Independent Living, Protection and Advocacy agency)
- **Faith communities, civic groups, and volunteer programs**
- **Peer support and family networks**
- **Technology:** medication reminders, GPS, remote monitoring, communication tools

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Community and Everyday Supports Fill Specific Gaps

Need	Possible support to explore
Remembering tasks	Visual schedule, reminders, scheduled prompts
Managing bills	Accessible bill review, payment reminders, automatic payments
Getting to appointments	Transportation coordination, travel training, accompaniment
Preparing meals	Meal delivery, cooking instruction, adaptive equipment
Maintaining relationships	Peer support, chosen activities, transportation
Supporting a caregiver	Respite, training, emergency backup



Person-Centered Planning Principles

- The **person is at the center and directs the process** as much as possible
- **Focus on strengths, preferences, goals**, and what is important to and for the person
- Plans reflect **the person's own voice and desired life**
- **Supports are flexible and revisited over time**
- **Dignity of risk:** people have the right to make choices, including risky ones, with appropriate support

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Tools YOU Can Use: Make YOUR State List

- Use the seven life domains at intake and review
- Ask questions to uncover unmet needs
- Request existing assessments before commissioning new ones
- Identify the right service door (disability, aging, brain injury, mental health)
- Get on waitlists early, and appeal denials on time
- Build interdisciplinary input into legal decisions
- Align legal tools with person-centered goals
- Social Security Administration (SSI/SSDI information)
- State Medicaid and IDD / developmental disabilities agency
- Aging and Disability Resource Center / Area Agency on Aging
- The Arc [YOUR state chapter], Center for Independent Living, Protection and Advocacy agency
- Charting the LifeCourse Nexus (UMKC)
- ABA Commission on Law and Aging
- National Resource Center for Supported Decision-Making
- Brain injury association [YOUR state chapter]

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Tools YOU Can Use: Local Resource Contact Worksheet

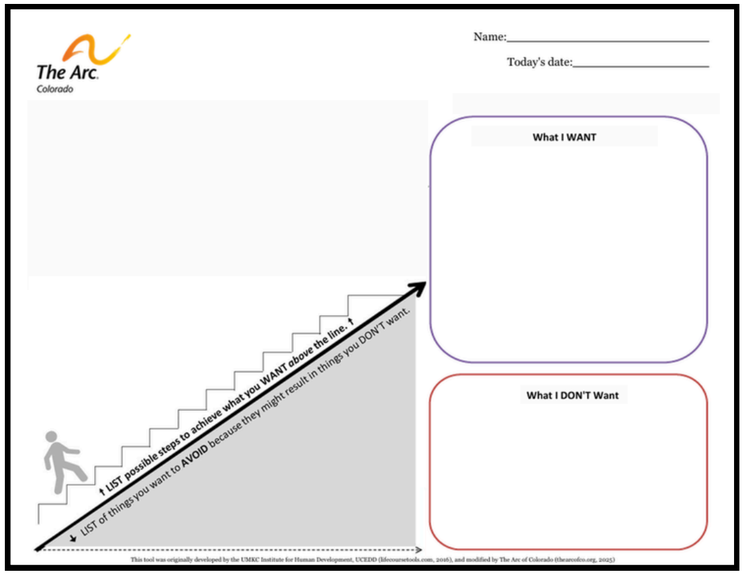
Resource	Local agency and intake contact
Medicaid long-term services and supports	[Agency, intake number, website]
Developmental disability services	[Agency, intake number, website]
Aging and caregiver navigation	[AAA or ADRC, number, website]
Brain injury and rehabilitation resources	[Program, number, website]
Vocational rehabilitation	[Agency, number, website]
Independent living and advocacy	[CIL, Arc chapter, number, website]
Protection and Advocacy or benefits legal assistance	[Organization, intake number, website]

Supported Decision-Making (SDM) is at the heart of ensuring

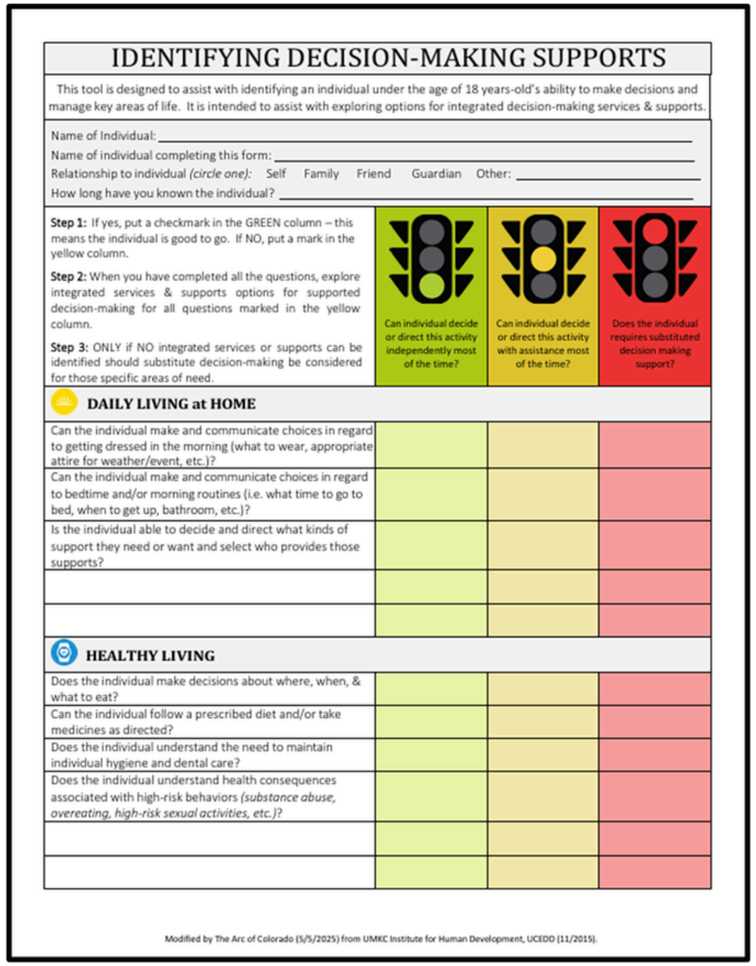
"liberty and justice for all"

"the pursuit of happiness"

and honoring an individual's civil and human rights.







IDENTIFYING DECISION-MAKING SUPPORTS

This tool is designed to assist with identifying an individual under the age of 18 years-old's ability to make decisions and manage key areas of life. It is intended to assist with exploring options for integrated decision-making services & supports.

Name of Individual: _____

Name of individual completing this form: _____

Relationship to individual *(circle one)*: Self Family Friend Guardian Other: _____

How long have you known the individual? _____

Step 1: If yes, put a checkmark in the GREEN column – this means the individual is good to go. If NO, put a mark in the yellow column.

Step 2: When you have completed all the questions, explore integrated services & supports options for supported decision-making for all questions marked in the yellow column.

Step 3: ONLY if NO integrated services or supports can be identified should substitute decision-making be considered for those specific areas of need.

	Can individual decide or direct this activity independently most of the time?	Can individual decide or direct this activity with assistance most of the time?	Does the individual requires substituted decision making support?
DAILY LIVING at HOME			
Can the individual make and communicate choices in regard to getting dressed in the morning (what to wear, appropriate attire for weather/event, etc.)?			
Can the individual make and communicate choices in regard to bedtime and/or morning routines (i.e. what time to go to bed, when to get up, bathroom, etc.)?			
Is the individual able to decide and direct what kinds of support they need or want and select who provides those supports?			
HEALTHY LIVING			
Does the individual make decisions about where, when, & what to eat?			
Can the individual follow a prescribed diet and/or take medicines as directed?			
Does the individual understand the need to maintain individual hygiene and dental care?			
Does the individual understand health consequences associated with high-risk behaviors *(substance abuse, overeating, high-risk sexual activities, etc.)*?			

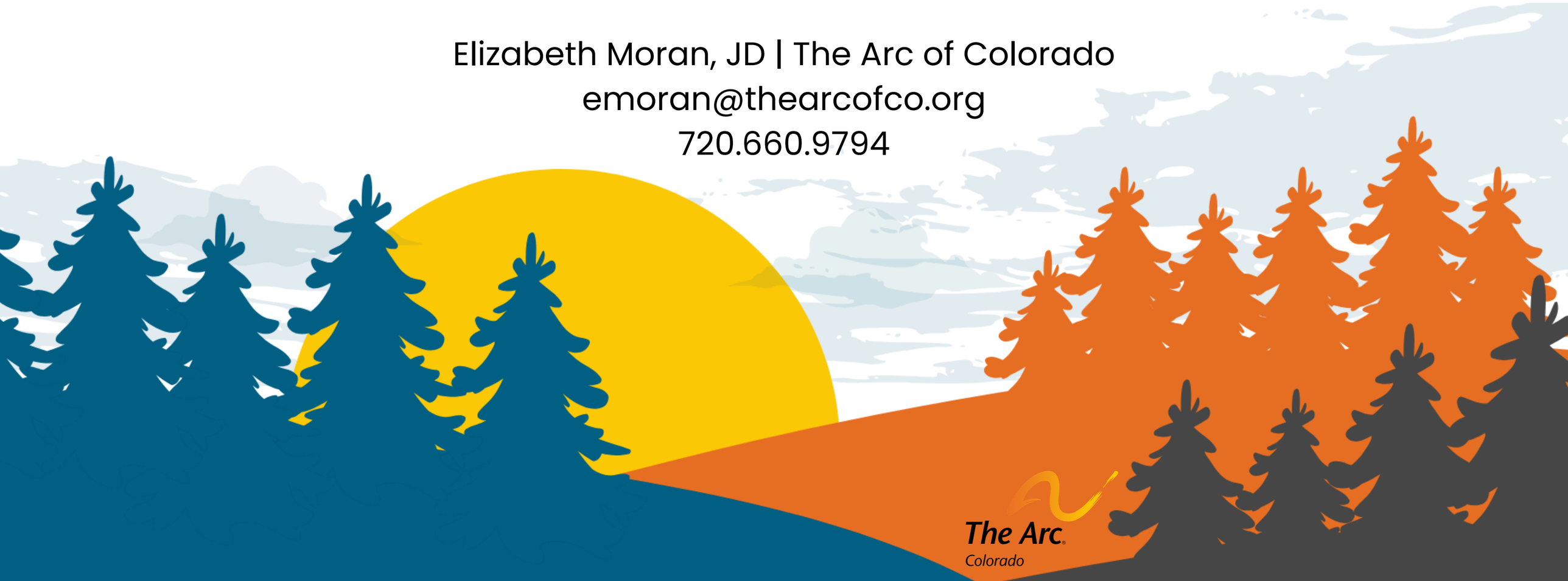
Modified by The Arc of Colorado (5/5/2025) from UMKC Institute for Human Development, UCEDD (11/2015).

The Arc Colorado

Thank You!

Questions?

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STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

Thursday
October 22, 2026

Attorneys and Trustees Navigating the Changing Landscape of Trust Administration

STETSON LAW

Center for Elder Justice

Access and Justice For All®

Attorneys and Trustees Working Together:

The Changing Landscape and

Layers of Administration

Kerry Tedford Coles

Roxanne J. Chang

Introduction

Attorneys and Trustees of special needs and supplemental needs trusts sit at the intersection of trust law, public benefits administration, and the day-to-day realities of their clients' lives. Close collaboration between attorneys and Trustees are required to address the ever-shifting landscape of eligibility rules and administrative requirements for public benefit programs, availability of public supports and services, and managing Trustee risk, while simultaneously addressing the needs and improving the lives of individuals with disabilities.

Learning Objectives

This discussion is designed to identify the roles attorneys and Trustees each play in supporting individuals with disabilities who rely on government benefit programs, and to understand how changing eligibility requirements for SSI, Medicaid, HUD housing, and related programs may affect the trusts attorneys draft and administer. Attorneys and Trustees will also come away better equipped to evaluate the potential impact of H.R. 1/OBBBA on disability supports, services, and home and community-based care; to apply practical strategies for drafting and administering trusts in a shifting benefits environment; and to recognize ways to help Trustees minimize their liability while preserving beneficiary quality of life and access to and supplementing essential services.

1. Setting the Stage: The Changing Benefits Landscape

Special needs attorneys and Trustees of special needs trusts and pooled trust administrators are likely already seeing the current and emerging administrative pressures affecting government benefits eligibility, redeterminations, documentation, and service access for individuals with disabilities. Individuals with disabilities are seeing an increase in the sheer volume of paperwork required to maintain benefits, as well as shorter windows in which to respond to state and federal requests for information. The burden to navigate the complex government benefit programs falls disproportionately on individuals and their families, many who already face challenges in meeting their most basic needs. This means Trustees are increasingly required to assist individuals with disabilities beyond the scope of standard trust administration responsibilities, and having to rely more on the advice and counsel of attorneys to help them navigate an already complex system.

Of looming significance and impact on government benefits eligibility and the availability of supports and services for individuals with disabilities relate to the implementation of H.R. 1/One Big Beautiful Bill Act (OBBBA) and its anticipated effects on Medicaid, disability services, and home and community-based supports. This includes the increased administration burdens on state agencies that determine eligibility for Medicaid and related programs due to the new work requirements for Medicaid and food assistance recipients, and the shortened redetermination requirements.

New federal work and community engagement requirements take effect by the end of 2026 (with some states already moving forward with implementation of the requirements under H.R. 1), and they bring an added documentation and administrative burden in

proving disability-based exemptions. Even where an individual with disabilities clearly qualifies for an exemption, the process of demonstrating that qualification—often on a recurring basis—is or will be a barrier to obtaining and maintaining coverage they are entitled to without having to meet the work requirements.

For individuals with disabilities who are only able to access Medicaid services and supports by obtaining eligibility through the Medicaid expansion program offered in their state, attorneys will also need to advise Trustees on the shift to six-month redetermination cycles for the Medicaid expansion populations. This requirement under H.R.1 will increase the frequency of eligibility reviews Trustees may need to respond to.

Further, attorneys may also need to provide further advocacy and counsel to individuals with disabilities and their families to navigate the increasing administrative burdens and the resulting errors and incorrect determinations of ineligibility or imposition of work requirements when the individual with disabilities should be exempt. This will impact the Trustee's exercise of discretion for trust distributions for attorney fees and require the Trustees to budget time and trust resources to assist beneficiaries and their support networks accordingly.

Attorneys and Trustees will also need to monitor the implementation of the 1915(c)(11) waiver under Section 71121 of H.R.1, which permits individuals to access Home and Community Based Services (HCBS) services even if they do not meet the traditional institutional level of care requirements for other 1915(c) waivers[1]. Disability advocates

[1]One Big Beautiful Bill Act, Pub. L. No. 119-21, § 71121 (2025) (adding new standalone HCBS waiver authority under section 1915(c) of the Social Security Act); see also 6 Strategies for the Next Phase of HCBS Transformation: Honoring the ADA in Today's Fiscal and Operational Realities, Sellers Dorsey (2026),

express concern regarding whether states will broadly adopt this optional waiver. Many states face heavy administrative burdens with the implementation of H.R.1 and tightening Medicaid budgets, which could hinder full execution (particularly in light of its strict requirements) despite the long-term cost-efficiency of institutional diversion.

2. Trust Administration in a New Environment

Attorneys and Trustees must therefore be mindful of the impact on support and services for persons with disabilities due to the sunset of enhanced federal Medicaid matching funds for expansion states. Reduced matching dollars will translate into tighter state budgets, longer Home and Community Based Services (HCBS) waitlists, cuts in HCBS funding and affiliated supports and services, resulting in greater pressure on Trustees to fill gaps in care through trust distributions. The landscape of trust distributions will change considerably, shifting from trust distributions to enhance the quality of life for individuals with disabilities, to distributions required to maintain their most basic needs to be able to remain in their home and/or in the community.

Attorneys have likely counseled Trustees using a fairly traditional approach to supplemental needs distributions, but attorneys should be prepared to help Trustees reconsider that approach as service delivery shifts toward keeping beneficiaries in home and community-based settings. Historically, many Trustees have taken a conservative view, limiting distributions to discretionary extras that supplement, but never supplant, available public benefits. As the availability and reliability of public benefits becomes less

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https://www.sellersdorsey.com/insights/blog/6-strategies-for-the-next-phase-of-hcbs-transformation-honoring-the-ada-in-todays-fiscal-and-operational-realities/.

certain, Trustees will increasingly ask attorneys what "supplemental" really means for a given beneficiary.

Attorneys will need to help Trustees balance quality-of-life enhancements with the preservation of eligibility for public benefits, recognizing that these two goals can sometimes pull in different directions. A distribution that meaningfully improves a beneficiary's independence or well-being may, if handled incorrectly, jeopardize the very benefits that make community living possible in the first place. Attorneys should advise Trustees to document their decisions carefully in light of changing service availability and administrative requirements—a well-documented rationale for a distribution can be the difference between a defensible exercise of discretion and a costly dispute with a beneficiary, a family member, or a state agency.

3. Defining the Attorney–Trustee Partnership

Attorneys will want to be clear, with every Trustee, about respective roles and responsibilities, and about how they will communicate to support coordinated decision-making. Attorneys should recognize when a question calls for legal guidance, benefits expertise, or fiduciary judgment—and when it calls for all three. A single distribution request might raise a legal question about trust interpretation, a practical question about benefits eligibility, and a values-based question about what the beneficiary actually needs. Establishing a clear process with the Trustee for routing these questions to the right resource, at the right time, will prevent delay and reduce the risk of an uninformed decision.

Attorneys should think carefully about the classic “who is the client” and accompanying conflict-of-interest conundrum whenever advice touches both Trustee and beneficiary interests. At the outset of any engagement, attorneys need to be very clear who they represent and what they will do if the Trustee's and beneficiary's interests diverge. When representing the beneficiary, the attorney must also be mindful the dynamics involved when also interacting with others in the beneficiary’s support circle (e.g., other family members).

Attorneys and their Trustee clients (along with attorneys drafting special needs trusts as part of an estate plan) should also clarify funding expectations early and often to ensure there are sufficient assets to meet the needs of the individuals along with the expectations of their families and other supports. For example, ensuring there are sufficient cash assets to maintain real estate and mortgages; setting realistic expectations regarding living in the home (particularly in light of impact of legislation like H.R.1 on HCBS services and staffing); and helping to identify “how much” is truly needed with respect to trust funding. These conversations are often uncomfortable, particularly when a family has an emotional attachment to a home or a living arrangement that the Trustee cannot realistically sustain. Attorneys and Trustees who raise funding questions early, and revisit them periodically as circumstances change, will be far better positioned to avoid a funding crisis later in the future.

4. Drafting Trust Agreements

Attorneys should keep flexibility and clarity in mind as drafting touchstones. How trust agreements are drafted can have a significant impact on whether the Trust can truly fulfill the intended purpose of the Settlor to provide for the needs of the individual, as well as

the Trustee's ability to fulfill their fiduciary duties and obligations in accordance with the terms of the trust agreement. Further, attorneys need to be effective in advising Trustees on challenges that frequently arise with administration of special needs trusts.

Attorneys should anticipate evolving benefit rules and service delivery models, and build maximum flexibility into distribution standards and Trustee authority. Trust documents drafted even a few years ago may not anticipate the pace of change now underway in Medicaid, HCBS, and related programs, and rigid language that made sense under a prior regulatory framework can become a Trustee liability under a new framework. At the same time, attorneys need to be sure that Trust Agreements are drafted to avoid anticipated issues or address current implementation of regulations related to government benefit programs.

Trust agreements should also be explicit in addressing documentation and reporting requirements, providing opportunities for advocacy by the Trustee, and ensuring coordination between the Trustee and the individual's care providers. The goal is to reduce ambiguity and conflict during administration, such as clear standards for what counts as a permissible distribution and clear procedures for resolving disagreements between co-trustees or between a Trustee and a beneficiary's care team.

Attorneys should also consider including provisions that are geared towards helping non-professional Trustees to understand various options to facilitate trust administration. For example, language can be included to permit funding of ABLE accounts with trust assets to facilitate ease of access to trust distributions for goods and services. For many beneficiaries, an ABLE account can serve as a useful complement to a special needs trust, offering more flexible day-to-day spending. The utilization of these tools, however,

will require further careful planning and implementation to avoid inadvertently affecting benefit eligibility while also ensuring the Trustee fulfills its fiduciary duties (e.g., determination of “early termination” in the transfer of balance of d4A Trust assets to an ABLE account).

In addition, provisions can be included to ensure the Trustee is able to act in the best interest of the beneficiary. Drafters should instead give the Trustee flexibility to change trust situs and governing law, amend the terms of the trust agreement to comply with changing government benefit eligibility rules and regulations, and distribute assets from a d4A trust to a pooled trust as circumstances require. Drafters should also include provision to anticipate or address any known issues with governmental agencies at the time of drafting. For example, there is lack of clarity by SSA regarding the treatment of decanting of a d4A/first-party Trust as early termination of the Trust under POMS SI 01120.199. Some SSA offices are rumored to take the position that the Trust Agreement must provide the Trustee to decant the Trust to avoid the determination that the distribution to the second trust is considered “early termination” of the first trust.

Additionally, attorneys should provide a streamlined successor trustee mechanism so administration can continue without interruption if a Trustee resigns or becomes unable to serve, such as the ability for a trust protector or trust director to appoint a successor trustee, or to permit the last-acting Trustee or another third party to appoint a successor Trustee. A trust without a workable and efficient succession plan can leave a beneficiary without needed distributions for months, particularly if the only remaining option is to seek court appointment of a successor Trustee.

Attorneys also need to avoid provisions that require Trustees to take action not permissible by law, or are not realistic. For example, Trustees cannot pursue government benefits. Attorneys should talk with Trustees about setting realistic expectations and parameters for the Trustee. For example, whether to require drug testing or leave the determination of when a beneficiary is "stable" to trustee discretion, along with the value of a comprehensive Letters of Intent and the choice between requiring Trustees to obtain annual evaluations versus simply recommending it. Any requirements to personally visit the individual with disabilities should be in reasonable intervals. Attorneys should walk clients and potential Trustees through the practical consequences of each approach, including the burdens of trust administration, rather than defaulting to boilerplate language.

5. Advising Trustees and Advocating for Beneficiaries

Attorneys should calibrate their advice to the type of Trustee they represent. A family member serving as Trustee for the first time will typically need more guidance than a corporate trustee with an established administrative infrastructure, since the standard of care, available resources, and beneficiary expectations often differ substantially between the two.

Much of an attorney's day-to-day work will involve determining what qualifies as a "supplemental" need and helping Trustees characterize distributions and provide an appropriate level of care when the mental health system falls short, especially given reductions in HCBS services. Attorneys will also help Trustees provide for a beneficiary's needs practically, particularly when there is no family or other support system, including the use tools such as prepaid gift or True Link cards, and will assist in developing trust

budgets and supplementing income as part of fulfilling the Trustee's broader responsibilities while also offering a sense of independence to the beneficiary.

Attorneys should help Trustees ensure that distributions are for the “sole benefit of” the individual in the administration of a d4A/self-settled/first-party special needs trust as defined by governmental agencies. For example, Social Security Administration’s Program Operations Manual SI 01120.201F.3.a., which reflects that a distribution is considered for the “sole benefit of” the trust beneficiary so long as it provides a **primary** benefit to the trust beneficiary, and acknowledging that any collateral benefit for others will not violate the “sole benefit of” rule. Guidance by attorneys may be further be required to ensure that the beneficiary is not being taken advantage by others by benefiting from trust distributions. Trustees should be encouraged to take a psychosocial approach to defining “needs” and “quality of life,” which can be a markedly different role when working with individuals with disabilities.

Attorneys may find themselves clarifying trust language directly with a beneficiary, since hearing an explanation of sole and absolute discretion from an attorney often carries more validity than hearing it from the Trustee alone. Attorneys should be prepared to help prove that a Trustee is acting in the beneficiary's best interest and to defend the Trustee when necessary. Counsel for Trustees may also be called upon to draft documents such as resignations and releases, and to negotiate with the Attorney General's office or the Social Security Administration when updating documents.

Another area attorneys must be well-versed in relates to the Medicaid payback and estate recovery mechanics when funding or terminating a first-party (d4A) or pooled special needs trust. Trustees frequently ask attorneys to walk them through how and why the

state may be entitled to reimbursement from remaining trust assets, along with the specific process to ensure Trustees properly satisfy these federal requirements.

6. Minimizing Trustee Liability

Attorneys will regularly be called on to advise Trustees about their fiduciary duties in the context of public benefits and disability supports, and about when to bring in other legal counsel or benefits professionals. A Trustee's fiduciary duty does not exist in a vacuum; it must be exercised against the backdrop of a beneficiary's specific benefit programs, medical needs, and support system, so a technically correct distribution can still be a poor exercise of discretion if it fails to account for its effect on eligibility. Attorneys should counsel Trustees to maintain clear records of decisions, advice received, and beneficiary needs, and to manage risk carefully when program rules or service availability are uncertain and advise whether and when the appointment of a trust protector or director as permitted under the terms of the trust agreement can be beneficial to the Trustee.

Attorneys should be prepared to help prove that a Trustee is acting in the beneficiary's best interest while fulfilling the Trustee’s responsibilities (e.g., prudent investor rules), and to defend the Trustee when necessary. Attorneys should be effective in issue-spotting and know when a matter needs a referral or consultation with litigation or ethics counsel. Attorneys should also be attentive to their own malpractice and errors-and-omissions coverage, and to that of any professional Trustees they work with, as scrutiny of professional liability in this area continues to increase.

7. Resolving Trustee–Beneficiary Conflicts

Attorneys will encounter common sources of conflict between Trustees and beneficiaries, including distribution requests, benefit concerns, autonomy, and expectations, and can add real value by encouraging proactive communication to reduce misunderstandings before they escalate. Many conflicts do not arise from a single bad decision but from an accumulation of small misunderstandings about what the trust can and cannot provide for, and about how distribution decisions are made. Attorneys should help Trustees apply trust terms, fiduciary standards, and person-centered planning principles, and consider court guidance, mediation or other conflict resolution pathways when necessary. Litigation is rarely the best outcome for either party in an ongoing Trustee-beneficiary relationship.

When attorneys represent trust beneficiaries or family members instead of the Trustee, they face a related set of challenges: resolving disputes between Trustees and beneficiaries and others in the circle of support, ensuring realistic expectations of what a Trustee can and cannot do, pressing for timely responses from Trustees, and addressing concerns with accountings and Trustee fees. Many of these concerns can be resolved through clearer communication and better-documented processes, without formal legal action.

8. Advocacy for Individuals with Disabilities—Working Together

Attorneys play a central role in identifying a beneficiary's current and future support needs and in coordinating with families, care managers, service providers, agencies, and advocates. Effective advocacy requires an ongoing relationship among everyone

involved in a beneficiary's life, so that changes in circumstances—a new diagnosis, a change in housing, a reduction in available services—are communicated quickly and acted upon before they become a crisis.

Attorneys should help Trustees use trust resources strategically to preserve independence, housing stability, health care access, and community participation, and be ready to advise on how to respond to reductions, delays, or denials in public benefits and services, including when it makes sense for the attorney or the Trustee to advocate directly with an agency on a beneficiary's behalf

Key Takeaways

Maintaining an amicable relationship with Trustees is essential to effective representation. Attorneys and Trustees must work collaboratively to respond to evolving eligibility requirements and service systems, and attorneys should expect trust administration to require increasing attention to preserving access to housing, health care, and home and community-based supports.

Flexible drafting, careful documentation, and informed decision-making will help attorneys reduce Trustees' liability, while advocacy and conflict resolution remain essential parts of trust administration for individuals with disabilities. As the benefits landscape continues to shift, attorneys will serve Trustees best by investing in clear communication, realistic expectations, and well-documented decision-making, regardless of what changes come next.

Attorneys and Trustees Working Together

The Changing Landscape and Layers of Administration

Kerry Tedford Coles | Roxanne J. Chang

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INTRODUCTION

Where Attorneys and Trustees Meet

Trust law

Public benefits administration

Clients' day-to-day lives

Close collaboration is required to address shifting eligibility rules, administrative requirements, the availability of public supports, and Trustee risk—while improving the lives of individuals with disabilities.

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LEARNING OBJECTIVES

What Attorneys and Trustees Will Take Away

1. Identify the roles attorneys and Trustees each play in supporting individuals who rely on benefit programs
2. Understand how changing SSI, Medicaid, and HUD rules affect the trusts attorneys draft and administer
3. Evaluate the impact of H.R. 1/OBBBA on disability supports and home and community-based care
4. Apply practical drafting and administration strategies for a shifting benefits environment
5. Help Trustees minimize liability while preserving the trust beneficiary's quality of life and access to essential services

3

1 · SETTING THE STAGE

Administrative Pressure Is Mounting

- **More paperwork**
  Greater volume of documentation needed to maintain benefits
- **Shorter response windows**
  Less time to answer state and federal requests for information
- **Burden falls on families**
  Many already struggle to meet the individual with disabilities' most basic needs
- **Trustees stretched beyond standard administration**
  Greater reliance on the advice and counsel of attorneys

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1 · SETTING THE STAGE

H.R. 1/OBBBA: What Is Changing

Work and community engagement requirements

Take effect by end of 2026; some states already implementing

Six-month redeterminations

For Medicaid expansion populations—more frequent eligibility reviews

Heavier state agency burden

Eligibility agencies absorb new work requirements and shorter cycles

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1 · SETTING THE STAGE

Exempt Is Not the Same as Easy

Proving the exemption

- Disability-based exemptions must be documented—often on a recurring basis
- The process itself can become a barrier to coverage the individual is entitled to

Expanded advocacy role

- Errors and wrongful ineligibility or work-requirement determinations will increase
- Affects Trustee discretion over distributions for attorney fees
- Trustees must budget time and trust resources to assist

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1 · SETTING THE STAGE

Watch: The New 1915(c)(11) HCBS Waiver

§ 71121

Permits access to HCBS without meeting the traditional institutional level-of-care requirement

Advocates are concerned about adoption

- The waiver is optional for states
- States face heavy H.R. 1 implementation burdens and tightening Medicaid budgets
- Strict requirements could hinder full execution—despite the long-term savings of institutional diversion

Source: OBBBA, Pub. L. No. 119-21, § 71121 (2025); Sellers Dorsey (2026)

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2 · TRUST ADMINISTRATION IN A NEW ENVIRONMENT

How Funding Cuts Reach the Trust

Enhanced federal Medicaid match sunsets → **Tighter state budgets** → **Longer HCBS waitlists and service cuts** → **Pressure on trust distributions to fill gaps**

The shift in distributions

From: enhancing quality of life → **To: meeting basic needs so the beneficiary can stay home and in the community**

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2 · TRUST ADMINISTRATION IN A NEW ENVIRONMENT

Rethinking What "Supplemental" Means

Traditional approach

- Conservative view of discretion
- Discretionary "extras" only
- Supplement—never supplant—public benefits

Emerging reality

- Public benefits are less available and less reliable
- Service delivery is shifting toward home and community-based settings
- Trustees will ask what "supplemental" really means for this beneficiary

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2 · TRUST ADMINISTRATION IN A NEW ENVIRONMENT

Balance the Goals, Document the Decision

Two goals can pull in different directions
A distribution that improves independence or well-being may, if mishandled, jeopardize the benefits that make community living possible.

A well-documented rationale can be the difference between a defensible exercise of discretion and a costly dispute with a beneficiary, family member, or state agency.

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3 · DEFINING THE ATTORNEY–TRUSTEE PARTNERSHIP

Counsel on Three Kinds of Questions

Legal
How should the trust be interpreted?

Benefits
How will trust terms and distributions affect eligibility?

Exercise of Trustee Discretion
What does the beneficiary actually need?

Clarify the scope and expectations of representation - Getting each question to the right resource at the right time prevents delay and uninformed decisions for the Trustee.

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3 · DEFINING THE ATTORNEY–TRUSTEE PARTNERSHIP

Who Is the Client?

Trustee OR **Beneficiary**

The classic conflict-of-interest conundrum

- Arises whenever advice touches both Trustee and beneficiary interests
- At the outset of every engagement, be clear about whom the attorney represents
- Decide in advance what happens if their interests diverge
- Dealing with others in the beneficiary's support circle (e.g., family members)

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3 · DEFINING THE ATTORNEY–TRUSTEE PARTNERSHIP

Clarify Funding Expectations Early and Often.

For example:

- **Carrying real estate**
  Are there sufficient cash assets to maintain the home and mortgage?
- **Living arrangements**
  Set realistic expectations, given H.R. 1's impact on HCBS services and staffing
- **"How much" is truly needed**
  Right-size trust funding—including in estate plans

Hard conversations now—revisited as circumstances change—prevent a funding crisis later.

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4 · DRAFTING TRUST AGREEMENTS

Touchstones: Flexibility and Clarity

Flexibility

- Anticipate evolving benefit rules and service models
- Build maximum flexibility into distribution standards and Trustee authority
- Rigid language from a prior framework can become a Trustee liability

Clarity

- Documentation and reporting requirements
- Room for Trustee advocacy and coordination with care providers
- Clear standards for permissible distributions and for resolving disputes

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4 · DRAFTING TRUST AGREEMENTS

Consider Provisions Worth Including

- **Fund ABLE accounts** with trust assets
- **Ability to Decant** to avoid determination of early termination for d4A Trusts
- **Change situs** and governing law
- **Amend terms** to track changing benefit rules
- **Move d4A assets** to a pooled trust as needed
- **Streamline succession** via trust protector/director, or last Trustee

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4 · DRAFTING TRUST AGREEMENTS

Avoid Problematic Provisions

Not permissible or not realistic

Example: Trustees cannot pursue government benefits.

Talk through the practical choices

- Drug testing vs. Trustee discretion on when a beneficiary is "stable"
- Value of a comprehensive Letter of Intent
- Annual evaluations: required or recommended?
- Personal visits at reasonable intervals
- The real burdens of administration—not boilerplate

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5 · ADVISING TRUSTEES AND ADVOCATING FOR BENEFICIARIES

Calibrate Advice to the Trustee

First-time family Trustee

- Typically needs more guidance
- Fewer administrative resources
- Standard of care and expectations differ

Corporate Trustee

- Established infrastructure
- Different standard of care
- Different beneficiary expectations

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5 · ADVISING TRUSTEES AND ADVOCATING FOR BENEFICIARIES

The Day-to-Day Work

Defining "supplemental" needs
Characterizing distributions as “supplemental” while HCBS and mental health services fall short

Practical tools
Prepaid gift and True Link cards—especially when there is no family support

Budgets and income
Developing trust budgets and supplementing income

Independence
Offering the beneficiary a genuine sense of autonomy

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5 · ADVISING TRUSTEES AND ADVOCATING FOR BENEFICIARIES

The "Sole Benefit Of" Rule for d4A & Pooled Trusts

Primary Benefit

to the beneficiary satisfies the SBO rule; collateral benefit to others does not violate it

SSA POMS SI 01120.201F.3.a

Attorneys help Trustees

- Apply agency definitions to first-party/self-settled/d4A and pooled trusts
- Guard against others taking advantage of trust distributions
- Take a psychosocial approach to defining "needs" and "quality of life"

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5 · ADVISING TRUSTEES AND ADVOCATING FOR BENEFICIARIES

Explaining, Defending, and Paying Back

Explain

Clarify "sole and absolute discretion" directly with the beneficiary—it carries weight from the attorney

Defend

Show the Trustee acts in the beneficiary's best interest; draft resignations and releases; negotiate with the AG or SSA

Payback

Walk Trustees through Medicaid payback and estate recovery when funding or terminating d4A and pooled trusts

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6 · MINIMIZING TRUSTEE LIABILITY

Fiduciary Duty Doesn't Exist in a Vacuum

A technically correct distribution can still be a poor exercise of discretion if it ignores the effect on eligibility.

Keep clear records
Decisions, advice received, and beneficiary needs

Manage uncertainty
Take care when program rules or services are in flux

Consider a protector
Appoint a trust protector or director where the trust permits

Bring in help
Know when to involve other counsel or other professionals

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6 · MINIMIZING TRUSTEE LIABILITY

Defending Trustees—and Protecting Everyone

Prove best interest
Show the Trustee meets prudent investor responsibilities or is acting in the best interest of the beneficiary; defend when necessary

Spot issues early
Know when to refer to or consult litigation or ethics counsel

Check coverage
Review malpractice and E&O coverage—the attorney's and professional Trustees'—as scrutiny increases

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7 · RESOLVING TRUSTEE–BENEFICIARY CONFLICTS

Where Conflict Comes From—and Where It Goes

Common sources

Distribution requests | **Benefit concerns** | **Autonomy** | **Expectations**

Resolution pathway

Proactive communication → **Trust terms, fiduciary standards, person-centered planning** → **Mediation, court guidance, other pathways**

Litigation is rarely the best outcome in an ongoing relationship.

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7 · RESOLVING TRUSTEE–BENEFICIARY CONFLICTS

When the Client Is the Beneficiary

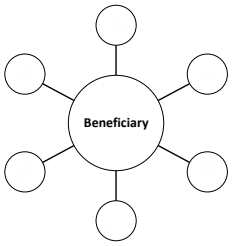
- **Disputes across the circle of support**
- **Realistic expectations of what a Trustee can do**
- **Timely responses from Trustees**
- **Accountings and Trustee fees**

Many concerns resolve through clearer communication and better-documented processes—without formal legal action.

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8 · ADVOCACY—WORKING TOGETHER

An Ongoing Circle of Support



Around the beneficiary

Families, care managers, service providers, agencies, advocates, and the attorney and Trustee

Why it matters

Changes—a new diagnosis, a housing change, a service reduction—must be communicated quickly and acted on before they become a crisis.

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8 · ADVOCACY—WORKING TOGETHER

Using Trust Resources Strategically

Independence	Housing stability	Health care access	Community participation

When benefits are reduced, delayed, or denied

Advise on the response—including when the attorney or Trustee should advocate directly with the agency.

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Key Takeaways

- An amicable attorney–Trustee relationship is essential to effective representation
- Expect administration to demand more attention to housing, health care, and HCBS access
- Flexible drafting, careful documentation, and informed decisions reduce Trustee liability
- Advocacy and conflict resolution are core parts of trust administration
- Clear communication and realistic expectations serve Trustees—whatever changes come next

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Questions?

Kerry Tedford Coles | Roxanne J. Chang

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First-Party Special Needs Trusts

Drafting When Federal Compliance Is Not Enough: State-Level D4A Anomalies, Administrative Friction, and Practical Drafting Implications

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Overview

A first-party special needs trust under 42 U.S.C. § 1396p(d)(4)(A) is often taught as though the drafting exercise begins and ends with the federal statute: disabled beneficiary, under age sixty-five, trust established by the proper person, sole-benefit administration, and Medicaid payback. That federal baseline remains indispensable, but it is not the whole story. In a meaningful group of jurisdictions, a trust that appears facially compliant under federal law may still encounter delay, rejection, additional reporting obligations, funding obstacles, lien-clearance issues, property restrictions, or termination complications because the governing state has added its own statutory, regulatory, manual-based, or operational overlay.

That gap between federal sufficiency and state implementation matters most when the practitioner, court, or fiduciary is handling a settlement-funded trust, moving a beneficiary across state lines, or administering trusts nationally through a corporate platform. A local lawyer may know intuitively how one state behaves. A trust company officer with a 51-jurisdiction book of business cannot safely rely on intuition or on one state's habits. The relevant question is not merely whether the trust is federally compliant in the abstract, but where it will be reviewed, funded, administered, distributed from, and eventually terminated.

This paper therefore takes a deliberately blended approach. It begins with the core drafting and administration principles that still govern first-party trusts as a matter of federal law and sound practice. It then turns to the more interesting and, for many fiduciaries, more consequential subject: the jurisdictions in which compliance with the federal statute alone may be insufficient as an operational matter. The result is intended

to be useful both to lawyers drafting these instruments and to trustees and trust officers who must administer them in real files rather than in the clean hypotheticals of federal statutory text.

What a First-Party Trust Is

At its most basic, a first-party trust is a trust funded with assets that belonged to, were vested in, or became legally payable to the beneficiary whose needs the trust is designed to serve. Traditional trust law would describe the arrangement as self-settled. In the special-needs setting, that source-of-funds inquiry is often the first and most important threshold question. If the assets were the beneficiary's by right, whether because of a personal-injury recovery, an inheritance payable outright, a beneficiary designation, accumulated back benefits, or some other vested entitlement, the practitioner is in first-party trust territory rather than third-party planning.

Congress authorized self-settled special needs trusts in 1993 through the Omnibus Budget Reconciliation Act of 1993, signed into law on August 10, 1993.[1] The point was not to create a general asset-protection device for a beneficiary's own funds. The point was narrower and more humane: to permit a disabled individual to preserve eligibility for means-tested public benefits, principally Medicaid and SSI, while still using his or her own property in a structured way for supplemental benefit. If the same funds are paid directly to the disabled individual and held outright, those assets generally become countable resources. If they are transferred into a properly established and

[1]Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13611, 107 Stat. 312, 622–27 (1993) (approved Aug. 10, 1993), https://www.govinfo.gov/content/pkg/STATUTE-107/pdf/STATUTE-107-Pg312.pdf, codified in relevant part at 42 U.S.C. § 1396p(d)(4)(A), https://www.law.cornell.edu/uscode/text/42/1396p.

administered first-party special needs trust, they may be disregarded for eligibility purposes, subject always to the governing federal and state rules. See 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203.

For SSI purposes, distribution mechanics remain critical. Payments made directly to third-party vendors for goods and services may avoid treatment as income to the beneficiary, while payments for shelter implicate the in-kind support and maintenance (ISM) rules and may reduce, though not necessarily eliminate, SSI. Effective September 30, 2024, the Social Security Administration no longer counts food in ISM calculations, so trust payments for food no longer reduce SSI as they once did.[2] Medicaid treatment is different; the central concern is usually whether the trust corpus remains a countable resource and whether trust administration is consistent with the governing exception. For practitioners and trustees alike, that distinction between benefit systems should be kept conceptually separate from the drafting question itself.

The Federal D4A Baseline

The classic stand-alone first-party trust is the trust described in 42 U.S.C. § 1396p(d)(4)(A), usually shortened to a "D4A" trust. The trust holds the assets of a disabled individual. The beneficiary must meet the Social Security disability standard. The trust must be established by the disabled individual if competent, or by a parent, grandparent, guardian, or court. It must be for the sole benefit of the disabled

[2]Social Security Administration, Emergency Message EM-24048, Omitting Food from In-Kind Support and Maintenance (ISM) Calculations (effective Sept. 30, 2024), https://secure.ssa.gov/apps10/reference.nsf/links/09252024015358PM; see also Social Security Administration, SSI Spotlight on Living Arrangements, https://www.ssa.gov/ssi/text-living-ussi.htm.

beneficiary, and the beneficiary must be under age sixty-five when the trust is established and funded.[3]

The trust must also contain a Medicaid payback provision. In broad terms, the state or states that furnished medical assistance are repaid at the beneficiary's death, up to the amount properly recoverable under governing law, before any remainder passes to other beneficiaries. That single sentence, however, conceals a great deal of complexity. States differ meaningfully over the exact formulation of payback, over whether and how they treat early termination, over whether they insist on all-state reimbursement language, over the order of allowable expenses at death, and over whether they impose reporting or approval conditions while the beneficiary is still alive. Those differences are part of the central thesis of this paper.

Federal law supplies the floor. It does not guarantee a frictionless path in every jurisdiction. A drafter who stops at the federal elements may produce an instrument that looks fine on first read yet performs badly in administration because a particular state has layered on requirements concerning notice, asset forms, annual accounts, court procedures, liens, death reporting, or termination mechanics.

Funding Contexts and Why They Matter

The D4A trust arises most commonly in two situations. The first is litigation, particularly personal-injury matters. A settlement or judgment may never physically pass through the beneficiary's hands, especially where structured-settlement mechanics are involved, yet it is still treated as the beneficiary's property for trust-classification

[3]42 U.S.C. § 1396p(d)(4)(A), https://www.law.cornell.edu/uscode/text/42/1396p; Soc. Sec. Admin., Program Operations Manual System (POMS) SI 01120.203, Exceptions to Counting Trusts Established on or after January 1, 2000, https://secure.ssa.gov/poms.nsf/lnx/0501120203.

purposes. The second is failed or incomplete family planning, usually where parents intended a third-party supplemental needs arrangement but allowed an inheritance, retirement asset, or beneficiary designation to pass outright to the disabled individual.

In both settings, the timing and mechanics of funding matter enormously. If a tort settlement is involved, some states require Medicaid lien resolution before the trust is funded. Others insist on agency review or notice before court approval. Still others focus on reporting after funding rather than before. A trust company that routinely accepts settlement assignments in one easy state can step into significant trouble if it assumes the same process works in New Jersey, Georgia, Maryland, or another high-friction jurisdiction.

That is one reason a purely forms-based approach to D4A work is dangerous. The same apparently federal-compliant instrument can succeed smoothly in one state and trigger review problems, funding delays, or post-death disputes in another.

Stand-Alone Trusts, Pooled Trusts, and Smaller Recoveries

In substantial settlement matters, especially those exceeding approximately six figures, the usual practice is to establish a stand-alone D4A trust tailored to the beneficiary and administered by a professional fiduciary or corporate trustee if one is available. That remains the gold-standard structure where the asset base can support the cost of competent administration and investment management.

For more modest recoveries, the pooled-trust alternative under 42 U.S.C. § 1396p(d)(4)(C) often becomes part of the conversation. A pooled trust combines assets for investment and administrative purposes while maintaining separate subaccounts for individual beneficiaries. It can be especially useful where the amount involved is too

large to spend down comfortably in a month but too small to justify the economics of a stand-alone professional trust administration. That remains true even though many clients dislike the charitable-retention feature and the loss of personal control that pooled structures may entail.

Age sixty-five remains a fault line in pooled-trust practice. The transfer-penalty treatment of post-age-sixty-five pooled-trust funding is jurisdiction-sensitive, and the law remains far from uniform. That issue is analytically distinct from the stand-alone D4A trust, but in practice the two subjects are constantly linked because pooled trusts are often the proposed solution when a disabled beneficiary is older, or when a smaller fund cannot support a separate professional administration. A practitioner handling a national file should never assume that pooled-trust treatment is interchangeable from one jurisdiction to another.

Where the recovery is very small, ordinary spend-down planning may still be the wiser route. Funeral and burial planning, vehicle acquisition, home-related expenditures, exempt-resource conversion, and other legitimate spend-down techniques may avoid the cost and complexity of trust administration altogether. But those choices are intensely timing-dependent, benefit-program-specific, and fact-sensitive. They should be treated as planning alternatives, not casual fallbacks.

ABLE Accounts: Fund Them First

No first-party analysis is complete without considering an ABLE account under I.R.C. § 529A. Effective January 1, 2026, the ABLE Age Adjustment Act raised the age by which disability must begin from twenty-six to forty-six, opening ABLE accounts to a

much larger group of first-party trust beneficiaries.[4] Contributions from all sources are limited to $20,000 for 2026. That figure is not the same as the $19,000 gift-tax annual exclusion, because the ABLE limit is now computed from a different inflation base year.[5] An employed beneficiary who does not participate in an employer retirement plan may contribute more under the ABLE-to-Work rule, which OBBBA made permanent.[6] For SSI, the first $100,000 in an ABLE account is disregarded as a resource, and distributions for qualified disability expenses are generally not income.[7] ABLE accounts are not free of payback in most states: on the beneficiary's death, the state may claim the remaining balance for medical assistance paid, after outstanding qualified disability expenses, including funeral and burial costs. Some states have chosen not to pursue ABLE payback at all, among them Pennsylvania and North Carolina.[8] In those states, the sequencing rule becomes absolute: whenever the beneficiary is ABLE-eligible, the ABLE account should be funded to the annual maximum first, every time, before a dollar

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[4]ABLE Age Adjustment Act, enacted as part of the SECURE 2.0 Act of 2022, Pub. L. No. 117-328, div. T (amending I.R.C. § 529A(e)(1)), effective for taxable years beginning after December 31, 2025. See CalABLE, Age Adjustment, https://calable.ca.gov/how-it-works/age-adjustment.

[5]Soc. Sec. Admin., POMS SI 01130.740, Achieving a Better Life Experience (ABLE) Accounts (annual contribution limit chart: $20,000 for 2026), https://secure.ssa.gov/apps10/poms.nsf/lnx/0501130740; Internal Revenue Serv., IRS Releases Tax Inflation Adjustments for Tax Year 2026 (gift-tax annual exclusion of $19,000), https://www.irs.gov/newsroom/irs-releases-tax-inflation-adjustments-for-tax-year-2026-including-amendments-from-the-one-big-beautiful-bill; U.S. Sec. & Exch. Comm'n, An Introduction to ABLE Accounts, https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-6.

[6]I.R.C. § 529A(b)(2)(B)(ii), as made permanent by Pub. L. No. 119-21 (2025). The companion Tax Law Update paper discusses the OBBBA ABLE provisions in more detail.

[7]Soc. Sec. Admin., POMS SI 01130.740, supra.

[8]I.R.C. § 529A(f). See PA ABLE, Benefits ("Account is not subject to Medical Assistance (Medicaid) repayment"), https://www.paable.gov/benefits/; PA ABLE, Resources (describing the federal claim as limited to medical assistance provided while the beneficiary had the ABLE account), https://www.paable.gov/resources/; NC ABLE, News & Media (North Carolina law prohibits Medicaid recovery from NC ABLE accounts unless required by federal law), https://ncable.nc.gov/news-media. State policies on ABLE payback vary and change; confirm the beneficiary's state and the state of the ABLE program.

goes into the D4A trust, and refilled from the trust every year thereafter. Note that because the payback claim belongs to the state that furnished Medicaid, the drafter should confirm the rule both in the beneficiary's Medicaid state and in the ABLE program being used, particularly when the beneficiary has moved or holds an out-of-state ABLE account.

That out-of-state point is not hypothetical. ABLE accounts are portable: a beneficiary may open an account in any state's program that accepts out-of-state enrollees, regardless of where the beneficiary lives. Many practitioners, the author included, have long placed clients in Ohio's STABLE Account program. STABLE was the first ABLE program in the country, launching on June 1, 2016, and it remains one of the most widely used.[9] In the author's view, its design benefited from the early involvement of Steven Dale, who advised Ohio's Medicaid leadership as the program took shape. Its scale matters for a practical reason that rarely appears in the literature. ABLE programs are expensive for states to administer relative to the assets many of them hold, and the author expects some smaller state programs to close or consolidate over time. A large, well-built program is more likely to be one of the last standing. But an out-of-state program does not carry its home state's payback rules with it. Whatever the ABLE program's own state does, the Medicaid payback claim belongs to the state or states that furnished the beneficiary's medical assistance. A New Jersey Medicaid recipient with an Ohio STABLE account remains subject to New Jersey's position on

[9]Ohio Treasurer of State, Treasurer Sprague Recognizes Tenth Anniversary of STABLE Account Program, https://tos.ohio.gov/newsroom/article/treasurer-sprague-recognizes-tenth-anniversary-of-stable-account-program/; The Arc of Ohio, STABLE presentation (STABLE administered by the Ohio Treasurer, launched June 1, 2016, as the first ABLE plan in the nation), https://www.thearcofohio.org/wp-content/uploads/2020/10/STABLE-Master-Presentation.pdf. The observations about program design, administrative cost, and likely consolidation are the author's own.

ABLE payback, not Ohio's. Where the beneficiary's state requires payback from both the D4A trust and the ABLE account, moving funds from one to the other does not defeat the state's recovery rights; the choice is about administrative flexibility, which is exactly what a scrivener should be planning for. One nuance deserves mention: the federal ABLE claim reaches medical assistance paid after the ABLE account was established, which can be narrower than a state's asserted D4A payback scope, such as New Jersey's position measuring payback from birth. That difference flows from the federal statute itself, not from any maneuver by the trustee.

In New Jersey practice, the sequencing point is practical and important. When the beneficiary's disability began before age forty-six, the preferable approach is to direct the annual maximum, $20,000 for 2026, into the beneficiary's ABLE account first and to fund the balance into the D4A trust. The ABLE account gives the beneficiary direct, flexible access for qualified disability expenses without the trust's $5,000 and forty-five-day advance-notice regime, while the D4A trust holds the larger corpus under professional administration. The planning does not stop at initial funding, and it begins with the instrument itself. Authorizing the annual ABLE transfer should be one of the original drafting objectives of the D4A trust, not something the trustee discovers later. The trust should expressly permit the trustee to contribute to an ABLE account for the beneficiary under I.R.C. § 529A, on a recurring basis and in the trustee's discretion, as a distribution for the beneficiary's sole benefit, and it should coordinate that power with any state notice requirement. A trustee who must infer the authority from general distribution language invites questions from the agency, a court, or a corporate trustee's own compliance department. In the author's practice, the D4A trustee moves the annual

maximum from the first-party trust into the beneficiary's ABLE account every January, as a distribution for the beneficiary's sole benefit. Because a $20,000 transfer exceeds New Jersey's $5,000 threshold, the trustee sends DMAHS the forty-five-day advance notice in November, identifying the intended January transfer. In the author's experience, the state has not objected. The result is a deliberate annual cycle rather than a workaround to be avoided: each year, a portion of the corpus moves from an account subject to New Jersey's advance-notice regime into an account the beneficiary can use far more flexibly, consistent with federal law and the state's own rules. For a corporate trustee compensated on assets under management, the annual transfer may look counterintuitive, because it shrinks the trust each year. For many beneficiaries in a state like New Jersey, it is nonetheless among the most beneficiary-serving moves a fiduciary can make, and the duty of loyalty runs to the beneficiary, not to the fee base. The same analysis is worth running in every state: ABLE is often the most flexible dollar the beneficiary will have, so, often, it should be filled before the trust and refilled every year.

Trustee Selection and Why It Is a Drafting Question

A surprisingly large share of D4A problems that appear to be state law issues are, in practice, trustee-selection issues. A trust that is drafted perfectly but administered by the wrong fiduciary can fail operationally just as surely as a badly drafted instrument. Families often want a sibling, parent, or other relative to serve. The impulse is understandable. The practical risks are equally real. A first-party special needs trust requires discretionary judgment, benefits literacy, accounting discipline, tax competence, investment management, documentation, and an ability to keep current

with changing agency practices. Rarely does a family member bring all of that to the role.

In an ideal world, the trustee of a special needs trust uses discretion prudently for the beneficiary's supplemental benefit, understands SSI and Medicaid, keeps complete books, handles tax reporting correctly, can coordinate with care providers, withstands scrutiny from agencies and remainder beneficiaries, and is either personally durable or institutionally backed by an entity that is durable. That combination is far more likely to be found in a professional fiduciary or corporate trustee than in a loving but untrained relative.

The point is not theoretical. Trust breakdown through bad administration is painfully real. Practitioners who have cleaned up failed family-trustee matters know how much damage can be done before anyone intervenes. For that reason, the drafting conference with the family should treat trustee selection as part of the substantive planning, not as an afterthought to be filled in on the signature page.

At the same time, economics imposes limits. Many institutional trustees prefer or require substantial minimum balances. In smaller cases, the realistic options may be a professional fiduciary, an attorney-trustee, a state-licensed fiduciary where available, or a structured co-trustee/advisory arrangement. Those practical limits should be discussed candidly at the outset, because they often determine whether the planned trust can actually function well after funding.

Flexibility in Drafting

D4A drafting is unusually vulnerable to legal drift. The federal statutory framework has remained relatively stable in outline since the enactment of the Special

Needs Trust Fairness Act—enacted as § 5007, "Fairness in Medicaid Supplemental Needs Trusts," of the 21st Century Cures Act, Pub. L. No. 114-255, § 5007, 130 Stat. 1033, 1209 (2016)—which amended 42 U.S.C. § 1396p(d)(4)(A) to permit a legally competent disabled individual to establish his or her own first-party special needs trust.[10] But the interpretive ecosystem around the statute has not remained static. State regulations change. Agencies shift procedures. POMS guidance evolves. Institutional custodians change their willingness to hold certain assets. Courts differ on the effect of remainder structures, sole-benefit questions, or procedural defects. The instrument therefore should be drafted with as much lawful flexibility as possible.

That means more than adding boilerplate amendment language. It means thinking seriously about successor fiduciaries, trust protectors where permitted, decanting or modification options where appropriate, the ability to change administrative situs or governing law when that can be done consistently with the beneficiary's benefit rules, and the practical question of where a retirement asset, structured-settlement right, or real property interest can actually be held. In a world where the beneficiary may move and the fiduciary may operate across state lines, flexibility is not elegance; it is survival.

One recurring example involves retirement assets. Even where private rulings or practitioner consensus suggest that a trust structure is tax-feasible, a large custodian

[10]The Special Needs Trust Fairness Act was enacted as § 5007, "Fairness in Medicaid Supplemental Needs Trusts," of the 21st Century Cures Act, Pub. L. No. 114-255, § 5007, 130 Stat. 1033, 1209 (2016), https://www.congress.gov/bill/114th-congress/house-bill/34. It amended 42 U.S.C. § 1396p(d)(4)(A) by inserting "the individual" among the persons permitted to establish a first-party special needs trust. Federal guidance states that the amendment applies to trusts established on or after December 13, 2016. See State Medicaid Director Letter #17-001, Implications of Section 5007 of the Cures Act for Special Needs Trusts (Aug. 1, 2017).

may decline to hold the arrangement, forcing the family and counsel to search for a workable institution. A drafter who focuses only on technical tax permission and ignores market or administrative feasibility has not truly solved the client's problem.

Estate Recovery and Death Administration

Estate recovery is often treated as a subject separate from D4A drafting, but the two are inseparable in practice. OBRA '93 requires states to pursue recovery in at least certain circumstances, yet states differ meaningfully in the breadth of their recovery statutes, in whether nonprobate assets are reached, in the threshold below which recovery is not pursued, and in how aggressively agencies enforce claims in the trust-termination setting.

That variation matters before death, not just after it. If the state takes the position that funeral expenses cannot be paid from the trust once the payback claim exceeds the remaining balance, counsel should arrange burial and funeral planning in advance through an irrevocable burial contract or other permitted device. If a state insists on a short reimbursement timetable or imposes a detailed closing-account requirement, the trustee must be prepared long before the beneficiary dies.

A well-drafted D4A trust should therefore anticipate death administration from the outset. It should not merely recite a payback clause. It should coordinate with permissible burial planning, identify post-death reporting obligations, avoid language that would delay reimbursement impermissibly, and prepare the fiduciary for the practical sequence of account closing, claim resolution, and remainder distribution under the governing state's rules.

The State-Overlay Thesis

The central proposition of this paper is straightforward: federal compliance is necessary, but in a limited and important group of jurisdictions it is not operationally sufficient. The first pass of the 51-jurisdiction survey separated true state-specific D4A additions from four things that are too often conflated in secondary sources: ordinary trust-law duties, SSI/POMS distribution rules, general Medicaid eligibility doctrines such as Miller-trust or income-cap rules, and unsupported assertions copied from one guide to another without primary-source confirmation.

That distinction matters because the paper's point is not to create an exaggerated map of difficult states. The point is to identify which jurisdictions impose genuine, additional hurdles that a lawyer or trust company should investigate before assuming that a federal-form trust can be dropped into the file and funded safely. The result is a more modest but more useful map: not every state is a trap, but the trap states matter disproportionately.

The anomaly categories that emerged most clearly include advance expenditure notice, pre-review or approval requirements, prescribed annual accountings, lien or funding gates, termination restrictions, unusual payback formulations, and age-sixty-five pooled-trust transfer-penalty differences. Those categories give practitioners and fiduciaries a usable framework for intake and administration.

Not Every State Is a New Jersey

Before turning to the friction states, it is worth saying plainly that not every jurisdiction behaves that way. Christopher Smith has observed that Michigan is, in practice, comparatively hands-off with respect to D4A trusts, while still presenting issues

concerning funding of pooled trusts after age sixty-five.[11] Michigan's eligibility manual applies the federal criteria rather than a separate state overlay.[12]

That point deserves emphasis because many practitioners build intuition from the state where they practice most often. If one's home state generally accepts a federally compliant D4A trust without elaborate separate process, there is a natural tendency to assume the system works that way everywhere. For the national practitioner or institutional trustee, that assumption is precisely the danger. Michigan's relative ease is not the norm in every jurisdiction; it is the contrast that proves why the difficult states must be identified and respected.

The practical lesson is therefore not that every state is burdensome. It is that no fiduciary should assume uniformity. A national trustee must be facile across jurisdictions, not merely comfortable in one state.

New Jersey: The Easy State to Bash, and for Good Reason

New Jersey remains one of the clearest examples of a jurisdiction whose operational demands go well beyond the bare federal text. Under New Jersey administrative practice, the trustee generally must provide forty-five days' advance written notice to the Division of Medical Assistance and Health Services of any expenditure exceeding $5,000, whether per expenditure or in the aggregate during any

[11]The author gratefully acknowledges Christopher Smith, Esq., a member of the Special Needs Alliance, for practical observations concerning Michigan's comparatively hands-off treatment of D4A trusts and its continuing post-age-sixty-five pooled-trust issues. These observations reflect practitioner experience and should be independently confirmed for a current matter. Any remaining errors are the author's alone.

[12]Mich. Dep't of Health & Human Servs., Bridges Eligibility Manual (BEM) 401, Trusts, https://dhhs.michigan.gov/OLMWEB/EX/BP/Public/BEM/401.pdf.

twelve-month period, or of any amount that would substantially deplete trust principal.[13] Annual accountings go not only to the eligibility agency but also to the centralized state review unit; trustee changes and the beneficiary's death trigger notice obligations; and, in tort matters, Medicaid reimbursement relating to the tort claim must generally be addressed before the trust is funded.

New Jersey is also notable for the breadth of its asserted payback position. The state's practice has been to claim reimbursement measured from birth, not merely from trust creation. Whether every aspect of that position would survive sustained litigation is a separate question. For working lawyers and trustees, the practical point is that New Jersey is administered as a high-friction state and should be treated as such at drafting, funding, and termination.

Because New Jersey is so often the example lawyers know best, it tends to dominate the conversation. That should not obscure the broader truth that a number of other jurisdictions have their own versions of administrative friction, sometimes in forms less obvious than New Jersey's.

Nevada: The Other $5,000 State

Nevada appears to be the other surveyed jurisdiction with a hard $5,000 expenditure trigger. Its Medicaid materials call for notice of expenditures above that amount, annual account reconciliations with sole-benefit explanations, and death notice. It also imposes a short payback timetable: the trustee must repay the state no later than

[13]N.J.A.C. 10:71-4.11(g), https://www.law.cornell.edu/regulations/new-jersey/N-J-A-C-10-71-4-11; N.J. Div. of Med. Assistance & Health Servs., Special Needs Trusts, https://www.nj.gov/humanservices/dmahs/clients/snt.html; N.J. Div. of Med. Assistance & Health Servs., Special Needs Trusts: Frequently Asked Questions, https://www.nj.gov/humanservices/dmahs/clients/SNT_FAQs.pdf.

three months after the beneficiary's death or termination of the trust exemption.[14] For an out-of-state trustee accustomed to ordinary discretionary-trust administration, that is a material operational trap.

What makes Nevada especially useful analytically is that it demonstrates the point that state-level difficulty does not always arise from an elaborate statute. A manual-based or agency-driven requirement can be just as consequential in administration as a published code provision, provided it is durable and consistently enforced.

Georgia: Pre-Review and Lien Clearance

Georgia's Medicaid Manual describes a formal, high-touch process. The drafting attorney should send the trust to the Department of Community Health (DCH) Legal Services on Form 956, the Special Needs Trust Review Routing Form, two months before execution or judicial approval. Notice of any hearing on court approval of the settlement and trust must be served on DCH at least fifteen business days in advance. DCH will not recognize the trust's validity until all liens in its favor are satisfied in full. Every trust is subject to a yearly DCH audit, the trustee must update and submit an asset schedule annually, a change of trustee requires at least thirty days' notice, and DCH must be notified within five days of the beneficiary's death.[15]

Whether each detail is better characterized as formal law, manual instruction, or entrenched process, the practical implication is the same: a court order does not

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[14]Nev. Div. of Welfare & Supportive Servs., Medicaid Assistance Manual § F-500, Treatment of Trusts, https://www.dss.nv.gov/siteassets/dwss.nv.gov/content/medical/F-500_-_Treatment_of_Trusts.pdf.

[15]Ga. Dep't of Human Servs., Div. of Family & Children Servs., Medicaid Policy Manual § 2346, Special Needs Trust, https://pamms.dhs.ga.gov/dfcs/medicaid/2346/.

necessarily end the inquiry. In Georgia, as in several other states, the trust may have to survive a separate state-agency gate before the resource exclusion is accepted operationally.

California, Minnesota, Iowa, Pennsylvania, Colorado, Missouri, Washington, and New York

The survey also identified several additional states whose overlays deserve focused attention in any national-practice checklist. California requires the trustee to notify the Department of Health Care Services at least fifteen days before the establishment hearing under Probate Code §§ 3600–3605 and 3610–3613, and again at termination, and requires all DHCS personal-injury liens to be satisfied before a trust is funded from a personal-injury settlement.[16] Minnesota's statute expressly requires submission of the trust instrument and an inventory of trust assets to the Commissioner of Human Services at the Medical Assistance application, followed by annual accountings with prescribed content.[17] Iowa's Medicaid Trust Program review, annual reporting to both the program and the district court, and a payback formulation reaching medical assistance paid generally, not merely during the trust term, likewise create meaningful administrative friction.[18] Pennsylvania remains a cautionary example. Its statute directs agency review of the trust, satisfaction of agency liens and claims before

[16]Cal. Dep't of Health Care Servs., Special Needs Trust, https://www.dhcs.ca.gov/services/special-needs-trust/ (citing Cal. Prob. Code §§ 3600–3605, 3604(d), 3610–3613; Cal. Code Regs. tit. 22, § 50489.9(d)(2)).

[17]Minn. Stat. § 501C.1205, https://www.revisor.mn.gov/statutes/cite/501C.1205.

[18]Iowa Medicaid Trust Program, Special Needs Trusts, https://www.iowa-medicaidtrusts.com/Special.aspx. The program's materials describe trust review, approval, or denial; annual income and expenditure reporting to the program and the district court; termination notice; and payback of medical assistance paid generally, not only during the trust term. Confirm the current language before reliance.

funding, and notice at death, but *Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012), held several of the statute's other additions preempted, meaning practitioners must separate still-operative review and lien requirements from invalidated add-ons.[19] Colorado appears to make agency validation part of trust effectiveness.[20] Missouri uses published agency checklists as a practical approval mechanism.[21] Washington supplies an unusually detailed regulatory regime,[22] and New York overlays the federal rules with a stand-alone SNT statute and significant court practice.[23]

None of those states need be caricatured as bad jurisdictions. The point is more disciplined. Each demands independent attention because each has created some meaningful overlay beyond the federal statute itself. For a local practitioner, the overlay may be familiar. For a national fiduciary, it must be systematized.

Maryland: Regulation, Submission, and Actual Review

Maryland is one of the most instructive jurisdictions in the country because it shows the importance of separating statutory text, current regulation, agency manual

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[19]62 P.S. § 1414(b)(4), (d), https://casetext.com/statute/pennsylvania-statutes/statutes-unconsolidated/title-62-ps-poor-persons-and-public-welfare/chapter-1-public-welfare-code/article-xiv-fraud-and-abuse-control/section-1414-special-needs-trusts; Lewis v. Alexander, 685 F.3d 325 (3d Cir. 2012), https://law.justia.com/cases/federal/appellate-courts/ca3/11-3439/11-3439-2012-06-20.html. The provisions the Third Circuit held preempted, as identified in the author's survey, included the statute's limit on pooled-trust retention, its definition of "special needs," its expenditure provision, and its age restriction. Practitioners should consult the opinion directly for the precise scope of the holding.

[20]Colorado's disability-trust statute provides that a disability trust is not valid until the Department of Health Care Policy and Financing ensures that the trust complies with state law. H.B. 19-1054 (Colo. 2019) clarified that the trust must also comply with Title XIX of the Social Security Act, that the Department is reimbursed upon the beneficiary's death, and that other states' medical assistance agencies must also be fully reimbursed before any other person is paid. See https://leg.colorado.gov/bills/hb19-1054.

[21]Mo. Dep't of Soc. Servs., Family Support Div., Checklists for Trusts (special needs, self-settled, and pooled trusts), https://mydss.mo.gov/legal-trust.

[22]Wash. Admin. Code ch. 182-516, https://app.leg.wa.gov/wac/default.aspx?cite=182-516&full=true.

[23]N.Y. Est. Powers & Trusts Law § 7-1.12, https://www.nysenate.gov/legislation/laws/EPT/7-1.12.

language, and actual operating practice. Its D4A requirements are found principally in regulation rather than statute, and the statutory backdrop is itself instructive: Estates and Trusts Article § 14.5-1002 declares a state policy encouraging special needs trusts and directs that state agencies not adopt rules more restrictive than federal law. Maryland's Medical Assistance program revised the regulation in 2016 expressly to conform to that mandate, yet the current text still contains one of the most detailed drafting checklists in the country.[24] The lesson is that an anti-restrictive statute does not mean a light regulatory touch; it means the agency believes its detailed requirements merely implement federal law. COMAR 10.09.24.08-2(C) imposes extensive requirements for stand-alone self-settled trusts and comparatively little additional content for pooled trusts beyond the federal baseline.

The Maryland regulation requires, among other things, that the trust be irrevocable, established and funded before age sixty-five, and drafted for proportional Medicaid reimbursement to all states that furnished assistance. It imposes detailed early-termination protections, bars provisions that would hinder or delay state reimbursement, prohibits post-age-sixty-five additions, requires sole-benefit language, and disqualifies the beneficiary from serving not only as trustee or co-trustee but also as trust protector, trust adviser, or other person able to influence distributions. See COMAR 10.09.24.08-2(C).

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[24]Md. Code Ann., Est. & Trusts § 14.5-1002, https://mgaleg.maryland.gov/mgawebsite/Laws/StatuteText?article=get&section=14.5-1002; Md. Dep't of Health & Mental Hygiene, Proposed Action on COMAR 10.09.24.08-2, 43 Md. Reg. 544 (Apr. 29, 2016) (stating that the revision would "clarify that it is no more restrictive than federal law"); COMAR 10.09.24.08-2, https://regs.maryland.gov/us/md/exec/comar/10.09.24.08-2. An earlier pass of the author's survey treated § 14.5-1002 as making Maryland a counter-example to the anomaly states. Colleague input and the current regulatory text show the more accurate picture described here.

Maryland goes further. The regulation includes extensive rules concerning trustee conflicts, compensation, titling of trust property, joint-ownership issues, lending and investment restrictions, annuities and structured settlements, real-property acquisition, annual accountings, and a prohibition on paying funeral expenses from the trust other than through an irrevocable burial contract. See COMAR 10.09.24.08-2(C)(10)(t). It also requires a copy of the trust and every amendment to be sent to the Maryland Medical Assistance Program, Division of Recoveries and Financial Services. See COMAR 10.09.24.08-2(C)(11). Critically, failure to comply with any provision of the section causes the full value of the trust to be treated as an available resource for Medical Assistance eligibility. See COMAR 10.09.24.08-2(C)(12).

Mary E. O'Byrne explains that the review function once sat in the Attorney General's Office but was moved back to Maryland Medicaid around 2018. Although the regulation itself speaks in terms of submission rather than explicit approval, Maryland Medicaid reportedly reviews the trust, returns a confirmatory letter, and provides a stamped copy. The Maryland Medicaid Manual used by staff likewise instructs that the trust must be approved, although the manual predates the current regulation in important respects and should not be treated as an up-to-date statement of every substantive restriction.[25]

[25]The author gratefully acknowledges Mary E. O'Byrne, Esq., a past president of the Special Needs Alliance, for her assistance concerning Maryland's regulatory framework, the movement of review functions from the Attorney General's Office back to Maryland Medicaid, and the current trust-submission and review practice. See COMAR 10.09.24.08-2; Maryland Medical Assistance Program, Medicaid Manual, Section 800 – Resources, at 857–60. Because the manual predates portions of the current regulatory structure, current COMAR text should control where the two diverge. Any remaining errors are the author's alone.

Morris Klein's experience is consistent: Maryland requires numerous restrictions in the instrument, the health department reviews each trust, and counsel has long used a detailed checklist cross-referencing the required provisions to the trust text.[26] Whether one describes that process as approval or review plus confirmatory submission, the practical conclusion is the same. Maryland is emphatically a state in which federal D4A compliance alone is not enough.

The District of Columbia: The Border Contrast

The District of Columbia provides the perfect neighboring contrast. Morris Klein reports that D.C. does not impose state-law requirements beyond the SSI/federal framework, does not require pre-approval of special needs trusts, and in his practice has treated even voluntary Attorney General review as focused on practical details such as the correct death-notice address rather than on a separate regulatory drafting regime.[27]

That Maryland-D.C. contrast makes the central point of this paper better than any abstract statement could. Two jurisdictions may sit side by side geographically and still have dramatically different operational expectations for exactly the same kind of trust. For national planners and trust companies, that reality destroys the comforting but dangerous assumption that a trust acceptable in one local office will be acceptable everywhere.

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[26]The author gratefully acknowledges Morris Klein, Esq., a member of the Special Needs Alliance, for practical guidance concerning Maryland's review process for self-settled special needs trusts, the agency's use of a provision-location checklist, and the contrast between Maryland and the District of Columbia. These observations reflect experienced local practice and should be confirmed in a current matter. Any remaining errors are the author's alone.

[27]Id.

Hawaii: Outdated Text and Difficult Practice

Scott Suzuki identifies Hawaii as another jurisdiction in which the formal rule set and actual practice require careful separate attention. Hawaii's administrative rules still appear not to reflect the SNT Fairness Act's recognition that a disabled individual may establish his or her own trust. The state's pooled-trust rule also appears to impose an age-sixty-five limitation not found in the federal text, even though Scott reports having prevailed in an unpublished matter permitting a post-sixty-five D4C transfer.[28]

Scott also reports unusual practical difficulty in paying the state back at the beneficiary's death, including a case in which probate proceedings had to be opened merely to get the state to accept a reimbursement check from the trustee. That anecdote is more than colorful. It is a serious reminder that the hardest problem in a trust may arise not at drafting but at termination, and not because the law is clear, but because agency implementation is obscure.

A separate Hawaii point is not strictly a D4A drafting rule, but it is too revealing to ignore. Scott notes that Hawaii interprets “placed in a trust” so broadly in the home-property context that if one co-owner places a fractional interest into a trust, the entire property may be treated as countable for another co-owner's Medicaid purposes.[29] Even if that issue belongs analytically outside stand-alone D4A drafting, it reinforces the

[28]The author gratefully acknowledges Scott C. Suzuki, Esq., a member and past president of the Special Needs Alliance, for practical observations concerning Hawaii's D4A and pooled-trust administration, post-age-sixty-five transfer practice, and state payback procedures. These observations reflect local practice experience and should be independently confirmed for a current matter. Any remaining errors are the author's alone.

[29]The author also thanks Mr. Suzuki for his observations concerning Hawaii's broad interpretation of home property “placed in a trust,” a point included here because it illustrates the degree to which state Medicaid interpretation can diverge from what many practitioners might expect.

larger lesson that state Medicaid interpretation can be startlingly expansive and must be checked independently.

Massachusetts: Regulations, Historical Drafting Expectations, and Death Accountings

Massachusetts contributes two valuable insights. First, Neal Winston notes that the state now permits self-settled pooled trusts to be created after age sixty-four by virtue of 2024 legislation.[3031] That alone is a useful reminder that pooled-trust age treatment cannot be generalized nationally.

Second, Neal reports that MassHealth, for many years, communicated additional drafting expectations for self-settled D4A trusts through reviewer responses and related practice materials, with the state's specific trust regulations located at 130 CMR 515.001 et seq. He further observes that MassHealth currently seeks an accounting of distributions for the prior year when the beneficiary dies and the trust balance is insufficient to satisfy the Medicaid reimbursement claim.[32] That post-death accounting focus is exactly the sort of practical detail that national fiduciaries often miss until a file is already in closing administration.

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[30]The author gratefully acknowledges Neal A. Winston, Esq., a member and Past President of the Special Needs Alliance, for his observations concerning Massachusetts' 2024 legislation permitting certain post-age-sixty-four self-settled pooled trusts.

[31]See MassHealth Eligibility Operations Memo 24-08, Eligibility Changes Concerning Transfers to Pooled Trust (Dec. 2024) (permissible transfers into valid pooled-trust accounts may be made before and after age sixty-five without a transfer penalty, for applications received on or after March 1, 2024), https://www.mass.gov/doc/eom-24-08-eligibility-changes-concerning-transfers-to-pooled-trust-0/download.

[32]The author also thanks Mr. Winston for his practical observations concerning Massachusetts self-settled trust regulations, historical MassHealth reviewer expectations, and current death-accounting practices in underfunded reimbursement cases. These observations reflect experienced local practice and should be confirmed in a current matter. Any remaining errors are the author's alone.

What the Maryland and Hawaii Examples Teach

Maryland and Hawaii together demonstrate why state-level work cannot be reduced to a simple statute-manual binary. Maryland has a dense current regulation and a review process partly reflected in a dated manual and partly in experienced practitioner understanding of current agency operations. Hawaii presents nearly the reverse problem: outdated or incomplete regulatory text, some favorable unpublished experience, and difficult death-administration practice that appears easier to comply with than to explain.

For the drafter and fiduciary, the lesson is the same in both places. One must identify the current controlling source of law, distinguish that source from older materials and loose secondary summaries, and then learn the actual administrative pathway used in the field. A trust company officer who skips any of those steps is not really administering nationally; it is merely hoping nationally.

The Pooled-Trust Age-65 Split

Although this paper focuses on stand-alone D4A trusts, the age-sixty-five pooled-trust issue cannot be omitted because it is so often the practical alternative. The survey identified significant variation among jurisdictions on whether post-age-sixty-five transfers to pooled trusts trigger transfer penalties. Some jurisdictions or authorities have taken penalty positions, including South Dakota, the First Circuit, Illinois (subject to a narrow statutory exception), and Georgia as a matter of stated policy, while others, including Minnesota and North Carolina, have recognized no-penalty treatment.[33]

[33]In re Pooled Advocate Trust (S.D.), https://ujs.sd.gov/media/vvzhu0ne/25536.pdf; Maine Pooled Disability Trust v. Hamilton, 927 F.3d 52 (1st Cir. 2019), discussed in Brown & Peisch, Advisory 19-33, https://brownandpeisch.com/wp-content/uploads/2019/08/Advisory-19-33-Pooled-Special-Needs-

Massachusetts and Hawaii both add nuance to the issue, and Michigan remains a reminder that even easy D4A states may be less simple once pooled trusts are involved.

No national fiduciary should assume that pooled trusts are a universal escape hatch. The right question is always state-specific: what is the transfer-penalty treatment here, what authority supports that treatment, and how stable is the current agency position?

Jurisdictions Secondary Sources Often Mischaracterize

The survey also found the reverse problem. Several jurisdictions are described in consumer-facing guides and aggregator websites as imposing special first-party trust rules when, on primary review, the material cited is something else. Virginia, on the survey's review, applies the federal floor. Connecticut's distinctive treatment reflects general Medicaid eligibility rules rather than a D4A-specific add-on. Indiana's manual implements the federal criteria. Ohio's frequently cited statute governs third-party supplemental services trusts, not first-party D4A trusts. Louisiana's differences arise from civil-law drafting conventions rather than agency rules. Oregon's frequently cited provision is a generic Uniform Trust Code duty to inform beneficiaries, not a Medicaid-agency mandate. And Michigan's manual applies the federal criteria.[34] For the newer

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Trust.pdf (Massachusetts, although within the First Circuit, has since adopted a no-penalty rule by 2024 legislation, see note on Massachusetts supra); The Arc of Illinois, Pooled Trusts (SMART Act narrow exception), https://www.thearcofil.org/wp-content/uploads/2024/03/ARC-Pooled-Trusts.pdf; Pfoser v. Harpstead (Minn. 2021), summarized at https://attorney.elderlawanswers.com/minnesota-high-court-rules-65-year-old-medicaid-recipient-may-transfer-assets-to-pooled-trust-without-penalty-18127; N.C. Sess. Law 2025-24 (S. 344), https://www.ncleg.gov/EnactedLegislation/SessionLaws/HTML/2025-2026/SL2025-24.html. Georgia's position reflects stated agency policy as identified in the survey. Confirm full reporter citations before reliance.

[34]Sources reviewed in the author's survey include: Conn. Dep't of Soc. Servs., Uniform Policy Manual § 4030.80, https://portal.ct.gov/dss/-/media/departments-and-agencies/dss/upms/upm4--treatment-of-

practitioner or trust officer, the lesson runs in both directions: a state is not difficult merely because a website says so, and a state is not easy merely because a website omits it. Verify against the statute, regulation, manual, or case before adding or removing a state from the watch list.

Why This Matters Especially for Trust Companies

For the solo practitioner, a state overlay problem is serious enough. For a trust company, it is a governance problem. Institutional fiduciaries need intake systems, state matrices, funding checklists, distribution protocols, and closing procedures that recognize which jurisdictions require review, which require notice, which require annual accounts in a particular format, which restrict certain assets or fiduciary roles, and which make death administration unusually burdensome.

The audience for a conference like this one is not limited to attorneys who draft one trust at a time in one local court. It includes trust officers, settlement planners, and administrators whose mistakes are often procedural rather than doctrinal. The trust may be well written and still mishandled because the institution did not know that a particular state required pre-hearing notice, lien clearance before funding, or a very specific account-closing sequence. The reason to study these anomalies is therefore not academic completeness; it is operational competence.

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assets-standards-and-assistance/4030_80.doc; Ind. Family & Soc. Servs. Admin., Indiana Health Coverage Program Policy Manual § 2615.75.15, Certain Trusts Receiving Special Consideration, https://www.in.gov/fssa/ompp/files/2615.75.15CERTAIN-TRUSTS-RECEIVING-SPECIAL-CONSIDERATION.pdf; Ohio Rev. Code § 5815.28, https://codes.ohio.gov/ohio-revised-code/section-5815.28; Or. Rev. Stat. § 130.710, https://oregon.public.law/statutes/ors_130.710; Mich. BEM 401, supra. Characterizations of Virginia and Louisiana reflect the survey's review of secondary claims against primary sources. Each characterization should be rechecked against current authority before reliance.

A Practical D4A Intake and Administration Checklist

A lawyer or fiduciary confronting a first-party special needs trust in any jurisdiction should ask at least the following questions before funding and again before major administration steps:

- Is the state issue found in statute, regulation, manual, formal agency material, case law, or durable unwritten practice?
- Does the state require trust submission, review, approval, or pre-hearing notice?
- Are there mandatory trust provisions beyond the federal baseline, especially concerning early termination, all-state payback, beneficiary powers, or asset forms?
- Must Medicaid liens or tort claims be resolved before funding?
- Are there annual inventory, accounting, audit, or death-notice requirements?
- Does the state impose unusual rules concerning real property, annuities, structured settlements, or funeral payments?
- If pooled-trust funding is contemplated, what is the state treatment of post-age-sixty-five transfers?
- At the beneficiary's death, what sequence of accounting, reimbursement, and remainder distribution does the state expect?

That checklist is not exhaustive, but it is a safer starting point than the widespread and still too casual assumption that a federal-form D4A trust is functionally portable nationwide.

Conclusion

A first-party special needs trust is still, at one level, a federal creature. The drafter must get the federal basics right: the source of funds, the disabled beneficiary, the proper settlor, sole benefit, age, and payback structure. But modern practice has made something else equally clear. A D4A trust is not fully drafted when the federal clause set is complete. It is fully drafted only when counsel has also accounted for the law, procedure, and durable administrative practice of the state in which the trust will live.

That is why the state anomalies matter. They are not curiosities. They are the difference between a trust that works on paper and a trust that works in the real world. For the national practitioner and the trust company alike, the goal is not to memorize every state's eccentricity. It is to know that the eccentricities exist, to recognize the categories in which they arise, and to build a disciplined process for checking them before the trust is funded, administered, or terminated.

Appendix: Glossary for Newer Practitioners and Trust Officers

- **First-party (self-settled) special needs trust:** a trust holding assets that belonged to or were payable to the disabled beneficiary, such as a personal-injury recovery, an outright inheritance, or back benefits. The stand-alone version is the "D4A" trust under 42 U.S.C. § 1396p(d)(4)(A), and it requires Medicaid payback.
- **Third-party special needs trust:** a trust funded with someone else's assets, typically a parent's or grandparent's, for a disabled beneficiary. No Medicaid payback is required because the beneficiary never owned the funds.
- **Pooled trust ("D4C"):** a trust run by a nonprofit that pools investments while keeping a separate subaccount for each beneficiary, under 42 U.S.C. § 1396p(d)(4)(C). At death, the nonprofit may retain some funds, with the remainder subject to payback. Funding after age sixty-five is treated differently from state to state.
- **ABLE account:** a tax-advantaged account under I.R.C. § 529A for a person whose disability began before age forty-six (as of 2026). Contributions from all sources are limited to $20,000 for 2026, the first $100,000 is disregarded for SSI, and funds can be spent directly on qualified disability expenses. The state may claim the balance at death. In practice, the ABLE account is often funded first and the balance placed in the D4A trust.
- **Payback:** the requirement that, at the beneficiary's death or the trust's termination, the state or states that paid Medicaid be reimbursed from what remains before anyone else receives it.

- **Sole benefit:** the requirement that a first-party trust be administered only for the disabled beneficiary.
- **SSA disability standard:** the definition of disability in 42 U.S.C. § 1382c(a)(3), used by both SSI and the D4A exception.
- **SSI and Medicaid:** SSI is a federal cash benefit with a $2,000 resource limit for an individual; Medicaid is the federal-state health program. They count trust assets and distributions under different rules.
- **In-kind support and maintenance (ISM):** shelter provided or paid for by others, which can reduce SSI. Since September 30, 2024, food is no longer counted.
- **Countable (available) resource:** an asset that counts against a benefit's resource limit. A properly drafted and administered D4A trust is not countable.
- **Transfer penalty:** a period of Medicaid ineligibility for long-term care triggered by giving assets away for less than fair value during the look-back period.
- **Estate recovery:** a state's claim against a deceased Medicaid recipient's estate. It is related to, but distinct from, trust payback.
- **Trust protector:** a person, other than the trustee, given limited powers such as amending administrative terms or changing situs. Some states, including Maryland, bar the beneficiary from this role.
- **Decanting:** transferring assets from one trust to a new trust with updated terms, where state law permits.
- **Situs:** the place where a trust is administered, which can affect governing law and agency oversight.

2026 NATIONAL CONFERENCE ON SPECIAL NEEDS PLANNING AND SPECIAL NEEDS TRUSTS | STETSON UNIVERSITY COLLEGE OF LAW

First-Party Special Needs Trusts

Drafting When Federal Compliance Is Not Enough: State-Level D4A Anomalies, Administrative Friction, and Practical Drafting Implications

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Brick, New Jersey | October 2026

Educational materials only; not legal advice for any particular matter. State requirements change; confirm current authority and agency practice before relying on any slide. The written materials contain far more than these slides. Materials prepared with extensive use of Perplexity and Manus AI.

1

ROADMAP

Federal compliance is necessary, but not always sufficient

1 **The federal floor**	2 **Drafting and funding decisions**	3 **The state-overlay thesis**	4 **The state tour**	5 **Making it operational**
Source of funds, the D4A elements, the SNT Fairness Act, and why payback conceals complexity.	Funding contexts, choosing the vehicle, ABLE first, trustee selection, flexibility, death administration.	What counts as a true D4A add-on, seven anomaly categories, and an 11-jurisdiction map.	Notice, pre-approval, reporting, and payback regimes: NJ, NV, GA, MD vs. DC, HI, MA, and more.	Beneficiaries moving between states, trust-company governance, and an intake checklist.

The relevant question is not whether the trust is federally compliant in the abstract, but where it will be reviewed, funded, administered, distributed from, and terminated.

2

PART 1

The Federal Floor

Get the federal basics right first: source of funds, disabled beneficiary, proper settlor, sole benefit, age, and payback.

3

FEDERAL FLOOR | CLASSIFICATION

The first question is whose money it was

A first-party trust holds assets that belonged to, were vested in, or became legally payable to the beneficiary. If the assets were the beneficiary's by right, you are in first-party territory.

Ordinary first-party funding sources

- Personal-injury settlement or judgment, including structured-settlement rights
- Inheritance payable outright to the disabled individual
- Beneficiary designation: retirement account, life insurance, annuity
- Accumulated SSI or SSDI back benefits
- Any other vested entitlement of the beneficiary

The money need not pass through the beneficiary's hands. A settlement paid straight to the trust is still first-party money.

4

FEDERAL FLOOR | PURPOSE

OBRA '93 created a narrow exception, not an asset shield

SSI lens: distributions

- Vendor payments for goods and services may avoid treatment as income
- Shelter payments implicate in-kind support and maintenance (ISM)
- Since Sept. 30, 2024, food is no longer counted as ISM
- ISM may reduce, but not necessarily eliminate, SSI

Medicaid lens: corpus

- Is the trust corpus a countable resource?
- Is administration consistent with the (d)(4)(A) exception?
- Does the state add conditions while the beneficiary is alive?

Keep the benefit systems separate from the drafting question itself. Different agencies, different tests.

Source: 42 U.S.C. § 1396p(d)(4)(A), POMS SI 01120.203, SSA EM-24048 (food omitted from ISM)

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FEDERAL FLOOR | THE D4A ELEMENTS

Five federal elements, each a later pressure point

1 Disabled beneficiary
Meets the Social Security disability standard.

2 Proper settlor
The individual (if competent), parent, grandparent, guardian, or court.

3 Sole benefit
Administered for the sole benefit of the disabled beneficiary.

4 Under age 65
Established and funded before the beneficiary reaches 65.

5 Medicaid payback
State(s) repaid at death, up to medical assistance properly recoverable, before any remainder.

Federal law supplies the floor. It does not guarantee a frictionless path in every jurisdiction.

Source: 42 U.S.C. § 1396p(d)(4)(A), POMS SI 01120.203

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FEDERAL FLOOR | THE 2016 CHANGE

The SNT Fairness Act let a competent individual establish his or her own trust

Dec. 13, 2016

Trusts established on or after this date may be established by the disabled individual, per federal guidance (SMDL #17-001).

- Special Needs Trust Fairness Act, enacted as § 5007, "Fairness in Medicaid Supplemental Needs Trusts," of the 21st Century Cures Act
- Pub. L. No. 114-255, § 5007, 130 Stat. 1033, 1209 (2016)
- Amended § 1396p(d)(4)(A) by inserting "the individual" among permitted establishers
- Removed the need for a court petition solely because no parent or grandparent was available

The federal text has been stable since 2016. The interpretive ecosystem around it has not.

Source: H.R. 34 (21st Century Cures Act), 42 U.S.C. § 1396p

7

FEDERAL FLOOR | PAYBACK

One payback sentence hides five state-level variables

Variable	Where states diverge
Formulation	Exact payback wording; scope measured from trust creation or from birth.
All-state language	Whether the state insists on reimbursement to every state that paid.
Early termination	Whether and how termination during life is restricted or triggers payback.
Order of expenses	Which taxes, administrative costs, and funeral expenses come first at death.
Lifetime conditions	Reporting or approval conditions imposed while the beneficiary is alive.

A drafter who stops at the federal payback clause may produce a trust that reads well and performs badly.

8

PART 2

Drafting and Funding Decisions

The same apparently compliant instrument can fund smoothly in one state and stall in another. Most of the risk is decided before signing.

9

DRAFTING | FUNDING CONTEXTS

Two funding paths dominate, and timing matters in both

Litigation recoveries

- Personal-injury settlement or judgment; often structured
- Some states require Medicaid lien resolution before funding
- Others require agency review or notice before court approval
- Others focus on reporting after funding

Failed or incomplete family planning

- Parents intended a third-party SNT
- Inheritance, retirement asset, or beneficiary designation passed outright
- The fix is a first-party trust, with payback
- Prevention is beneficiary-designation review in the parents' plan

A purely forms-based approach is dangerous: the funding path, not the form, determines which state gates apply.

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DRAFTING | CHOOSING THE VEHICLE

Match the vehicle to the size of the recovery

Substantial recovery

Roughly six figures and up

Stand-alone (d)(4)(A) trust tailored to the beneficiary, ideally with a professional fiduciary or corporate trustee. The gold standard where the asset base supports competent administration.

Modest recovery

Too large to spend down, too small for stand-alone economics

(d)(4)(C) pooled trust: pooled investment, separate subaccounts. Watch charitable retention, loss of control, and the age-65 fault line.

Very small recovery

Administration cost outweighs benefit

Legitimate spend-down: burial planning, vehicle, home-related expenses, exempt-resource conversion. Timing- and program-specific.

Spend-down is a planning alternative, not a casual fallback.

Source: 42 U.S.C. § 1396p(d)(4)(A), (C)

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DRAFTING | ABLE ACCOUNTS

ABLE first, then the D4A trust

1

Confirm eligibility

Disability began before age 46 (effective Jan. 1, 2026; previously 26).

2

Fund ABLE to the cap

$20,000 for 2026, from all sources combined. Not the $19,000 gift exclusion.

3

Fund the D4A

Larger corpus under professional administration, with payback.

4

Refill every January

Move the annual max from the D4A to ABLE. In NJ, send the 45-day notice in November.

Why first: direct, flexible spending on qualified disability expenses; no D4A notice regime; first $100,000 disregarded for SSI.
Trade-offs: one account and an annual cap. Most states have payback on both, so the move is about flexibility, not the state's rights.
Draft for it: expressly authorize recurring trustee contributions to the beneficiary's ABLE account from day one.

Fill ABLE before the trust, and refill it every January. Plan for the notice, not around it.

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DRAFTING | TRUSTEE SELECTION

Many “state law” failures are really trustee-selection failures

What the role actually requires

- Prudent discretion for supplemental benefit
- SSI and Medicaid literacy
- Accounting discipline and complete books
- Tax and investment competence
- Coordination with care providers
- Withstanding agency and remainder-beneficiary scrutiny
- Durability, personal or institutional

When minimums rule out an institution	Consider
Smaller fund, need for expertise	Professional fiduciary
Local, counsel-supervised file	Attorney-trustee
State program available	State-licensed fiduciary
Family involvement desired	Co-trustee or advisory structure with a professional

Treat trustee selection as part of the drafting conference, not the signature page.

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DRAFTING | LEGAL DRIFT

Draft for drift: flexibility is survival, not elegance

Successor fiduciaries

A deep, ordered succession plan with professional fallbacks.

Trust protector

Where permitted, with powers that cannot be exercised by or for the beneficiary.

Decanting and modification

Lawful paths to conform the trust as rules change.

Situs and governing law

Power to move administration when consistent with the benefit rules.

Asset-holding feasibility

Confirm a custodian will hold retirement, structured-settlement, or real-property interests.

ABLE funding power

Express, recurring authority to contribute to the beneficiary’s ABLE account.

Technical tax permission is not a solution if no custodian will hold the asset.

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DRAFTING | DEATH ADMINISTRATION

Draft for the beneficiary’s death on day one

1 **During life**

Fund an irrevocable burial contract or other permitted device if funeral payment from the trust will be barred.

2 **At death**

Give required death notice; identify the reimbursement timetable.

3 **Accounting**

Prepare the closing account the state expects, including any prior-year distribution history.

4 **Claim resolution**

Resolve the payback claim without impermissible delay.

5 **Remainder**

Distribute only after reimbursement under the governing state’s rules.

A payback clause is not a death plan. The sequence of notice, accounting, reimbursement, and remainder must be built in.

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PART 3

The State-Overlay Thesis

Not every state is a trap, but the trap states matter disproportionately.

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STATE OVERLAY | METHOD

A disciplined map counts only true D4A add-ons

Excluded from the count

Not a D4A add-on	Why
Ordinary trust-law duties	UTC-type duties apply to all trusts
SSI/POMS distribution rules	Federal, not state
General Medicaid eligibility doctrines	Miller trusts, income caps, 209(b)
Copied, unsupported assertions	No primary-source confirmation

Counted as an anomaly

A statute, regulation, manual provision, formal agency material, case, or durable and consistently enforced practice that adds a notice, approval, reporting, funding, lien, termination, or payback obligation beyond § 1396p(d)(4)(A).

Result: a more modest map, and a more useful one.

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STATE OVERLAY | CATEGORIES

Seven categories of state friction give us an intake framework

1 **Advance expenditure notice**	2 **Pre-review or approval**	3 **Prescribed annual accountings**	4 **Lien or funding gates**
5 **Termination restrictions**	6 **Unusual payback formulations**	7 **Age-65 pooled-trust penalty differences**	**Know that the eccentricities exist and which category they fall in.**

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STATE OVERLAY | THE WHY

Why states add friction, and what each motive predicts

Likely motive	What it tends to produce	Examples
Protect the payback	Pre-expenditure review, broad payback scope, short repayment clocks	NJ (from birth); NV (three months)
Respond to past abuse	Mandatory provisions and bars on beneficiary roles	MD (no beneficiary as protector or adviser)
Limited agency capacity	Bright-line dollar thresholds and checklists in place of judgment	NJ and NV ($5,000); MO checklists
Institutional lag	Rules and manuals never conformed to federal change	HI (pre-2016 text); MD manual
Courts as gatekeepers	Court approval and agency notice of hearings	NY, CA, GA

Know the motive and you can predict the friction, even in a state that is not on the map.

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STATE OVERLAY | THE 11-JURISDICTION MAP

Eleven jurisdictions with meaningful overlays in the first pass

Jurisdiction	$ notice	Review / approval	Agency accounting	Lien / funding gate	Payback / termination	Statutory or reg. regime
New Jersey	●		●	●	●	
Nevada	●		●		●	
Georgia		●	●	●		
California		Notice		●	Notice	
Minnesota		Filing	●			●
Iowa		●	●		●	
Pennsylvania		●		●		
Colorado		●			●	●
Missouri		●				
Washington						●
New York		Court				●

● = feature identified in the first-pass survey. Text entries describe a narrower form of the feature. Maryland is addressed separately. Confirm current authority before reliance.

Source: N.J.A.C. 10:71-4.11, NV F-500, GA Manual § 2346, Minn. Stat. § 501C.1205, CO HB19-1054, WAC 182-516, N.Y. EPTL 7-1.12

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STATE OVERLAY | THE CONTRAST

Not every state is a New Jersey

Michigan

Comparatively hands-off with respect to D4A trusts in practice, while still presenting post-age-65 pooled-trust funding issues.

Practitioner observation: Christopher Smith, Esq., SNA member

The lesson for national fiduciaries

- Home-state intuition is the danger
- No fiduciary should assume uniformity
- An easy D4A state may be less simple once pooled trusts are involved
- A national trustee must be facile across jurisdictions

The practical lesson is not that every state is burdensome. It is that no state should be assumed to be easy.

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PART 4

The State Tour

Statute, regulation, manual, and practice: where the friction lives, and why the source matters.

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STATE TOUR | NEW JERSEY

New Jersey: the easy state to bash, and for good reason

$5,000

Expenditure threshold, per expenditure or in aggregate over 12 months

45 days

Advance written notice to DMAHS (BAAU) before the expenditure

Notice also applies to any amount that would substantially deplete principal.

Also required in practice

- Annual accountings to the eligibility agency and to DMAHS/BAAU
- Notice of trustee changes and of the beneficiary's death
- Tort-related Medicaid reimbursement before funding
- Asserted payback scope measured from birth, not trust creation
- Drafting guardrail: no terms that functionally return corpus to the beneficiary

Administer New Jersey as a high-friction state at drafting, funding, and termination.

Source: N.J.A.C. 10:71-4.11, NJ DMAHS SNT FAQs

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STATE TOUR | THE NEW JERSEY PARADOX

Same politics, different administrative culture

New Jersey

- Budget pressure met with control over distributions during the beneficiary's life
- $5,000 and 45-day advance notice; dual accountings
- Payback asserted from birth

California, New York, Massachusetts, Illinois

- Comparable budget pressure, more generous administration in practice
- Where friction exists, it is mostly procedural: courts, hearing notice, liens
- Massachusetts: post-65 pooled funding without penalty

In some states, the D4A has been the more flexible tool. In New Jersey, ABLE becomes the release valve.

Speaker's observation from practice; not a ranking of state programs.

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STATE TOUR | NEVADA

Nevada: the other $5,000 state, with a three-month payback clock

$5,000	Annual	3 months
Any trust expenditure above this amount must be reported to DWSS immediately	Reconciled accounting plus a justification that expenditures were for sole benefit	Deadline to repay the state after death or termination of the exemption

Difficulty need not come from a statute. A durable, enforced manual provision is just as consequential.

Source: Nevada DWSS Medicaid Manual F-500

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STATE TOUR | GEORGIA

Georgia: a court order may not end the inquiry

1	2	3	4	5
Submit	**Review**	**Hearing notice**	**Lien**	**Ongoing**
Trust submitted on Form 956 (SNT Review Routing Form) before execution or judicial approval	DCH Legal Services reviews validity	Advance notice to DCH of the court-approval hearing	Medicaid lien addressed before the trust is treated as validly funded	Annual audits or asset reporting

The trust may have to clear a separate agency gate before the resource exclusion is accepted.

Source: Georgia Medicaid Manual § 2346

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STATE TOUR | EIGHT MORE OVERLAYS

Eight more states demand independent attention

State	Overlay	Authority
California	Agency notice before certain establishment hearings and at termination; PI liens resolved before funding	Prob. Code §§ 3600–3605; DHCS SNT Unit
Minnesota	Trust and asset inventory to DHS at MA application; annual accountings with prescribed content	Minn. Stat. § 501C.1205
Iowa	Trust Program review; annual reporting to the program and district court; broad payback	Iowa Medicaid Trust Program
Pennsylvania	DHS review, lien attention before funding, death notice; several former add-ons preempted, so prune old checklists	62 P.S. § 1414; Lewis v. Alexander
Colorado	Trust not valid until the department ensures compliance with state law and Title XIX	C.R.S. disability-trust statute; HB19-1054
Missouri	Published FSD checklists; trusts submitted for approval to exclude assets	FSD trust checklists
Washington	Detailed self-settled-trust regulatory framework; court approval in some guardian cases	WAC 182-516
New York	Stand-alone SNT statute with mandatory provisions; court practice	EPTL 7-1.12

Source: Minn. Stat. § 501C.1205, CO HB19-1054, WAC 182-516, N.Y. EPTL 7-1.12, Lewis v. Alexander

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STATE TOUR | MARYLAND

Maryland: the regulation is the drafting checklist

Topic	COMAR 10.09.24.08-2(C) requirement
Structure	Irrevocable; established and funded before 65; no post-65 additions; sole-benefit language
Payback	Proportional reimbursement to all states that paid; nothing that hinders or delays it
Termination	Detailed early-termination protections
Beneficiary roles	Not trustee, co-trustee, trust protector, adviser, or anyone who can influence distributions
Administration	Trustee conflicts, compensation, titling, lending, investments, annuities, structured settlements, real property
Reporting	Annual accountings; trust and every amendment sent to the Division of Recoveries and Financial Services
Funeral	No funeral expenses from the trust except through an irrevocable burial contract

Source: COMAR 10.09.24.08-2

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STATE TOUR | MARYLAND

Noncompliance with any provision makes the full trust available

Full value

Failure to comply with any provision of the section causes the full value of the trust to be treated as an available resource. COMAR 10.09.24.08-2(C)(12).

Practitioner input: Mary E. O'Byrne, Esq. (past SNA president); Morris Klein, Esq. (SNA member)

How review works in practice

- Review moved from the Attorney General's Office back to Maryland Medicaid around 2018
- Regulation says submission; Medicaid reportedly reviews and returns a confirmatory letter and stamped copy
- Staff manual says "approved" but predates the current regulation; COMAR controls
- Counsel uses a checklist cross-referencing each required provision to the trust text

Whether called approval or review, Maryland is emphatically a state where federal compliance is not enough.

Source: COMAR 10.09.24.08-2

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STATE TOUR | THE BORDER CONTRAST

Maryland and D.C. sit side by side and behave nothing alike

Maryland

- Dense current regulation
- Mandatory provisions and role bars
- Agency review of each trust
- Noncompliance: full trust available

District of Columbia

- No requirements beyond the SSI/federal framework
- No pre-approval
- Voluntary AG review focused on practical details, such as the death-notice address

Practitioner input: Morris Klein, Esq. (SNA member)

Geography is no proxy for administrative expectations.

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STATE TOUR | HAWAII

Hawaii: outdated text, favorable outcomes, and hard termination practice

Outdated text

Rules still appear not to reflect the 2016 SNT Fairness Act self-establishment change.

Pooled-trust age limit

Rule appears to impose an age-65 limit absent from the federal text; an unpublished matter permitted a post-65 (d)(4)(C) transfer.

Termination friction

Probate opened merely to get the state to accept the trustee's reimbursement check.

Practitioner input: Scott C. Suzuki, Esq. (past SNA president)

The hardest problem may arise not at drafting but at termination, because agency implementation is obscure.

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STATE TOUR | MASSACHUSETTS

Massachusetts: post-65 pooled funding, and a death-accounting focus

Pooled trusts after 65

- 2024 legislation: no transfer penalty for funding a valid pooled-trust account before or after 65
- MassHealth EOM 24-08 applies it to applications received on or after March 1, 2024
- A reminder that pooled-trust age treatment cannot be generalized

D4A review and death accountings

- Historical drafting expectations communicated through reviewer responses
- Trust regulations at 130 CMR 515.001 et seq.
- At death with an underfunded claim: accounting of prior-year distributions

Practitioner input: Neal A. Winston, Esq. (SNA member)

Keep distribution records a closing auditor would want, from the first year.

Source: MassHealth EOM 24-08

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STATE TOUR | WHAT MD AND HI TEACH

Find the controlling source, then the actual pathway

Statute and current regulation The controlling text, checked in its current form

Agency manual and formal materials Often dated; controls only where consistent with current law

Case law, including preemption Prunes invalid add-ons (Lewis v. Alexander)

Durable, enforced agency practice Learned from experienced local practitioners

Secondary summaries Leads only; never authority by themselves

Skip a step and you are not administering nationally. You are hoping nationally.

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STATE TOUR | PAYBACK REGIMES

Payback is where the state variations converge

State	Payback feature	What the trustee must plan for
New Jersey	Asserted scope measured from birth, not trust creation	Claim may exceed assistance paid during the trust term
Iowa	Broad formulation of medical assistance paid	Same; confirm the claim period
Nevada	Repay within three months after death or termination	Liquidity and a ready closing account
Maryland	Proportional to all states; no funeral except irrevocable burial contract	Multistate claims; burial planning during life
Colorado	Reimbursement upon death; other states repaid before anyone else	Order of payment at termination
Massachusetts	Prior-year distribution accounting if balance is short	Records a closing auditor will want
Hawaii	Practical difficulty getting the state to accept payment	Time and process, possibly probate

Source: NJ DMAHS SNT FAQs, NV F-500, COMAR 10.09.24.08-2, CO HB19-1054, MassHealth EOM 24-08

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STATE TOUR | POOLED TRUSTS AFTER 65

Pooled trusts are not a universal escape hatch after 65

Penalty positions

- South Dakota
- First Circuit
- Illinois (narrow exception)
- Georgia

No-penalty authority

- Minnesota
- North Carolina
- Massachusetts (2024 legislation)

Ask every time

- What is the transfer-penalty treatment here?
- What authority supports it?
- How stable is the current agency position?

Hawaii and Michigan add nuance. The right answer is always state-specific.

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PART 5

Making It Operational

The goal is not to memorize every state's eccentricity. It is to build a process that catches them.

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OPERATIONAL | BENEFICIARIES AND TRUSTS ON THE MOVE

When the beneficiary moves, the trust meets a new reviewer

Draft for the move

- All-state, proportional payback language
- Power to change situs or governing law
- Amendment or decanting authority to conform

At relocation

- Re-run the state matrix before the new application
- Expect review under the new state's rules
- Conform the instrument where required (e.g., Maryland)

Obligations that follow

- Payback to every state that paid
- Death and trustee-change notices to prior states that require them
- Records that satisfy the strictest reviewer

A trust is portable only if it was drafted to be. Administer to the strictest state the beneficiary may live in.

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OPERATIONAL | TRUST COMPANIES

For an institution, the state overlay is a governance problem

State matrix

Which states require review, notice, specific annual accounts, or restrict assets and roles

Intake system

Flags the governing state, funding path, and any pre-funding gate

Funding checklist

Lien clearance, hearing notice, agency submission before assets move

Distribution protocol

Dollar-threshold notices and sole-benefit justifications

Relocation trigger

Re-run the matrix when the beneficiary moves

Closing procedure

Death notice, timetable, closing account, reimbursement, remainder

The reason to study these anomalies is operational competence, not academic completeness.

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OPERATIONAL | INTAKE CHECKLIST

Eight questions before funding, and again before major steps

1. Where is the state rule found: statute, regulation, manual, formal agency material, case law, or durable practice?
2. Does the state require submission, review, approval, or pre-hearing notice?
3. Are there mandatory provisions beyond federal law: early termination, all-state payback, beneficiary powers, asset forms?
4. Must Medicaid liens or tort claims be resolved before funding?
5. Are there annual inventory, accounting, audit, or death-notice requirements?
6. Are there unusual rules for real property, annuities, structured settlements, or funeral payments?
7. If pooled funding is contemplated, how are post-65 transfers treated?
8. At death, what sequence of accounting, reimbursement, and remainder does the state expect?

Safer than assuming a federal-form D4A trust is portable nationwide.

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OPERATIONAL | HOW THE SURVEY WAS BUILT

AI found the leads; primary sources and colleagues decided what counts

AI-assisted sweep	Primary-source check	Practitioner validation	Lawyer judgment
51 jurisdictions; leads and synthesis	Statute, regulation, manual, case	SNA colleagues on actual agency practice	What to teach, and how confidently

Request for practitioner input. Send statutes, regulations, manual provisions, forms, cases, or durable agency practice from your state: dollar thresholds, pre-review, required forms or language, agency accountings, lien and payback rules, and post-65 pooled-trust treatment.

The map is a request for practitioner intelligence, not a definitive national claim.

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CONCLUSION

A D4A trust is fully drafted only when it accounts for the state where it will live.

- Get the federal elements right: source of funds, beneficiary, settlor, sole benefit, age, payback.
- Then account for the state's law, procedure, and durable administrative practice.
- Know the categories, and build a process that checks them before funding, administration, and termination.

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Questions

The written materials develop each state, the checklist, and full citations.

WITH THANKS FOR PRACTITIONER INSIGHT

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STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

Friday
October 23, 2026

Medicaid Update

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Center for Elder Justice

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Materials Pending: Speaker has requested that materials be distributed at or after the conference. Please check the online materials for availability, as these materials will not be included in the printed conference materials.

STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

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October 23, 2026

What Now?

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There are no materials for this session.

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2026 National Conference on Special Needs Planning and Special Needs Trusts

Stetson Law

October 23, 2026

MEDICARE UPDATES

David A. Lipschutz

Co-Director/Attorney, Center for Medicare Advocacy

I. Federal Update

A. Reconciliation Bill – Overview

On July 4, 2025, President Trump signed into law H.R. 1 – One Big Beautiful Bill Act (OBBB).[1] Narrowly passing Congress using the reconciliation process in the Senate (which requires a simple majority rather than 60 votes), the bill extends the 2017 tax cuts and funds other administration priorities. In order to offset some of the costs of these policies, the bill makes unprecedented and wide-ranging cuts to a number of safety-net programs, including over $1 trillion in cuts to health programs, which will result in an estimated 10 million people losing insurance coverage, along with cuts to food assistance provided to low-income individuals through the federal SNAP program, among other changes.[2] With respect to health care, the bulk of cuts, which will be implemented over a number of years, are directed at the Medicaid program and aimed at reducing the number people covered. These changes include: new "community engagement" (work requirements) for certain individuals to maintain coverage; more frequent eligibility redeterminations; rescission of eligibility for certain groups of lawfully present immigrants (similar to the Medicare-specific provision described below); and reduced ability for states to raise additional Medicaid funds through provider taxes. There are also significant changes for Affordable Care Act marketplace enrollees, including non-renewal of financial assistance for qualifying individuals.

[1] Pub. Law No: 119-21.
[2] Congressional Budget Office (CBO), "Estimated Budgetary Effects of Public Law 119-21, to Provide for Reconciliation Pursuant to Title II of H. Con. Res. 14, Relative to the Budget Enforcement Baseline for Consideration in the Senate" (July 21, 2025), available at: https://www.cbo.gov/publication/61569.

Many of the cuts to Medicaid will impact people who have both Medicare and Medicaid (dual eligibles). As outlined in joint publications by the Center for Medicare Advocacy, Justice in Aging, Medicare Rights Center and Community Catalyst,[3]

- One in five Medicare enrollees relies on Medicaid to help pay Medicare premiums and cost sharing
- Nearly 30% of Medicaid funding goes to people with Medicare
- Medicaid is the primary payer for 63% of nursing facility residents
- Without Medicaid, over 12 million Medicare enrollees would experience gaps in care that jeopardize their health and well-being.

There are also provisions of the OBBB that will directly impact Medicare beneficiaries, including:

- *Ending implementation of a rule streamlining eligibility and enrollment in Medicare Savings Programs (MSPs)* – §71101 prohibits the Secretary of Health & Human Services from implementing (for 9 years) certain provisions of the final rule published by CMS on September 21, 2023 (88 Fed. Reg. 65230), which was aimed at making it easier for Medicare beneficiaries to enroll in and qualify for MSPs, which can cover some Medicare premiums and costs for lower income beneficiaries. The Congressional Budget Office (CBO) estimates that this will save over $66 billion over 10 years due to fewer people enrolling in MSPs; more than 1.3 million dually

[3] Center for Medicare Advocacy, Justice in Aging, Medicare Rights Center and Community Catalyst, "A Cut to Medicaid is a Cut to Medicare" (March 2025) – Fact Sheet: https://medicareadvocacy.org/wp-content/uploads/2025/03/A-Cut-to-Medicaid-is-a-Cut-to-Medicare-fact-sheet.pdf; Issue Brief: https://medicareadvocacy.org/wp-content/uploads/2025/03/A-Cut-to-Medicaid-is-a-Cut-to-Medicare-Issue-Brief.pdf.

eligible individuals are expected to lose assistance through MSPs. Note that while H.R.1 postponed certain federal requirements concerning MSPs, states still have the authority to enhance MSP access for their residents.[4]

- *Prohibiting implementation of a final staffing rule for nursing facilities* - §71111 prohibits CMS from implementing a final rule issued in 2024 (89 Fed Reg 408706) which established national minimum staffing requirements for nursing facilities to promote quality care (note that CMS subsequently rescinded the rule).

- *Restricting the Medicare program's ability to negotiate the price of certain drugs* – the Inflation Reduction Act of 2022 (Pub. Law No: 117-169) gave the Secretary authority to negotiate the prices for certain high-cost drugs for Medicare beneficiaries, with negotiated prices first effective in 2026. Section 71203 of the OBBB carves out certain "orphan drugs" (medications developed to treat rare diseases) from Medicare drug price negotiation.

- *Limiting eligibility and terminating coverage of certain lawfully present non-citizens* – See below.

[4] See, e.g., Center for Medicare Advocacy and Aging & Disability Health Policy Lab, "Spotlight on Medicare Savings Programs (MSPs)" at: https://medicareadvocacy.org/spotlight-on-msps/.

B. Implementation of H.R. 1 Immigration Provisions

Before H.R.1, lawfully present non-citizens could qualify for Medicare by meeting work history requirements, or if they lacked the required work credits, by meeting length of residency requirements. Qualified non-citizens who worked and contributed payroll taxes for the required number of years were eligible for Medicare coverage on the same basis as U.S. citizens. H.R.1 strips away Medicare eligibility from specific categories of lawfully present non-citizen groups. Now, starting immediately upon passage of the bill, §71201 (now Section 1899C of the Social Security Act, 42 U.S.C. §1395mmm) restricts Medicare eligibility to:

- U.S. citizens
- And the following "eligible noncitizens":
    - Lawful permanent residents (green card holders);
    - Cuban and Haitian Entrants; and
    - Individuals from certain Pacific Island nations with special agreements with the U.S. "COFA" migrants).

This eliminates Medicare eligibility for all other lawfully present immigrants, regardless of how long they have worked and paid into the system, including:

- Refugees and people granted asylum;
- People with Temporary Protected Status;
- Survivors of human trafficking;

- Survivors of domestic violence; and
- Individuals granted humanitarian parole.

Not later than one year after enactment (July 4, 2026), the Commissioner of the Social Security Administration (SSA) is directed to identify individuals with Medicare coverage who do not meet the new criteria, and notify such individuals "as soon as practicable after such identification and in a manner designed to ensure such individual's comprehension of such notification" that their coverage will be terminated as of 18 months after enactment (at the end of January 2027). Note: Undocumented individuals have never been eligible for Medicare coverage, but, until enactment of the OBBB, lawfully present individuals who meet the requisite work history requirements through SSA have been eligible for Medicare coverage.

On July 16, 2026, the Centers for Medicare & Medicaid Services (CMS) issued a **proposed rule** that includes provisions implementing new Section 1899C of the Social Security Act (section 71201 of H.R.1, which CMS refers to in the proposed rule as the "Working Families Tax Cut" (WFTC) legislation) at 91 Federal Register 43842 (July 16, 2026) (CMS-1848-P). These rules incorporate definitions of newly specified groups of individuals who may be eligible for Medicare, procedures for termination and applicable appeal rights for those found ineligible, and enrollment options for individuals who later gain or regain eligibility. *Note that the provisions of this rule as described below are in proposed form and may be changed prior to being finalized before January 2027*.

The Center for Medicare Advocacy (CMA) issued an Explainer of the provisions in this proposed rule in August 2026.[5] CMA also submitted comments to the proposed rule, expressing concerns about insufficient due process.[6] In short, the proposed rule outlines the following procedures:

- **Notice & Termination Timeline**:
    - ***Grace Period Population***: for individuals who are identified by SSA as not or potentially not meeting the new criteria during an 18-month window following passage of H.R.1 (roughly through 2026 – identified as the "grace period"), SSA will issue:
        - Preliminary Notices will be sent some time in "Late Fall" 2026 informing them that SSA records indicate that they do not meet the new criteria and their entitlement will end if they cannot provide evidence proving eligibility; the notice will instruct them to contact SSA if they believe the information is incorrect.
        - Formal Termination Notices will be issued in late December 2026 to all identified individuals determined to be ineligible based on available data informing them that their Medicare coverage will be terminating effective **February 1, 2027**; the notice will inform individuals of their appeal rights under existing appeals regulations

[5] CMA, "Explainer: Changes to Medicare Eligibility Based on Immigration Status" (Aug. 20, 2026), available at: https://medicareadvocacy.org/explainer-changes-to-medicare-eligibility-based-on-immigration-status/.
[6] CMA, Comments to CY 2027 Proposed Physician Fee Schedule Rule (Sept. 14, 2026), available at: https://medicareadvocacy.org/wp-content/uploads/2026/09/CMA-Comments-PFS-2027.pdf.

for initial determinations delineated in 42 CFR part 405, subpart 1. (Appeals would be sent to SSA - see 42 CFR 405.900(b)(1) "… in accordance with SSA regs governing reconsiderations at 20 CFR, part 404, subpart J".)[7]

- ***Outside Grace Period Population***: For individuals identified after the grace period, including individuals who may have been improperly enrolled, overlooked, or whose immigration status may have changed during the grace period, or who in the future may be properly enrolled in Medicare but then lose their eligible non-citizen status; only one Termination Notice will be sent explaining that they do not satisfy the new criteria and that their Medicare coverage will terminate at the end of the month following the month in which the notice is dated; the notice will also include information about appeal rights (same as above).

- **Plan Disenrollment**: CMS will automatically handle prospective disenrollment from Medicare Advantage, Part D, and Cost plans once SSA updates entitlement records. The plans are **not** required to send separate disenrollment notices.
- **Special Enrollment Periods (SEPs)**: The proposed rule creates a 6-month SEP for individuals who gain or regain eligible status. Coverage for premium Parts A and B is prospective-only, while premium-free Part A can offer up to 6 months of retroactive coverage. There is an SEP for enrollment into a Medicare Advantage plan available the month the person is entitled to Part A and enrolled in Part B and lasts for 2 more

[7] 91 Fed. Reg. 43842 (July 16, 2026), at 43999.

months; there is also a 2-month SEP for Part D after either the individual's Part A or B entitlement date, whichever is earlier.

II. Medicare Advantage and Part D Updates

The Medicare Advantage program (MA, also known as "Part C") – the private plan option in Medicare in addition to traditional Medicare (sometimes called "Original" or Fee-for-Service) – now covers more than half of all Medicare beneficiaries, and is growing. According to KFF, MA "enrollment has more than doubled since 2010 and is projected to grow from 54% of the eligible population in 2024 to 60% by the end of this decade."[8]

It is well established that MA plans are significantly overpaid relative to what traditional Medicare spends on a given beneficiary due to a variety of factors, including manipulation of the risk-adjusted payment system. According to the Medicare Payment Advisory Commission (MedPAC), for 2026, MA payments are projected to be $76 billion – or 14% more – above what spending would be in traditional Medicare for the same beneficiaries. According to MedPAC, as outlined in a press release,[9] this is largely due to two factors: 1) favorable selection of beneficiaries into MA plans – the tendency of beneficiaries with lower spending to enroll in MA; and 2) coding intensity – the tendency for MA plans to

[8]KFF, "10 Reasons Why Medicare Advantage Enrollment is Growing and Why It Matters" (Jan. 2024), available at: https://www.kff.org/medicare/issue-brief/10-reasons-why-medicare-advantage-enrollment-is-growing-and-why-it-matters/.

[9] Medicare Payment Advisory Commission (MedPAC), "MEDICARE PAYMENT ADVISORY COMMISSION RELEASES REPORT TO CONGRESS ON MEDICARE PAYMENT POLICY" (March 12, 2026), available at: https://www.medpac.gov/wp-content/uploads/2026/03/March_2026_MedPAC_Report_Press_Release_SEC.pdf.

record more diagnoses codes for their enrollees, which increases risk adjusted payment to plans.

In addition to overpayments which add pressure to Medicare's fiscal solvency, there have been some recent reductions in consumer protections (discussed below) coupled with ongoing problems with accessing care due to excessive prior authorization and denials and delays in care.

A. New Rules for 2027

CMS issues annual updated rules to the Medicare Advantage (Part C) and Part D programs for the following calendar year, first in proposed form, with opportunity for public comment, followed by a final rule. In November 2025, CMS issued a proposed Part C & D rule for CY2027.[10] On April 2, 2026, CMS issued a final rule for 2027.[11]

Summary of Selected Provisions of Final Rule[12]

- **Special Enrollment Period (SEP) re: Medicare Advantage Provider Terminations**

One of the only new consumer protections proposed by CMS was to expand current SEP rights to change MA plans following provider terminations, but CMS did not finalize

[10] See *CMA Alert* "CMA Comments to Proposed CY 2027 Rule re: Medicare Advantage and Part D" (Jan. 29, 2026), available here: https://medicareadvocacy.org/comments-on-2027-cd-rules/; for the Center for Medicare Advocacy's full comments on the proposed rule, see https://medicareadvocacy.org/wp-content/uploads/2026/01/CMA-comments-CD-2027.pdf.

[11] 91 Fed. Reg. 17384 (April 6, 2026)). CMS also released related press releases on April 2, 2026, available here: https://www.cms.gov/newsroom/fact-sheets/contract-year-2027-medicare-advantage-part-d-final-rule and here: https://www.cms.gov/newsroom/press-releases/medicare-beneficiaries-see-simpler-more-flexible-plan-choices-better-drug-coverage-higher-quality.

[12] Note that this section is adapted from a CMA Alert titled "CMS Caves to Medicare Advantage Industry" (April 9, 2026), available at: https://medicareadvocacy.org/cms-caves-to-medicare-advantage-industry/.

it. Without further explanation, CMS stated: "In this final rule, CMS is not finalizing the proposal to establish a special enrollment period for provider terminations and are not addressing comments received on this proposal" (p. 17387).

- **MA Supplemental Benefits**

CMS finalized a number of changes relating to supplemental benefits offered by MA plans, including:

  - Rescind Mid-Year Supplemental Benefits Notice – due to concerns with underutilization of supplemental benefits, in 2024 CMS proposed to require MA plans to issue mid-year personalized notices to plan enrollees that would include details about unused benefits. CMS first suspended, and now rescinds this requirement.
  - Administration of Supplemental Benefits Through Debit Cards – MA plans using debit cards to administer supplemental benefits must electronically link cards to plan-covered items and services through a real-time point-of-sale verification mechanism. Further, card use is limited to a specific plan year. CMS is not finalizing a proposed prohibition on marketing the dollar value of supplemental benefits
  - Special Supplemental Benefits for the Chronically Ill (SSBCI) – CMS is codifying a requirement for MA plans to post their objective SSBCI eligibility requirements on their public-facing website.

- **Updating Third-Party Marketing Organizations (TPMO) Disclaimer Requirements – Removal of Reference to SHIPs**

CMS finalized their proposal that TPMOs no longer need to reference State Health Insurance Assistance Programs (SHIPs) in their disclaimers. CMS provides no additional justification for this change beyond the thin reasoning in the proposed rule, which, as noted in comments filed by CMA, completely ignored a number of relevant issues. These include: 1) ongoing marketing misconduct and financial incentives of agents and brokers, including the fact that TPMOs don't have to sell all available plans in a given area; and 2) the value of SHIPs and their unbiased counseling compared to both agents/brokers and the shortcomings of 1-800-MEDICARE.

- **Removing Rules on Time and Manner of Beneficiary Outreach**

CMS finalized a number of changes to rules that restricted agent/broker activities; CMS characterized these changes in the above-referenced press release as being "designed to improve the enrollment decision-making process by creating a more convenient, beneficiary-friendly outreach experience and to reduce the burden on beneficiaries, plans, and agents/brokers." To the contrary, as discussed at length in CMA's comments to the proposed rule, these changes are far more advantageous to insurers, agents and brokers and remove important consumer protections meant to address marketing misconduct.

    - Marketing Events Following Educational Events in Same Location – the Medicare statute requires "educational" vs. "marketing" events to be

distinct. CMS has now removed the previous 12-hour delay requirement between educational and marketing events. Agents/brokers can now hold such events back-to-back, increasing the risk that individuals merely seeking information will be subject to high-pressures sales tactics. In response to concerns about marketing abuses raised in the comments, and in contrast to previous statements, the agency implausibly asserts that "CMS believes that such instances of plan marketing violations and negative beneficiary enrollment experiences that commenters describe are rare, as CMS does not often receive reports or complaints in this area" (p. 17453).

- Timing of Personal Marketing Appointment After Scope of Appointment (SOA) Form Completion (p. 17454) – CMS eliminates the 48-hour waiting period between collection of an SOA form and a subsequent marketing appointment ("cooling off" period). Among CMS' provided rationale is that "[t]here is often a built-in layer of added protection from any potential undue pressure, as evidenced by the tendency for vulnerable beneficiaries to have other people help them with plan options and making decisions" which does not account for individuals who do not have other people to help them.
- Scope of Appointment (SOA) Forms at Educational Events (p. 17459) – CMS has lifted the prohibition on collecting SOAs at educational events, which contradicts the agency's own prior rationale for reinstating this prohibition, including that educational events are "meant to provide generic information

about the different options, rather than to persuade beneficiaries to enroll in any type of plan" (see, e.g., 2024 proposed rule).

B. Part D Updates

i. End of Part D Premium Stabilization Demonstration

Among other things, the IRA made significant changes to Part D's standard benefit design, which shift additional costs to Part D plan sponsors while reducing beneficiary out-of-pocket expenses. Out of concern about how these shifting costs could impact plan sponsors' offerings, including premiums that they charge, in July 2024 CMS announced a voluntary Part D Premium Stabilization Demonstration "designed to test whether additional policy changes stabilize year-over-year changes in premiums for participating standalone PDPs, leading to more predictable options for beneficiaries during the initial implementation of the Inflation Reduction Act of 2022's (IRA's) benefit improvements [...]."[13] This demonstration limited premium increases for participating Part D plan sponsors to no more than $35 a month for 2025.

On July 28, 2025, CMS issued a memorandum[14] announcing that the Part D Premium Stabilization Demonstration would continue for another year for CY 2026, but was scaled back. The monthly premium subsidy to plan sponsors was reduced from $15 to $10, and the limit on the monthly PDP premium increase was increased from $35 in 2025 up to $50

[13] CMS, Memorandum: "Annual Release of Part D National Average Monthly Bid Amount and Other Part C & D Bid Information" (July 29, 2024), available at: https://www.cms.gov/files/document/july-29-2024-parts-c-d-announcement.pdf.

[14] CMS Memo: "Annual Release of Part D National Average Bid Monthly Bid Amount and Other Part C & D Bid Information" (July 28, 2025), available at: http://www.cms.gov/files/document/july-28-2025-parts-c-d-announcement.pdf.

in 2026. The component of the demonstration that further mitigated costs to plan sponsors relating to risk corridors was eliminated.

As noted by KFF[15] after CMS' announcement about a scaled back demo for 2026, "In announcing these changes, CMS states that it is 'facilitating the [Part D] program's return to operating under regular market conditions.' Increasingly, however, these regular conditions appear unfavorable to the ongoing stability of the stand-alone prescription drug plan market, further tilting the playing field for coverage towards Medicare Advantage."

Despite plans to continue the demo for at least 3 years, in July 2026, CMS announced that the demonstration is ending early and will not continue for the 2027 plan year. This will likely result in even more favorable conditions for the Medicare Advantage industry, and will likely push more people seeking to reduce their premium costs to enroll in Medicare Advantage plans, further diminishing the PDP market and original/traditional Medicare as a whole.[16]

ii. GLP-1 Coverage

The Medicare statue excludes coverage of drugs for weight loss but in 2024 CMS started to allow Part D coverage of anti-obesity medication when such drugs receive FDA approval for an additionally medically accepted indication that is not specifically excluded from

[15] KFF *Quick Take:* "The Trump Administration is Reducing Enhanced Support for the Part D Stand-Alone Drug Plan Market" by Juliette Cubanski (July 28, 2025), available at: https://www.kff.org/quick-take/the-trump-administration-is-reducing-enhanced-support-for-the-part-d-stand-alone-drug-plan-market/.

[16] See *CMA Alert* "Administration Ends Part D Premium Stabilization Demonstration" (Aug. 6, 2026), available at: https://medicareadvocacy.org/administration-ends-part-d-premium-stabilization-demonstration/.

Medicare coverage.[17] In 2026, CMS announced a Medicare GLP-1 Bridge short-term demonstration that is providing eligible Medicare Part D beneficiaries with access to certain GLP-1 drugs for weight management between July 1, 2026, and December 31, 2027. Eligible beneficiaries will have a $50 copay. This demonstration operates outside of the Medicare Part D benefit coverage structure, meaning that the Part D deductible will not apply, copays do not count toward the beneficiary's true out-of-pocket costs (TrOOP), and the low-income subsidy (LIS or Extra Help) does not apply.[18]

III. Miscellaneous Updates

A. Oversight of Nursing Facilities – New Risk Based Survey (RBS)

The Centers for Medicare & Medicaid Services (CMS) implemented a new risk-based survey (RBS) protocol for nursing facilities on September 8, 2026.[19] The new survey protocol is available for 12% of nursing homes nationwide (more than 1,000 facilities) that CMS describes as "higher quality facilities." A risk-based survey has fewer surveyors, includes fewer residents whose care is reviewed by surveyors, and looks at only a single regulatory requirement, infection control. Nine other requirements for care, including staffing, resident assessment, environment, medication administration, and personal

[17] See, e.g., Dept. of Health & Human Services, Assistant Secretary for Planning and Evaluation, "Medicare Coverage of Anti-Obesity Medications" (Nov. 2024), available at: https://aspe.hhs.gov/sites/default/files/documents/127bd5b3347b34be31ac5c6b5ed30e6a/medicare-coverage-anti-obesity-meds.pdf.
[18] For more information, see the CMS website at: https://www.cms.gov/medicare/coverage/prescription-drug-coverage/medicare-glp-1-bridge.
[19] CMS, "Nursing Home Risk-Based Survey National Implementation," QSO-26-14-NH (Jul. 16, 2026), available at: https://www.cms.gov/files/document/qso-26-14-nh-original-release-2026-07-16.pdf.

funds, are reviewed only if "triggered" by (1) a complaint or facility-reported incident, (2) identification of the issue by an ombudsman, or (3) identification of the issue during the survey (by a resident or surveyor observation). CMS links a nursing home's eligibility for an RBS to meeting 11 criteria. Advocates are concerned about the new survey process, in part, because it reduces and streamlines longstanding survey requirements, places residents at a heightened risk of harm and undermines accountability.[20]

B. Improper Coverage Changes by SNFs

CMA has received recent reports that nursing homes have disenrolled residents without their knowledge or consent from their Medicare Advantage plans they had selected to original Medicare, which pays higher reimbursement rates and does not require prior authorization.[21] This practice is illegal. CMS issued memos in 2015 and 2021 telling long-term care facilities not to disenroll beneficiaries from MA without beneficiary's "request, consent, knowledge, and/or complete understanding".[22] There has also been litigation filed surrounding this issue.[23]

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[20] See, e.g., Consumer Voice, "CMS Announces Plans to Reduce Oversight of Some Nursing Homes through 'Risk-based Survey' System" (July 2026) available at: https://theconsumervoice.org/wp-content/uploads/2026/07/CV-Statement-CMS-RBS.pdf; Long Term Care Community Coalition, "LTCCC Alert: CMS's New Risk-Based Survey Policy for Nursing Homes Puts Vulnerable Residents at Risk" (July 2026) available at: https://nursinghome411.org/wp-content/uploads/2026/07/LTCCC-Alert-on-CMS-Risk-Based-Survey-Policy-July-2026.pdf; and CMA Press Release "The Risk-Based Survey Endangers Nursing Home Residents" (July 28, 2026), available at: https://medicareadvocacy.org/risk-based-survey-endangers-nursing-home-residents/.

[21] See *CMA Alert* "Skilled Nursing Facilities Cannot Disenroll Residents from Medicare Advantage Plans" (Sept. 24, 2026), available at: https://medicareadvocacy.org/nursing-homes-cant-disenroll-you/.

[22] CMS, "Memo to Long Term Care Facilities on Medicare Health Plan Enrollment" (October 2021) available at: https://www.cms.gov/files/document/ltcfdisenrollmentmemo.pdf; this 2021 memo reiterates a prior CMS "Memo to Long Term Care Facilities on Disenrollment Issues" (May 25, 2015) available at: https://www.cms.gov/sites/default/files/repo-new/35/LTCFDisenrollmentMemo052615.pdf.

[23] See U.S. Attorney, S.D.N.Y. Press Release "U.S. Attorney Announces $7.85 Million Settlement With Citadel Skilled Nursing Facility in Bronx For Fraudulently Switching Residents' Healthcare Coverage To Boost

CMA has also encountered SNFs switching residents without consent to Medicare Advantage Special Needs Plans for Institutionalized individuals (I-SNPs) with which the facility has a contract or affiliation. Special Needs Plans (SNPs) were created by federal law in 2003. I-SNPs are a type of MA plan for people who, for 90 days or more, need the level of care provided in a long-term care facility. There is a small, but growing number of I-SNPs, which are increasingly owned by nursing home providers.[24] A growing number of nursing home residents are enrolled in I-SNPs; 8% of nursing home residents were in I-SNPs in 2018, compared with 12% in 2024 (more than 100,000).[25] For more information about I-SNPs, see, e.g., CMA materials.[26]

C. Observation Status Appeals Misclassified

i. Overview

On October 4, 2024, CMS issued a rule implementing the Court's order in the nationwide class action, *Alexander v. Azar,* 613 F. Supp. 3d 339 (D. Conn. 2020)*, aff'd sub nom. Barrows*

Medicare Payments" (June 29, 2022), available at:https://www.justice.gov/usao-sdny/pr/us-attorney-announces-785-million-settlement-citadel-skilled-nursing-facility-bronx.

[24] In 2015, there were 57 I-SNPs, including 5 (9%) led by nursing home providers; in 2020, there were 150 I-SNPs, including 50 (33%) led by nursing home providers. See ATI Advisory, "An Idea That's Growing: Long-Term Care Providers Taking Charge in Managed Care" (April 2020) available at: https://atiadvisory.com/wp-content/uploads/2020/04/An-Idea-Thats-Growing_ATI-Advisory.pdf.

[25] Medicare Payment Advisory Commission (MedPAC), "Institutional special needs plans: Provision of services, network adequacy requirements, and star ratings" (April 2026), available at: https://www.medpac.gov/wp-content/uploads/2025/08/Tab-I-I-SNPs-April-2026.pdf.

[26] Center for Medicare Advocacy, Issue Brief: "The Premise and Reality of Institutional Special Needs Plans (I-SNPs)" (Apr. 15, 2026), available at: https://medicareadvocacy.org/wp-content/uploads/2026/04/I-SNP-Issue-Brief-PDF-for-Posting-00800881xC6348.pdf; *also see* Center for Medicare Advocacy, *CMA Alert* "Nursing Homes Operate Managed Care Programs for Their Residents – A Conflict of Interest" (Mar. 23, 2023), available at: https://medicareadvocacy.org/isnps-a-conflict-of-interest/.

v. Becerra, 24 F.4th 116 (2d Cir. 2022).[27] In March 2020, the U.S. District Court in Hartford, Connecticut issued a decision concluding that Medicare beneficiaries whose hospital classification is changed from inpatient to outpatient receiving observation services have the right to appeal that decision to Medicare and a chance to receive certain types of coverage, or to receive reimbursement for certain noncovered services resulting from that change. Although the actual hospital services received are typically indistinguishable to beneficiaries under either classification, the distinction between designation as an inpatient (Part A coverage) versus outpatient (Part B coverage) can and has resulted in devastating financial consequences for Medicare beneficiaries. For example, many Medicare beneficiaries who were reclassified as outpatient have had to either pay thousands of dollars out of pocket for required skilled nursing facility (SNF) care or forgo it altogether.

The Center for Medicare Advocacy, Justice in Aging, and *pro bono* partner Wilson Sonsini Goodrich & Rosati represented the plaintiffs in this lengthy litigation. See the Center for Medicare Advocacy's Frequently Asked Questions webpage for more information about the case and outpatient observation status.[28]

The regulations address two types of appeals: retrospective and prospective. The retrospective appeals process, which was for class members who were denied the right to appeal in the past, expired at the end of 2025. Prospective appeals became operational on

[27] 89 Fed. Reg. 83240 (Oct. 4, 2024).
[28] Center for Medicare Advocacy website at: https://link.edgepilot.com/s/092767ca/Jwg95muhu0qkp9o7qV9smQ?u=https://medicareadvocacy.org/frequently-asked-questions-about-the-observation-status-court-decision/

February 14, 2025 and are available on an ongoing basis for eligible beneficiaries who are still in the hospital.[29] If a hospital changes someone's status from inpatient to outpatient receiving observation services, and the individual is either not enrolled in Part B or has stayed in the hospital for 3 or more consecutive days but were an inpatient for fewer than 3 days, the hospital is required to issue a written notice called the Medicare Change in Status Notice (MCSN). Medicare contractors known as Beneficiary and Family Centered Care Quality Improvement Organizations (BFCC-QIO, or QIO) – currently Acentra Health (formerly Kepro) and Commence Health (formerly Livanta) depending on the jurisdiction,[30] are tasked with providing both the first level of review (expedited determination) and the second level of review (expedited reconsideration).[31]

ii. Misclassified Appeals

CMA has encountered (and heard additional reports of) Medicare contractors misclassifying observation status appeals as hospital discharge appeals.[32] This includes when a hospital has changed an individual's status from inpatient to outpatient but has not issued an MCSN. For example, an advocate assisting a client with such an appeal was recently told by one QIO staff member that they "had not heard of this type of appeal" and when contacted by another QIO representative who was familiar with such appeals, was

[29] See 42 C.F.R. §§405.1210 – .1212; also see Center for Medicare Advocacy website at: https://medicareadvocacy.org/observation-status-appeal-resources/.
[30] See CMS website at: https://www.cms.gov/medicare/quality/quality-improvement-organizations/family-centered-care.
[31] For a flowchart outlining this appeals process, see CMA "Medicare Expedited Appeals for Changes to Patient Status" available at: https://medicareadvocacy.org/wp-content/uploads/2025/03/Prospective-Appeals-Flowchart.pdf.
[32] See, e.g., CMA Alert "Case Study: Observation Status Appeal Results in Nursing Home Coverage" (Aug. 7, 2025), available at: https://medicareadvocacy.org/case-study-observation-status-appeal-results-in-nursing-home-coverage/.

told that there was no MCSN in the record so the appeal would be rejected and could not go forward.

Under the law, patients have a right to appeal a change in status regardless of whether or not they have received an MCSN. If you encounter this scenario, please contact the Center for Medicare Advocacy.

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Medicare Updates

2026 National Conference on Special Needs Planning and Special Needs Trusts

Stetson Law

October 23, 2026

Presented by
David Lipschutz, Co-Director, Law & Policy
Center for Medicare Advocacy

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About the Center for Medicare Advocacy

The Center for Medicare Advocacy is a non-profit, non-partisan law organization founded in 1986 that works to advance health equity, access to comprehensive Medicare, and quality health care. Based in Connecticut and Washington DC with additional attorneys in California, Georgia, Maryland, and Wisconsin.

- Attorneys, advocates, a nurse, communication and technical experts
- Education, legal analysis, writing, assistance, and advocacy
- Systemic Change - Policy and Litigation
  - Based on our experience with the problems of real people
- Medicare coverage and appeals expertise
- Medicare/Medicaid Third Party Liability Projects

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Agenda

I. Federal Updates
- H.R.1 – Reconciliation Bill Overview
- Implementation of H.R.1 Immigration Provisions

II. Medicare Advantage and Part D Updates
- New Rules for 2027
- Part D Updates

III. Miscellaneous Updates
- Skilled Nursing Facility (SNF) Oversight
- Improper Coverage Changes by SNFs
- Improper Classification of Observation Status Appeals by Contractors

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H.R. 1 and Medicare

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H.R. 1 and Medicare

- **New Restrictions on Lawfully Present Immigrants**
  - (See below)
- **Blocking Improvements to Medicare Savings Programs** (MSPs)
  - Prohibits implementation (for 9 years) a 2023 final rule aimed at streamlining MSP enrollment
    - CBO: will save $66 billion over 10 years due to 1.3 million fewer people enrolled in MSPs
    - States can still address some MSP challenges
- **Blocking Nursing Home Staffing Standards**
  - Prohibits implementation of a 2024 rule establishing minimum staffing ratios (CMS since rescinded rule)
- **Limiting Drug Price Negotiation**
  - Expands carve-outs for certain orphan drugs from negotiation
    - CBO estimates this will cost $8.8 billion over 10 years

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H.R.1 Amended the Social Security Act – New Section 1899C (42 U.S.C. §1395mmm) Limits Medicare Eligibility To:

- ❑U.S. Citizens and Nationals

Eligible Non-Citizens:

- ❑Lawful Permanent Residents (LPR) = Green Card holders
- ❑Cuban-Haitian Entrant (CHE) grantees
- ❑Compact of Free Association (COFA) migrants – from Federated States of Micronesia, Republic of the Marshall Islands, and the Republic of Palau

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Lawfully Present Non-Citizens Who Are No Longer Eligible for Medicare

- ❑ Refugees
- ❑ Asylees
- ❑ Individuals with Temporary Protected Status
- ❑ Humanitarian Parolees
- ❑ Survivors of Human Trafficking and Domestic Violence
- ❑ Persons Granted Withholding of Removal

NOTE: Persons in these categories may still be eligible for Title II benefits

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CMS Issued a Proposed Rule Implementing HR1 Immigration Provisions

- On July 16, 2026, the Centers for Medicare & Medicaid Services (CMS) issued a proposed rule that includes provisions implementing new Section 1899C of the Social Security Act (section 71201 of H.R.1) at 91 Federal Register 43842 (July 16, 2026) (CMS-1848-P). Comments are due Sept 14.
  - See CMA Explainer (Aug. 2026)
- *Note that the provisions of this rule as described below are in proposed form and may be changed prior to being finalized before January 2027.*

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Proposed Disenrollment Processes

Separate processes for:

"Grace Period" Population – Persons identified by SSA as being ineligible under the new restrictions between July 4, 2025 and the end of December 2026.

" Outside of the Grace Period" Population – Everyone else, including persons who SSA overlooked, or improperly enrolled, or whose immigration status changed during the grace period, or someone who one day enrolls in Medicare but then later loses their eligible status.

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Grace Period Population Disenrollment Process (Proposed)

SSA must provide:

- **Preliminary Notice** – **"as soon as practicable"** informing them that SSA records show they do not meet 1899C criteria and their entitlement to or enrollment in Medicare will be terminated in January 2027 if they cannot provide evidence proving eligibility. It instructs them to contact SSA if they believe the information is incorrect.
- **Termination Notice** – **towards end of December 2026.** This serves as a formal **"initial determination"** of ineligibility and that enrollment will be **terminated effective February 1, 2027**. It must inform of appeals rights pursuant to SSA regulations governing reconsiderations at 20 CFR. part 404, subpart J.

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Outside of Grace Period Population Disenrollment Process (Proposed)

SSA must provide:

- **Termination Notice –** explaining that per available data they do not satisfy 1899 criteria and their Medicare enrollment will be terminated at the end of the month following the month in which the notice is dated.
- SSA will not terminate anyone prior to notification
- Notice will include information about appeal rights

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Disenrollment From Medicare Advantage (MA) & Part D

- CMS proposes to create a separate involuntary disenrollment process that will be *prospective* and effective the first day of calendar month following the last month of entitlement to Part A or B.
- CMS would process disenrollments automatically (through internal MARx system) when SSA provides updated eligibility and entitlement records.
- CMS would notify the plan of disenrollment (through MARx).
- Plans would have the *option* to (but not be required to) provide notice to the beneficiary of disenrollment, since SSA will already be notifying the beneficiary that they lost Part A and B entitlement.

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Special Enrollment Period (SEP) for Those Who Gain or Regain Eligibility

- Would apply to individual who was terminated from Medicare, or who initially does not meet, but later meets the 1899C requirements.
- SEP would begin the month in which the individual "upon contacting the SSA, provides sufficient documentation to establish eligibility" and end 6 months later
- **For premium-free Part A,** CMS proposes **retroactive entitlement for up to 6 months,** but not earlier than first month in which individual met all the eligibility requirements.
- **For premium Part A and B**, CMS proposes a uniform ***prospective-only* effective date**, beginning with first day of month following month of enrollment.

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Special Enrollment Period (SEP) for MA and Part D

- **SEP to enroll in Medicare Advantage** would become available the month the person establishes entitlement to Part A and is enrolled in Part B, and last for 2 more months.
- **SEP to enroll in Part D** would last for 2 months after either the individual's Part A or Part B entitlement date, whichever is earlier. The SEP would end based on the earlier of the two entitlement dates.
- Enrollments in MA and Part D in would be effective the first day of the calendar month following the month in which election is made.

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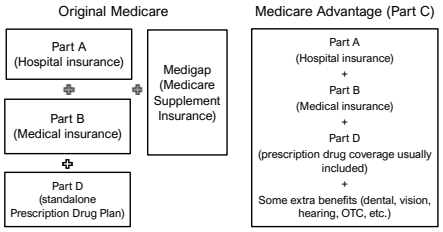
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Medicare Advantage and Part D Updates

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Reminder: Two Paths to Medicare



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Potential Medicare Advantage Tradeoffs for Beneficiaries

Source: KFF

Potential Advantages

- One stop shopping – no need for Medigap or separate Part D plan
- Lower premiums than Medigap; most pay no premium other than Part B
- Plans typically offer additional benefits (like dental)
- Plans have an out-of-pocket limit for benefits covered under Parts A and B
- Potential for better coordinated care

Potential Disadvantages

- Limited provider network
- Potential for higher out-of-pocket costs for certain services
- More utilization review than traditional Medicare
- No choice of separate drug plan to reduce drug costs
- Limited ability to switch back to traditional Medicare with Medigap

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Medicare Advantage Updates

- On April 2, 2026, CMS issued the Medicare Advantage and Part D final rule for 2027
  - Center for Medicare Advocacy's full comments on the proposed rule – raised concerns about the roll-back of important consumer protections …

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New Medicare Advantage and Part D Rules for 2027

Special Enrollment Period (SEP) re: Medicare Advantage Provider Terminations

- CMS did not finalize the CMS proposal to expand current SEP rights to change MA plans following provider terminations
- CMS stated: "In this final rule, CMS is not finalizing the proposal to establish a special enrollment period for provider terminations and are not addressing comments received on this proposal"

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New MA and Part D Rules for 2027

MA Supplemental Benefits

- Rescind Mid-Year Supplemental Benefits Notice –CMS first delayed, then rescinded, the proposal to require MA plans to issue mid-year personalized notices to plan enrollees that would include details about unused benefits
- Administration of Supplemental Benefits Through Debit Cards –CMS did not finalize a proposed prohibition on marketing the dollar value of supplemental benefits
- Special Supplemental Benefits for the Chronically Ill (SSBCI) – CMS did include a requirement for MA plans to post their objective SSBCI eligibility requirements on their public-facing website

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New MA and Part D Rules for 2027

Updating Third-Party Marketing Organizations (TPMO) Disclaimer Requirements

- CMS finalized their proposal that TPMOs no longer need to reference State Health Insurance Assistance Programs (SHIPs) in their disclaimers
- CMS: "for the TPMO disclaimer, 1–800–MEDICARE is a better option to assist beneficiaries with health care choices"

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New MA and Part D Rules for 2027

Removing Rules on Time and Manner of Beneficiary Outreach

- Marketing Events Following Educational Events in Same Location
- Timing of Personal Marketing Appointment After Scope of Appointment (SOA) Form Completion
  - No more 48-hour cooling off period
- Scope of Appointment (SOA) Forms at Educational Events

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New MA and Part D Rules for 2027

Star Ratings Changes

- CMS finalized significant changes to the Star Ratings measures, including removing 11 measures focusing on administrative processes on which CMS has indicated that plans perform similarly including:
  - how plans respond to appeals of claims denials
  - measuring why members chose to leave their plans
  - providing access to foreign language interpreters and Deaf communication access

Rescission of various measures aimed at addressing health disparities and improving health equity, including the requirement for MA quality improvement programs to include activities that reduce health disparities

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GLP-1 Coverage

- Medicare law excludes coverage of drugs solely for weight loss BUT in recent years has allowed Part D coverage for qualifying medical conditions
- GLP-1 Bridge Demo – July 1, 2026 – December 31, 2027
  - Allows coverage for people using drug solely for weight loss
  - Available to eligible beneficiaries in Part D plans (but pre-authorization requests go to Medicare contractor)
  - $50 copay, Part D deductible, TrOOP, LIS don't apply

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End of Part D Demo

- End of Part D Premium Stabilization Demonstration for Stand-Alone Part D plans (PDPs)
  - Inflation Reduction Act of 2022 (IRA) Part D changes (including out-of-pocket cap, rx price negotiation) shifted additional costs on to Part D plan sponsors, leading many to increase premiums
  - Demo started 2025 plan year to offset increased PDP premiums – see *CMA Alert* (8/6/26)
    - CMS told *WSJ* around 75% of PDP enrollees will see their premium costs increase next year (around 30% will have an increase of less than $10 per month, and 45% will have increases "largely in the $11 to $20 range a month")

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Part D Landscape

- Number of stand-alone Part D plans (PDPs) has shrunk in last several years
  - Average beneficiary's choice dropped from 30 in 2021, to 14 in 2025 to 11 in 2026 (average number of MA-PDs increased from 27 to 32 between 2021 and 2026)
  - At the same time, PDP premiums have increased
- KFF "How Medicare Advantage Rebates Disadvantage Medicare's Stand-Alone Drug Plan Market" (June 2026)
  - "A continuation of recent trends in the Part D market—fewer PDPs coupled with higher average premiums for PDPs than MA-PDs—could diminish the ability of Medicare beneficiaries in traditional Medicare to find PDPs at a comparatively affordable price, especially for those with modest incomes, which could make enrollment in Medicare Advantage more likely."

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MA Landscape

- MA plans are scaling back in 2027…
- *STAT News* (Oct. 1, 2026):
  - MA "insurers are raising out-of-pocket costs for enrollees, drastically cutting money for dental work and other benefits, and eliminating plans that have broad networks of hospitals and doctors"
  - In 2026, MA enrollment is highly concentrated among plans owned by a small number of parent organizations, with UnitedHealth Group leading the market, and, together with Humana, accounting for nearly half (46%) of all Medicare Advantage enrollees nationwide (the same as in 2025, and consistent with the pattern in prior years) – see KFF

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Miscellaneous Updates

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New Risk-Based Surveys for Nursing Facilities

- Citing lack of any increase in the federal survey budget since 2015 and 20% increase in complaints about nursing homes, CMS announced implementation of risk-based survey (RBS) for "higher quality facilities to undergo a more focused survey protocol requiring less onsite time and a smaller survey team," beginning Sep. 8, 2026.
- Advocates are concerned that RBS reduces and streamlines survey requirements, places residents at a heightened risk of harm and undermines accountability.

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SNF Issues

- **Beneficiary Choice**
  - Reports of SNFs enrolling people without consent in Institutional-Special Needs Plans (I-SNPs) with which facilities have contracts/affiliations
  - Reports of SNFs disenrolling people without consent from MA plans they had selected to original/traditional Medicare, which pays higher reimbursement rates and does not require prior authorization
    - This practice is illegal

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Observation Status Appeals Process

- Hospital observation status can impact eligibility for SNF care, can impact people with no Part B coverage
  - Medicare requires a 3-day inpatient hospital stay as a prerequisite for SNF coverage – observation ≠ inpatient
- CMS issued a final rule in Oct. 2024 implementing court's decision in *Alexander v. Azar*
- Effective 2025, Medicare beneficiaries whose hospital classification is changed from inpatient to outpatient receiving observation status have a right to appeal that decision
- Prospective appeals available (deadline for retrospective appeals has passed)
  - Handled by QIOs – Acentra or Commence Health

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Observation Status Appeals Misclassified

- CMA has encountered and heard additional reports of Medicare contractors misclassifying observation status appeals as hospital discharge appeals
  - Hospital required to issue a Medicare Change of Status Notice (MCSN)
  - Reports that if such notice is not issued, QIO is not processing appeal as an observation status appeal, rather they are treated as hospital discharge appeals
  - Beneficiaries still has an appeal right even if hospital does not issue notice

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Q&A

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STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

Friday
October 23, 2026

From Supplemental to Essential: When the Special Needs Trust Becomes the Safety Net

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Access and Justice For All®

From Supplemental to Essential:
When the Special Needs Trust Becomes the Safety Net

Tara Anne Pleat, Esq., CELA

I. Introduction

For decades, the basic premise of special needs trust planning has been reflected in the name of the trust itself. A supplemental needs trust is intended to supplement, rather than supplant, publicly funded benefits and services available to an individual with a disability. Public benefits provide the foundation. Private trust assets add to that foundation by paying for the things that government programs do not provide.

That remains an important legal construct. Increasingly, however, it is an incomplete description of the world in which these trusts are being administered.

Families planning for loved ones with disabilities are confronting a service-delivery system that is under significant strain. Home- and community-based services may be authorized but unavailable. Residential programs may exist but have no openings. Approved direct-support hours may go unfilled because an agency cannot recruit or retain workers. Care coordination may technically be part of a Medicaid-funded service package but be spread among professionals carrying workloads that do not permit individualized oversight. Families may spend years on waiting lists for waiver services while parents and siblings continue to provide the care that the public system is expected eventually to assume.

This is not merely a question of government spending. It is a question of capacity.

Care requires people. People must be available, trained, supported and paid; and ideally not exhausted. A legislature can authorize a program. An agency can approve a service. A court can recognize a right. None of those actions, standing alone, creates an available caregiver at two o'clock in the morning on a Saturday.

That distinction has become increasingly important for special needs planners.

In 2025, forty-one states maintained waiting or interest lists for Medicaid home- and community-based services, and more than 600,000 individuals appeared on those lists.[i] The figures are imperfect because states use different methodologies and many do not determine full program eligibility before placing an individual on a list. They nevertheless illustrate a basic problem: legal entitlement and practical access are not the same thing. In 2025, individuals on these lists waited an average of thirty-two months for services, while individuals with intellectual and developmental disabilities waited an average of thirty-seven months.[ii]

The workforce statistics tell the same story from another direction. In its 2025 survey of 469 organizations providing community-based services to people with intellectual and

developmental disabilities, ANCOR reported that 88 percent experienced moderate or severe staffing shortages. Sixty-two percent turned away new referrals because they did not have sufficient staff, 29 percent discontinued programs or services, and more than half operated in communities where few or no alternative providers offered comparable services.[iii] The Medicaid and CHIP Payment and Access Commission has likewise identified persistent workforce shortages as a significant obstacle to the delivery of home- and community-based services, noting annual turnover rates among HCBS workers of approximately 40 to 60 percent.[iv]

For families, those numbers translate into something far more personal. A service that cannot be staffed is not a service. An approved residential program without an available bed is not housing. An authorization for forty hours of support that can be staffed for only twenty-five hours is not forty hours of support.

The traditional planning model assumes that the public system provides a floor and the special needs trust builds upon it. In some communities and for some beneficiaries, that floor is increasingly unstable.

The consequence is that the trust may no longer be asked simply to purchase the traditional “extras.” It may be required to pay for private caregivers, care management, housing, transportation, advocacy, technology, therapy, household assistance and other supports that are essential to the beneficiary's ability to remain safe and engaged in the community.

The supplemental needs trust may therefore become something considerably more important.

It may become the beneficiary's financial safety net.

Recognizing that reality is not an argument against Medicaid. It is not an argument against public benefits, community integration, increased funding, or advocacy. Medicaid is foundational to the long-term support system for individuals with disabilities in the United States, and preserving access to it will remain central to special needs planning.

But we cannot responsibly plan for a system we wish existed rather than the system families actually encounter.

The planning objective cannot simply be preservation of benefits. The objective is to construct the most stable and sustainable life possible for the beneficiary by coordinating all available resources: public benefits, private funds, family and community supports, technology and professional assistance.

Public benefits are an essential part of that plan.

They are not the plan itself.

II. The Widening Gap Between Expectation and Capacity

The challenge facing long-term-care and disability systems is sometimes described as a funding problem. Funding unquestionably matters, but that description is incomplete.

It is also a capacity problem.

The United States is attempting to deliver increasingly individualized, labor-intensive care in home and community settings at precisely the same time that demand for those services is increasing and the workforce available to provide them remains inadequate.

That tension did not emerge overnight. Over the last several decades, disability policy has appropriately moved away from large institutional models and toward community integration, autonomy and person-centered services. The Supreme Court's decision in *Olmstead v. L.C.* recognized that unjustified segregation of individuals with disabilities constitutes discrimination under Title II of the Americans with Disabilities Act and reinforced the expectation that individuals should receive services in the most integrated setting appropriate to their needs.[v]

That principle changed lives but it also requires infrastructure.

Community living does not eliminate the need for assistance. It changes where and how that assistance must be delivered. Instead of concentrating workers and services within an institution, a community-based system may require staff to reach individuals in homes, apartments, workplaces and day programs across a broad geographic area. It requires transportation, supervision, case management, housing, medical coordination and reliable direct-support professionals.

Person-centered care is also inherently labor intensive. The more individualized the system becomes, the more difficult it becomes to achieve economies of scale.

At the same time, more people need care.

Individuals with significant disabilities are living longer. The general population is aging. Families are smaller and more geographically dispersed. The cohort of working-age individuals available both as paid workers and as unpaid family caregivers is under increasing pressure.

Family caregiving itself has grown dramatically. AARP and the National Alliance for Caregiving estimated in 2025 that approximately 63 million Americans (roughly one in four adults) were providing ongoing care to an adult or child with a complex medical condition or disability. That represented an increase of approximately 20 million caregivers over the preceding decade.[vi]^6

Those numbers should concern special needs planners because the formal and informal care systems are interconnected.

When formal services are unavailable, families fill the gap. When families can no longer fill the gap, formal services are asked to do more. When neither has sufficient capacity, the individual with the disability bears the consequence. This is why conversations about long-term planning cannot begin and end with eligibility. Eligibility is a legal determination, service delivery is a human one.

A beneficiary may be eligible for a Medicaid waiver and nevertheless lack an available provider. A beneficiary may qualify for residential services and remain at home with aging parents because no appropriate placement exists. A beneficiary may have a case manager but little meaningful contact because the case manager is responsible for too many individuals. A plan of care may authorize services that cannot be fully staffed.

The difference between what appears on paper and what happens in someone's home can be substantial.

For the special needs planner, three distinct questions therefore matter: whether the beneficiary is eligible for a particular support, whether that support is actually available and whether the available support is adequate.

The difference among eligibility, availability and adequacy should become part of the planning vocabulary.

It is possible to be eligible for something that is unavailable.

It is equally possible for something to be available but inadequate.

Until those distinctions are understood, the financial plan rests on an assumption rather than an assessment.

III. The Family Has Always Been Part of the Infrastructure

The strain on the formal service-delivery system exposes something else that special needs planners have always known but have not always quantified.

Families are part of the care infrastructure.

Parents of individuals with significant disabilities routinely perform an extraordinary range of functions without compensation and often without identifying what they do as “services.” They coordinate medical appointments, supervise staff, manage benefits, communicate with providers, arrange transportation, purchase clothing and household items, monitor medications, maintain social connections, respond to crises and provide the historical and personal knowledge that allows everyone else to understand the beneficiary.

Those activities become so embedded in family life that they disappear from the financial plan.

A family may accurately report that its adult child receives Medicaid-funded residential or community services. That tells the planner very little about what happens when the transportation van does not arrive, a new staff person does not understand the beneficiary's communication style, the pharmacy cannot obtain a refill, or a benefits notice appears in the mail.

Who resolves those problems?

Often, it is a parent.

The importance of that contribution is difficult to overstate because it combines labor with judgment.

A paid caregiver can perform a task. A parent may know why the task matters, whether it has been performed properly and what to do when something changes.

The parent may also be the person who recognizes that the beneficiary is unusually quiet, that an apparently minor behavioral change usually precedes illness, that a particular staff member is a poor match, or that the beneficiary is agreeing to something simply because the beneficiary does not want to disappoint another person.

That knowledge is not replaced automatically when the parent dies. This is one of the places where the traditional family life cycle and the experience of a family that includes an individual with significant disabilities diverge.

In a more traditional family cycle, parents provide increasingly less support as children move toward independence. Later, the relationship may reverse as adult children assist aging parents.

When a child has significant lifelong support needs, parental responsibility may remain intense for decades. The parents themselves age, but the support obligation does not necessarily decline. Eventually, the family faces a transition that is less like handing responsibility to a successor and more like attempting to replace an entire operating system.

Families often assume that a sibling will “take care of” the person with the disability and as most planners know that phrase needs to be unpacked.

Does it mean the sibling will serve as trustee? Attend medical appointments? Monitor residential staff? Manage Medicaid recertifications? Respond to emergencies? Spend weekends providing respite? Provide transportation? Invite the sibling with the disability home for holidays? Find a replacement caregiver when the agency cannot staff a shift? Move the beneficiary into the sibling's home?

Those are profoundly different commitments, and do parents *really* want that for their typical children.

The sibling may be loving and willing while nevertheless being unable to replicate what a parent has done. The sibling may live several states away. The sibling may have children, employment, a spouse, aging parents or personal health limitations. The sibling may be capable of advocacy but uncomfortable managing money. The sibling may be an excellent trustee but unable to provide direct care.

Good planning should not depend on vague expectations of family sacrifice.

The appropriate question is not simply who will replace the parent. It is which functions the parent currently performs, which of those functions can be transferred to other family members, which can be provided through public programs and which will have to be purchased privately.

Once the question is framed that way, the importance of private financial resources becomes obvious.

IV. When "Supplemental" Starts Paying for Essential Support

Historically, planners often described special needs trust distributions by giving examples of enhancements to public benefits: travel, entertainment, computers, furniture, additional therapy, recreation, education or other expenditures that improved quality of life without replacing basic governmental support.

Those expenditures remain important. Quality of life is not trivial simply because a need is not medical.

But the distinction between supplemental and essential spending has become increasingly difficult to maintain in practice.

Consider housing.

If the beneficiary cannot obtain a suitable publicly funded residential placement, a trust may need to purchase, rent or help maintain housing. If an aging parent dies and the beneficiary has lived in the family home for decades, the trust may be called upon to stabilize that arrangement while a long-term plan is developed. The trust may need to fund modifications, property management, household assistance or a companion arrangement. ***Housing is not an extra.***

Consider direct care.

If Medicaid has authorized services but no worker is available, a trust with sufficient resources may need to pay privately for assistance that the public system theoretically covers. ***That care is not an extra.***

Consider care management.

A beneficiary may technically receive Medicaid-funded case management, but a professional trustee located hundreds of miles away may need an independent person to visit the beneficiary, communicate with providers and identify unmet needs. The private care manager may become the trustee's reliable source of information about what is actually happening on the ground.

That is not an extra either.

Nor are transportation, benefits advocacy, emergency staffing, household support or the technology necessary to communicate and live safely.

This does not mean a trustee should automatically replace every unavailable public service with private dollars. Few trusts could sustain that approach over a beneficiary's lifetime. What it does mean is that we should stop assuming that private trust expenditures necessarily represent luxury or enhancement while public programs cover necessity.

In an unstable service environment, the same expenditure may move back and forth across that line. A privately paid aide may be supplemental while Medicaid services are fully staffed and essential when they are not. A private care manager may be helpful when public coordination is working well and indispensable when it is not. A housing expenditure may initially enhance independence and later become necessary to prevent homelessness or institutionalization.

The legal name of the trust has not changed but the work the trust is doing has.

V. Funding the Life That Will Actually Exist

Once that reality is acknowledged, the financial planning conversation has to change as well.

Families commonly ask how much should be left to a special needs trust. The question cannot be answered by using a universal target.

A $1 million trust may provide substantial security for one beneficiary and be plainly insufficient for another. The result depends upon the beneficiary's age, life expectancy, health, level of disability, housing, geography, public benefits, family support, investment performance and the amount of privately funded care that will be necessary.

The most important variable may be the one that does not appear on the family's current budget: unpaid family labor.

If a parent provides thirty hours each week of supervision, transportation, coordination and personal assistance, the beneficiary's current support needs are not inexpensive simply because no check is written for those thirty hours.

The cost has been absorbed by the family. When the parent is gone, some portion of that cost likely will become financial.

That reality should inform life insurance planning, retirement-account beneficiary designations, estate equalization discussions and decisions about how much of a parent's estate should pass to the child with the disability rather than to other beneficiaries. It should also inform expectations about siblings.

Leaving assets equally among children and informally asking one child to use part of an inheritance to help a sibling with a disability is generally a poor substitute for intentional planning. It creates no reliable funding source, no fiduciary structure and no assurance that the money will remain available when the beneficiary needs it.

Even where a trust has already been established, planners should periodically revisit the funding assumptions. The question is not simply what the trust is worth. The better question is *what the trust will be expected to purchase over the beneficiary's lifetime.*

That analysis should account for housing, private care, transportation, technology, medical and therapeutic needs, professional administration, benefits advocacy and the potential cost of replacing the coordination currently supplied, typically for free, by family.

It should also acknowledge uncertainty.

No planner can predict the Medicaid system thirty years from now. Nor can the planner reliably predict the beneficiary's support needs at age sixty based solely upon needs at age thirty. Accordingly, financial projections should not assume that every currently authorized public service will remain available, fully staffed and adequate indefinitely. Financial projections should also incorporate the long-term care needs of the caregiver.

That does not require projecting the collapse of the public system, it requires a margin for reality.

VI. The Trustee's Job Changes When the Trust Becomes the Backstop

The pressures affecting families also change trust administration.

A special needs trustee is not a guardian merely by virtue of serving as trustee. A trustee is not ordinarily the beneficiary's health-care agent, service coordinator, residential provider or direct caregiver. Careless drafting should not turn the trustee into all those things.

At the same time, a trustee responsible for exercising broad distribution discretion cannot do that job intelligently without understanding the beneficiary's circumstances.

A trustee cannot administer a special needs trust solely from account statements.

The legal issue is familiar. Discretion requires judgment, and judgment requires information. General fiduciary principles require trustees to act in good faith, in accordance with the terms and purposes of the trust, and based on information appropriate to the decision being made.[vii]

The practical issue is harder: how does the trustee obtain that information?

A competent adult beneficiary may be able to communicate directly with the trustee, identify needs and request distributions. Another beneficiary may have difficulty communicating or may not appreciate it when a service is inadequate. Family may provide reliable information, but family may be unavailable, exhausted, conflicted or geographically distant. Medicaid-funded staff may be helpful, but staffing instability may make reliance on those individuals difficult.

The problem can be illustrated by something as simple as a winter coat. The trustee may have unquestioned authority to buy the beneficiary a winter coat. The transaction will have no meaningful effect on benefits and may plainly serve the purposes of the trust. But if nobody tells the trustee that the beneficiary needs a coat, the scope of the trustee's distribution authority is irrelevant. That is the administrative challenge presented by a beneficiary who cannot independently advocate. It is also why private care management and advocacy can become essential trust expenditures.

A care manager can visit the beneficiary, speak with staff, understand the service plan, identify unmet needs and provide the trustee with information necessary to exercise discretion. The care manager does not become the trustee. Nor should the trustee simply delegate discretionary judgment to the care manager.

The care manager supplies information. The trustee uses it.

This distinction becomes especially important for professional and corporate trustees. Those fiduciaries may offer continuity, investment infrastructure, accounting, tax administration and institutional experience. They may nevertheless be located hundreds of miles from the beneficiary and have limited firsthand knowledge of the disability-service environment in which the beneficiary lives.

Conversely, a family trustee may know the beneficiary intimately but lack experience with public benefits, investments, fiduciary accounting or long-term budgeting.

Neither structure is inherently defective, but both require a way to fill the gaps.

A well-administered special needs trust should therefore have a reliable process for learning about the beneficiary's life. Depending upon the circumstances, that may involve regular communication with the beneficiary, family, a guardian or agent, residential providers, care managers, benefits specialists or other trusted professionals.

The objective is not to create bureaucracy. It is to avoid administering the trust in the dark.

VII. Eligibility, Availability and Adequacy as a Fiduciary Framework

The same distinction that should guide planning can help trustees make distribution decisions.

The traditional distribution inquiry often focuses heavily on whether a public benefit will pay for a particular good or service and whether a trust distribution will impair eligibility. Those questions remain necessary, but they are no longer (and never really were) sufficient.

Suppose a beneficiary needs a particular service and Medicaid will theoretically fund it. The trustee should first determine whether the beneficiary is eligible for the service. If the answer is no, the trust may be the only realistic source of funding. If the beneficiary is eligible, the next question is whether the service is actually available. Is there a provider? Is there an opening? Can the authorized hours be staffed? Can services begin in a reasonable period of time? If the answer is yes, the trustee must still consider *adequacy.*

Does the service meet the beneficiary's needs? Is staffing sufficiently reliable? Does the program allow the beneficiary to remain safely in the current setting? Is the service available at the intensity necessary to accomplish its intended purpose?

Only after answering those questions can the trustee intelligently assess whether private trust funds should be used. This is not an invitation for trustees to substitute their preferences for public policy or to purchase a more expensive private service simply because it is available. The trust has a finite life. Every dollar spent today is unavailable tomorrow.

For many beneficiaries, effective use of public benefits is the only way to make private resources last throughout life. But conserving trust assets is also not a neutral decision.

A trustee who declines to spend trust funds while a beneficiary loses stable housing has made a discretionary decision.

A trustee who waits indefinitely for a provider to become available while a parent in her eighties continues to provide care has made a discretionary decision.

A trustee who preserves a modest cash benefit while refusing an expenditure that would materially improve the beneficiary's safety or independence has made a discretionary decision.

The decision may be justified. But it should be recognized as a decision and supported by a reasonable process.

This point has appeared before in special needs trust administration. In *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, a New York Surrogate's Court criticized administration of a substantial discretionary trust where the fiduciaries had protected and invested the assets but had failed for a significant period to become sufficiently knowledgeable about the beneficiary's actual circumstances and needs. Once appropriate care-management assistance was brought into the administration, trust funds began to be used in the manner contemplated for the beneficiary.[viii]

The broader lesson is not uniquely New York.

A trustee cannot reasonably exercise discretion about needs the trustee has made no meaningful effort to understand.

VIII. When Preservation of Benefits Produces the Wrong Result

Special needs planning appropriately places significant emphasis on preservation of benefits. That emphasis can become distorted when preservation itself becomes the measure of success. The purpose of a special needs trust is not to achieve the highest possible SSI payment. Nor is it to preserve the largest possible trust remainder. The purpose is to serve the beneficiary within the parameters established by the governing instrument and applicable law.

Sometimes those goals will align perfectly with benefits preservation and sometimes they will not. Housing is the easiest example.

A trust distribution for shelter may affect an SSI recipient's monthly cash benefit. The trustee therefore needs to understand the consequences before making the expenditure. But if trust-funded housing provides the beneficiary with a safe and stable living arrangement that is otherwise unavailable, the fact that SSI may be reduced does not necessarily make the distribution a poor decision.

The trustee should compare the value of the benefit lost with the value of the housing obtained. That is a very different analysis from simply asking whether SSI will be affected.

The Social Security Administration's own changes to the in-kind support and maintenance rules illustrate the danger of allowing benefit mechanics to dominate long-term trust design. Effective September 30, 2024, SSA stopped including food in the calculation of in-kind support and maintenance and expanded a rental-subsidy

exception nationwide.[ix] Planning assumptions that governed trust administration for decades changed through administrative action.

A trust for a young beneficiary may operate for half a century.

Today's benefits manual cannot sensibly become tomorrow's immutable statement of settlor intent.

The same principle applies beyond SSI.

Assume a Medicaid waiver authorizes personal-care services, but the provider has been unable to staff the authorized hours for several months. If the trust has sufficient resources, paying privately for part of that care may be entirely appropriate.

The fact that Medicaid theoretically covers the service does not put a caregiver in the home.

Similarly, an available public service may be so limited that it does not accomplish the beneficiary's actual objective. A transportation benefit that cannot reliably get the beneficiary to employment may have little practical value. A care-management program that processes required paperwork but cannot provide individualized advocacy may need to be supplemented with private support.

None of this suggests that trustees should abandon efforts to obtain appropriate public services. To the contrary, trust funds may appropriately be used for legal representation, benefits consultation and advocacy precisely because publicly funded benefits remain so important.

The distinction is that benefits preservation should be a strategy employed for the beneficiary.

IX. Scarcity Exists Inside the Trust Too

Public resources are not the only scarce resources. Many special needs trusts are modest.

A trust holding several hundred thousand dollars for a beneficiary in early adulthood cannot possibly replace a lifetime of Medicaid-funded care. Even a multimillion-dollar trust can be depleted rapidly if it is required to provide intensive private staffing over decades.

Recognizing the limitations of the public system therefore should not produce unrealistic expectations of private money.

The trust cannot become a substitute Medicaid program.

It can, however, be used strategically.

That requires trustees to distinguish expenditures that merely duplicate reliable existing services from expenditures that address meaningful unmet needs. It requires consideration of whether spending now may avoid a substantially larger problem later. It requires attention to the beneficiary's life expectancy, foreseeable transitions, housing and the likelihood that family supports will diminish.

It also requires the trustee to recognize that quality of life is part of the analysis. An excessively conservative trust can fail in a different way from an excessively generous one.

If a beneficiary lives for decades with little meaningful use of trust assets because the trustee is focused almost exclusively on preservation of principal, the administration may technically conserve the fund while failing to fulfill the settlor's purpose.

This is particularly striking in a first-party trust subject to Medicaid reimbursement at the beneficiary's death. Preserving substantial assets that could have been used appropriately for the beneficiary during life may ultimately benefit the reimbursement claimant rather than the beneficiary for whom the trust was established.

That does not mean a first-party trust should be intentionally exhausted. It means preservation is not the only relevant value. The same issue arises in third-party trusts with remainder beneficiaries.

Parents often provide that assets remaining at the death of the beneficiary with a disability will pass to siblings, descendants or charities. That is ordinary and appropriate planning. But a remainder interest should not silently become a competing lifetime objective unless the settlor intended it to be one.

A family trustee who is also a remainder beneficiary may feel pressure to conserve assets. A corporate trustee may simply default to conservative spending because the trust is silent about priorities. Where the settlor intends the beneficiary's lifetime welfare to be paramount (which will almost always be the case), that intent should be clear.

The trustee should not administer an SNT designed for a lifetime beneficiary as though the preservation of an inheritance for the next generation were an equal purpose.

X. The Trust Cannot Replace a Support System by Itself

There is a temptation in estate planning to believe that if we have drafted a sufficiently comprehensive trust and funded it adequately, we have solved the problem.

We have not.

Money is a tool, someone still must know what to do with it. My law partner will often say money does not equal quality of life, money + advocacy equals quality of life.

The most successful long-term plans therefore tend to surround the beneficiary with a network rather than relying on a single heroic successor. That network may include a trustee, family members, a care manager, a benefits specialist, an attorney, a financial professional, a guardian or agent where appropriate, service providers and other people who know the beneficiary personally. Financial administration and human-services administration are different competencies.

The professional trustee who manages assets and exercises distribution discretion may need someone locally who understands the beneficiary's daily life. The family member with intimate knowledge of the beneficiary may need a professional fiduciary to manage money. The care manager may understand services but should not necessarily control trust distributions. The benefits specialist may know Medicaid and SSI but not the beneficiary. The plan should permit those roles to work together and it should also preserve institutional memory.

It should also preserve institutional memory.

A trust instrument tells the trustee what the trustee is legally authorized to do. It does not explain what the beneficiary's morning routine looks like, which physician the beneficiary trusts, which foods the beneficiary refuses, how the beneficiary expresses discomfort, what activities provide joy, who the beneficiary's friends are or what a parent has learned through forty years of trial and error.

Those things belong in a life plan, letter of intent or similar companion document. The most useful question a planner can ask a parent may be remarkably simple:

What are you doing for this person now that somebody else will need to know how to do when you are gone?

The answer frequently reveals the real planning problem.

XI. Testing the Plan Before Crisis

Families should also be encouraged, where possible, to test portions of the support system before the primary caregiver is gone.

Parents who have advocated for a child for decades may find it difficult to step aside even temporarily. They know the system. They know the beneficiary. They can often perform a task more quickly and effectively than a new provider.

But waiting until a parent's death or incapacity to determine whether the successor system works creates unnecessary risk. A gradual transition can reveal strengths and weaknesses while the parent is still available to intervene.

A sibling can begin attending care-planning meetings.

A care manager can take responsibility for selected coordination functions.

A Medicaid-funded provider can be asked to assume a task historically performed by the family.

A future trustee can learn about the beneficiary's services and meet the people involved.

The family can see whether transportation works without parental backup.

If the system succeeds, confidence grows.

If it fails, failure is valuable information.

The family learns that the written plan depends upon support that may not actually exist. Private funding can be reassessed. Roles can be changed. Additional professionals can be brought in. Expectations can be adjusted. It is far better to discover those vulnerabilities while the people who know the beneficiary best are still available to respond.

XII. Limited Drafting Implications

The detailed drafting of modern third-party special needs trusts warrants its own discussion, and it is addressed elsewhere in these Stetson materials. The central drafting lesson for present purposes is narrower.

If the trust ultimately serves as the financial backstop when public services cannot meet the beneficiary's needs, the governing instrument should not prevent the trustee from responding to that reality.

A trust that commands preservation of public benefits regardless of circumstance may produce exactly the wrong result when the beneficiary needs housing, care or another essential support that cannot otherwise be obtained. Similarly, the trustee should have authority to obtain the information necessary to exercise discretion. If that requires employing a private care manager, benefits specialist, advocate or other professional, the instrument should permit it.

A third-party trust should also make clear, where consistent with the settlor's intent, that the beneficiary's lifetime interests take priority over preservation of assets for remainder beneficiaries.

One formulation may provide:

The Trustee shall consider the availability and value of governmental and private benefits, services and resources available to the Beneficiary but shall not be required to withhold an otherwise appropriate distribution solely because the distribution may reduce, suspend or eliminate a benefit. The Trustee may make such a distribution when the Trustee reasonably determines that the expenditure better serves the Beneficiary's health, safety, welfare, independence, dignity or quality of life.

A related provision may address service scarcity directly:

In determining whether to make a distribution for a good or service that may be available through a governmental or private program, the Trustee may consider not only the Beneficiary's legal eligibility for the program, but also the actual availability, reliability, timeliness and adequacy of the good or service and the reasonably foreseeable consequences to the Beneficiary if the Trustee declines to supplement or replace it with privately funded support.

The trustee should also be empowered to obtain assistance:

The Trustee may employ and compensate a care manager, social worker, public-benefits specialist, housing advocate, attorney or other professional to assess the Beneficiary's circumstances, identify unmet needs, evaluate available services, facilitate communication and make recommendations to the Trustee. Any such adviser shall serve in an advisory capacity unless separately appointed to a fiduciary office, and the Trustee shall retain responsibility for the exercise of discretionary authority.

Finally, where consistent with the settlor's wishes:

During the Beneficiary's lifetime, the Settlor's primary concern is the Beneficiary. The Trustee shall not withhold an otherwise appropriate distribution merely to preserve trust property for a remainder beneficiary, and no remainder beneficiary may object to a distribution properly made for the Beneficiary because the distribution reduces property that may ultimately pass in remainder.

These are not intended as a complete set of model provisions but to illustrate the point.

If the surrounding service system is uncertain, the governing instrument should create flexibility rather than impose assumptions about how care will be delivered decades into the future.

XIII. Conclusion

The special needs trust remains one of the most important planning tools available to families of individuals with disabilities, but the environment in which it operates has changed. Publicly funded systems are being asked to provide increasingly

individualized, labor-intensive services to a growing population at the same time the workforce required to deliver those services is under extraordinary pressure. Meanwhile, the unpaid family caregivers who have historically filled countless gaps are aging, financially strained, and finite. The result is a widening divide between what the system promises and what families can reliably obtain. Sometimes that gap is caused by inadequate funding. Sometimes it is workforce shortages, bureaucracy, geography, housing scarcity, or provider capacity. Sometimes the system simply fails. Whatever the cause, planners have to confront the reality in front of them. Eligibility for Medicaid-funded services does not guarantee that an appropriate provider will be available when needed. Financial projections that assign no economic value to decades of unpaid parental support are incomplete. Trustees cannot assume that a theoretically available public benefit is actually delivering an adequate service. Families cannot assume that a sibling, agency, or professional fiduciary will somehow absorb every function the parents currently perform. Identifying these limits is not an argument against Medicaid, stronger public systems, or continued advocacy. It is what responsible planning requires.

Families planning today cannot wait for the system of tomorrow. They have to build from the resources that actually exist, and for many beneficiaries that will require Medicaid-funded services, Social Security benefits, family and community involvement, technology, professional care management, advocacy, and private funds working together. The special needs trust sits at the center of that private planning. Its historic role was to preserve eligibility while providing supplemental benefits. Its practical role is now much broader. It may pay for the care manager who sees a problem before it becomes a crisis, the private support needed when an authorized shift goes unfilled, the housing the public system cannot provide, the advocate who challenges an inappropriate reduction in services, or the transportation and technology necessary to sustain community life. These are not merely enhancements. They may be what keeps the plan functioning. The challenge for special needs planners is not to abandon the concept of supplementation, but to recognize that the line between supplemental and essential support has moved. Public benefits should be preserved when preservation serves the beneficiary. Private resources should be protected so they remain available over the beneficiary's lifetime. But neither preservation of benefits nor preservation of principal should ever displace the central purpose of the planning: the person. In an increasingly fragile service-delivery environment, the supplemental needs trust may be the resource that makes the rest of the plan possible. It may be the safety net beneath the safety net.

Appendix A

Questions for Counsel and Families: Testing the Assumptions Behind the Plan

A useful special needs planning discussion should move beyond identifying benefits and naming fiduciaries. Counsel should understand what the beneficiary's daily life actually requires and how much of that life is presently being sustained by family.

The family should be asked to describe an ordinary week. Who provides transportation? Who arranges medical care? Who communicates with service providers? Who handles benefits paperwork? Who monitors whether authorized services are actually delivered? Who manages emergencies? Who knows the beneficiary's routines, preferences, communication style and warning signs?

The discussion should then turn to transition. If the principal caregiver could no longer perform those functions tomorrow, who would assume each one? Is that person aware of the expectation? Is the person willing and realistically able to do it? If no family member can perform the role, does an appropriate professional or agency exist, and what would that service cost?

Public benefits should be examined at the same level of detail. What services is the beneficiary legally eligible to receive? Which of those services is the beneficiary actually receiving? Are authorized hours fully staffed? Are there waiting lists for additional services? Is the current housing sustainable? Are available providers adequate and reliable? How much unpaid family intervention is currently necessary to make publicly funded services work?

The financial plan should then be tested against those answers. What expenses will arise when unpaid family assistance is no longer available? Does the projected trust funding assume that existing governmental services will continue unchanged? Has the financial plan accounted for private care management, housing, transportation, advocacy and emergency support? If the public service system becomes less reliable, how much additional private expenditure could the trust sustain?

Finally, the family should consider whether the transition can be tested while the current caregivers are still able to participate. Can a successor attend planning meetings now? Can a care manager assume selected responsibilities? Can an agency take over a task the parent currently performs? Can the future trustee become familiar with the beneficiary before a crisis forces an immediate transition?

The object is not to predict every future problem. It is to identify which parts of the current plan depend upon assumptions that have never been tested.

Appendix B

Questions for Trustees: Eligibility, Availability and Adequacy

When a beneficiary needs a significant good or service that may be available through a public program, the trustee should first identify the relevant benefit and determine the beneficiary's legal eligibility. That is only the beginning.

The trustee should then determine whether the service is actually available. Is there an appropriate provider? Can the provider begin services within a reasonable period? Can authorized hours be staffed? Is an appropriate residential placement actually open? Does the transportation benefit function in the beneficiary's community?

If a service is available, the trustee should evaluate adequacy. Does it meet the beneficiary's actual needs? Is it reliable? Is the amount of service sufficient? Does it promote the beneficiary's safety, independence and community participation, or is it merely the closest available option?

The trustee should next consider the proposed private expenditure. What will the expenditure accomplish? What governmental benefit, if any, may be reduced? What is the economic value of the benefit that may be affected? Is there a less expensive private alternative? Is the expenditure likely to prevent a larger future cost or a more restrictive placement?

Finally, the trustee should consider the consequences of declining the expenditure. What happens to the beneficiary if no private money is spent? Does the beneficiary remain safe? Does a family member continue filling the gap without compensation? Is housing jeopardized? Does the beneficiary lose employment, community participation or meaningful social connection? Does the unmet need create a foreseeable crisis?

The proper fiduciary analysis is not simply whether a government program theoretically pays for the same category of service. The question is whether the trustee, after considering the beneficiary's circumstances, available public and private resources and the long-term sustainability of the trust, has made an informed decision about what course best advances the purposes of the trust.

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[i] Alice Burns, Abby Wolk & Molly O'Malley Watts, *A Look at Waiting Lists for Medicaid Home- and Community-Based Services from 2016 to 2025*, KFF (Nov. 20, 2025). KFF cautions that states differ significantly in their screening and reporting methodologies, so waiting-list data should not be treated as a uniform measure of unmet need.

[ii] Id. KFF reported an average 2025 waiting period of thirty-two months among responding states, with an average of thirty-seven months for individuals with intellectual and developmental disabilities.

[iii] ANCOR, *The State of America's Direct Support Workforce Crisis 2025* (2025). The survey included 469 community-based providers operating in forty-eight states and the District of Columbia. Eighty-eight percent reported moderate or severe staffing shortages; 62 percent had turned away referrals for lack of staff; 29 percent had discontinued programs or services; and 56 percent operated in areas with few or no alternative providers offering comparable services.

[iv] Medicaid & CHIP Payment & Access Comm'n, *Report to Congress on Medicaid and CHIP* (Mar. 2026), ch. 1, discussing Medicaid payment policies supporting the HCBS workforce and noting annual HCBS-worker turnover of approximately 40 to 60 percent.

[v] *Olmstead v. L.C.*, 527 U.S. 581, 597–603 (1999).

[vi] AARP & National Alliance for Caregiving, *Caregiving in the U.S. 2025* (July 2025). The study estimates that approximately 63 million Americans provide ongoing care to an adult or child with a complex medical condition or disability, an increase of approximately 20 million from 2015.

[vii] See Restatement (Third) of Trusts §§ 50, 76, 77 (Am. L. Inst. 2003); Uniform Trust Code §§ 801–804, 814. The precise duties and scope of review applicable to discretionary trustees vary under governing state law.

[viii] *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, 38 Misc. 3d 363, 376–80, 956 N.Y.S.2d 856 (Sur. Ct. N.Y. Cnty. 2012). The case has long been useful in illustrating the affirmative need for a trustee administering a discretionary trust for a beneficiary with significant disabilities to obtain sufficient information about the beneficiary and available services to make informed distribution decisions. The administrative principle is also reflected in special needs trust literature emphasizing communication, investigation, consideration and documentation in the exercise of trustee discretion, including an article submitted by Edward Wilcenski & Tara Anne Pleat (me 😊) being presented at this Stetson conference.

[ix] Social Security Administration, *Helpful SSI Changes Reducing Customer Burden Take Effect* (Sept. 30, 2024); Social Security Administration, *SSI Spotlight on Living Arrangements Regulatory Changes*, 2026 ed. Effective September 30, 2024, SSA stopped counting food in its in-kind support and maintenance calculation, expanded the rental-subsidy exception nationwide and revised the public-assistance-household rules.

From Supplemental to Essential

When the Special Needs Trust Becomes the Safety Net

Tara Anne Pleat, Esq., CELA

Stetson Special Needs Trusts National Conference Conference

1

The traditional premise

Supplement, not supplant.

An important legal construct, and an incomplete description of the world these trusts now operate in.

Special needs trust
Pays for what programs do not

Public benefits
Provide the foundation

2

A question of capacity

A legislature can authorize a program. An agency can approve a service. A court can recognize a right. ight.

None of those creates an available caregiver at two o'clock in the morning on a Saturday.

3

Waiting lists for home and community services

600,000+

people on waiting or interest lists in 41 states

KFF, 2025

32 months

average wait for services

37 months

for people with intellectual and developmental disabilities

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4

The workforce behind the services

88%

report moderate or severe staffing shortages

62%

turned away new referrals

29%

discontinued programs or services

ANCOR 2025 survey of 469 community providers

WILCENSKI PLEAT LAW

5

What the numbers mean for a family

A service that cannot be staffed	**is not a service.**
An approved residential program without an available bed available bed	**is not housing.**
Forty authorized hours that can be staffed for only twenty-twenty-five	**is not forty hours of support.**

WILCENSKI PLEAT LAW

6

Why capacity is under strain

63 million

family caregivers, roughly one in four adults.
Up about 20 million in a decade.
AARP and NAC, 2025

- Community living spreads staff across many settings
- Individualized care resists economies of scale
- People with disabilities are living longer
- Families are smaller and farther apart

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7

Three questions for every support

Eligibility	Availability	Adequacy
Does the beneficiary qualify?	Is there someone to deliver it?	Does it meet the need?

Eligibility is a legal determination. Service delivery is a human one.

WILCENSKI PLEAT LAW

8

The family as care infrastructure

- Coordinate medical appointments
- Supervise staff
- Manage benefits
- Arrange transportation
- Monitor medications
- Respond to crises
- Communicate with providers
- Maintain social connections

So embedded in family life that they disappear from the financial plan.

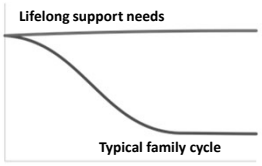
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9

The transition families face

Less like handing responsibility responsibility to a successor. More like replacing an entire entire operating system.

A parent's knowledge is not replaced automatically.



Parental support over time

10

What " take care of" means

Will the sibling…
Serve as trustee?
Attend medical appointments?
Manage Medicaid recertifications?
Respond to emergencies?
Cover an unstaffed shift?
Bring the beneficiary home to live?

Good planning should should not depend on on vague expectations expectations of family family sacrifice.

11

Sorting what the parent does today

Each function the parent performs now

Transferred to other family

Provided by public programs

Purchased privately

Framed this way, the importance of private resources becomes obvious.

12

When " supplemental" pays for essentials

Housing	No suitable public placement, or a family home that must be stabilized
Direct care	Hours Medicaid authorized that no worker is available to fill
Care management	Eyes on the ground for a trustee hundreds of miles away away

None of these is an extra.

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13

A line that moves

Supplemental when	Essential when	
Private aide	Medicaid hours are staffed	they are not
Care manager	public coordination works	it does not
Housing	it enhances independence	it prevents homelessness

The legal name of the trust has not changed, but the work the trust is doing has.

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14

Funding the life that will actually exist

30 hours

a week of unpaid parental support is a cost the family has absorbed

Projections need a margin for reality.

The better question

What will the trust be expected to purchase over the beneficiary's beneficiary's lifetime? lifetime?

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15

The trustee's job

A trustee cannot administer a special needs trust solely from account statements.

Discretion requires judgment. Judgment requires information.

16

The winter coat

- Unquestioned authority to buy it
- No meaningful effect on benefits
- Plainly serves the purposes of the trust

And nobody tells the trustee the beneficiary needs one.

17

Filling the trustee's information gap

Professional trustee	Family trustee
Brings continuity and financial infrastructure	**Brings** intimate knowledge of the beneficiary
May lack firsthand knowledge of daily life daily life	**May lack** benefits and fiduciary experience

The care manager supplies information. The trustee uses it.

18

The three questions as a fiduciary framework

Eligible?	Available?	Adequate?
If not, the trust may be be the only source	A provider, an opening, staffed hours	Reliable, safe and sufficient

Only then: should private trust funds be used?

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19

Declining to spend is also a decision

Declining to spend while a beneficiary loses stable stable housing	**A discretionary decision**
Waiting for a provider while a parent in her eighties eighties provides care	**A discretionary decision**
Preserving a modest cash benefit over safety or independence	**A discretionary decision**

Matter of JP Morgan Chase Bank, N.A. (Marie H.), N.Y. Sur. Ct. 2012

WILCENSKI PLEAT LAW

20

When preserving benefits is the wrong goal

The benefit lost	vs.	The housing obtained
A reduced monthly SSI payment		Safe, stable and otherwise unavailable

Today's benefits manual cannot sensibly become tomorrow's immutable statement of settlor statement of settlor intent.

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21

Scarcity inside the trust

The trust cannot become a a substitute Medicaid program.

It can be used strategically. strategically.

Too generous
Decades of private staffing can deplete even a large trust

Too conservative
Principal is conserved and the settlor's purpose purpose is not fulfilled

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A network rather than a single successor

Money + advocacy = = quality of life

Financial administration and human-services administration are different competencies.

- Trustee
- Family
- Care manager
- Benefits specialist
- Attorney
- Financial professional
- Guardian or agent
- Providers

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Testing the plan before a crisis

- A sibling attends care-planning meetings
- A care manager takes on selected coordination
- A provider assumes a task the family has always done
- The future trustee meets the people involved
- Transportation runs without parental backup

If it succeeds, confidence grows. If it fails, failure is valuable information.

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Drafting for flexibility (paper, Section XII)

Benefit reduction	*"…shall not be required to withhold an otherwise appropriate appropriate distribution…"*
Service scarcity	*"…the actual availability, reliability, timeliness and adequacy of adequacy of the good or service…"*
Outside advisers	*"…may employ and compensate a care manager, social worker… worker… or other professional…"*
Remainder interests	*"…the Settlor's primary concern is the Beneficiary."*

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For counsel and families: Appendix A

What are you doing now that somebody else will need to know how to do when you are gone?

- Who does what in an ordinary week?
- Who takes each function tomorrow?
- Which services actually arrive?
- What will replacing family cost?
- What can we test now?

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For trustees: Appendix B

Has the trustee made an informed decision about what best advances the purposes of the trust?

- Is the beneficiary legally eligible?
- Is the service actually available?
- Is it adequate and reliable?
- What will spending accomplish?
- What happens if we decline?

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It may be the safety net beneath the safety net.

Neither preservation of benefits nor preservation of principal should displace the central purpose of the planning: the person.

Tara Anne Pleat, Esq., CELA · www.WPLawNY.com

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National Conference on Special Needs Planning and Special Needs Trusts

Friday
October 23, 2026

The Update

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Materials Pending: Speaker has requested that materials be distributed at or after the conference. Please check the online materials for availability, as these materials will not be included in the printed conference materials.

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Unexpected Expenses When Immigration Status is at Issue

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Please check the materials website to see if materials and/or PowerPoint slides for this session were uploaded after these binders/PDF files were created.

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Don’t Bring a Hammer When You Need a Screwdriver: Choosing the Right AI Tool

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DON'T BRING A HAMMER WHEN YOU NEED A SCREWDRIVER:

Choosing The Right AI Tool And Building An AI Policy That Works

By: Crystal West Edwards, Esq., CELA*
Porzio, Bromberg & Newman, P.C.
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Every week brings a new AI product promising to transform legal practice. For most firms and businesses, the question is no longer whether to use AI, but which tool fits which job and what rules should govern its use. A general-purpose chatbot is not a legal research database, a contract review platform is not a timekeeping system, and a tool appropriate for polishing a newsletter may be entirely inappropriate for a client's confidential file. Selecting the wrong tool, or permitting lawyers and staff to select tools without guidance, exposes the firm and its clients to risks implicating confidentiality, privilege, candor to the tribunal, billing, and supervision.

This paper addresses the scope of AI and common misconceptions, the ethical framework governing responsible AI use, the reasons every firm should adopt a written AI policy, the components that policy should include, and the steps for deployment. It then reviews the major categories of AI products, their practical uses, and the guardrails necessary to maintain client confidentiality and comply with ethics obligations. Whether the reader practices in a large firm, a solo office, or an in-house department, the principle is the same: don't bring a hammer when you need a screwdriver.

UNDERSTANDING THE SCOPE OF ARTIFICIAL INTELLIGENCE

Before practitioners can select the right tool, they need a shared vocabulary. "AI" describes everything from spam filters to systems capable of drafting entire briefs. Think of AI as a toolbox rather than a single tool.

Predictive and Analytical AI

Lawyers who believe they have never used AI have likely been relying on predictive or analytical AI for years. Predictive or analytical AI identifies patterns in data and makes predictions based on those patterns. Spam filters operate on these principles.

Generative AI

Generative AI creates new content (text, images, or code) in response to a prompt. ChatGPT, Claude, Gemini, and Copilot are the products most people have in mind when they refer to AI today. These tools produce content by predicting the most likely next words in a sequence, which explains

both their fluency and their potential for confident inaccuracy. When generative AI produces authoritative-sounding but fabricated content, the result is called a "hallucination."

Agentic AI

Agentic AI is the newest category. These systems plan and carry out multi-step tasks on the user's behalf, such as browsing the internet, completing forms, or sending email. More autonomy means greater need for oversight; agentic tools require the closest supervision of any category discussed here.

Embedded AI

The category practitioners most often overlook is embedded AI., which has features built into software the firm already licenses. Word, Outlook, Zoom, Westlaw, Lexis, and many practice management platforms have added AI functionality, sometimes enabled by default. A firm may not have deliberately adopted AI, yet its lawyers and staff may use it daily. Any AI policy must account for embedded AI as well as standalone products.

SEPARATING MYTH FROM REALITY

Much of the hesitation and overconfidence surrounding AI in law practice stems from persistent misconceptions. Addressing them helps practitioners understand both capabilities and risks.

Myth: "AI Looks Up the Answer"

Generative AI is not a search engine. A large language model generates text that sounds right; it does not retrieve verified information from a database. It can invent cases, citations, and quotations with complete confidence.

Mata v. Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023), brought this risk to the profession’s attention. The plaintiff sued Avianca for injuries when a metal serving cart struck his knee during a flight. When Avianca moved to dismiss, plaintiff's counsel filed an opposition citing judicial opinions inclusive of fabricated quotations generated by ChatGPT. Judge P. Kevin Castel imposed a $5,000 sanction under Rule 11[1], holding the firm jointly and severally liable. Rule 11(b) provides that by presenting a filing, an attorney certifies that the legal contentions are warranted by existing law or a nonfrivolous argument for extending it. A citation to a nonexistent case cannot satisfy that certification. Courts nationwide have since sanctioned lawyers for the same mistake.[2]

[1] *See* Rule 11, Fed. R. Civ. P.

[2] *See* Mata v. Avianca, Inc., 678 F. Supp. 3d 448 (S.D.N.Y. 2023)

Myth: "Legal-Specific Tools Don't Hallucinate"

Many practitioners assume that paying for a legal research product solves the hallucination problem. Legal tools grounded in real databases are much better than general-purpose chatbots, but better is not perfect. A 2024 Stanford study found that leading legal research AI tools still produced incorrect or unsupported answers roughly 17% to 33% of the time.[3] Purchasing a legal-specific product does not relieve the lawyer of the obligation to verify output.

Myth: "AI Will Replace Lawyers"

AI replaces tasks, not judgment. First drafts, summaries, and document sorting are well suited to AI assistance. Professional judgment, the client relationship, and professional responsibility for the work remain with the lawyer.

Myth: "If We Don't Use AI, We Have No AI Risk"

AI features are now embedded in email, word processing, videoconferencing, and research platforms. Employees may also use free tools on personal accounts without telling anyone, which is called "shadow AI." A firm that has not adopted AI does not have an AI-free practice; it has unmanaged AI.

Myth: "My Chats with AI Are Private"

Consumer versions of many AI tools retain conversation history and may use inputs to train models unless the user opts out. *United States v. Heppner*, No. 25 Cr. 503 (JSR) (S.D.N.Y. Feb. 17, 2026), addressed the privilege consequences. The defendant, a former corporate executive indicted on securities and wire fraud, used the consumer version of an AI platform to generate approximately 31 documents analyzing his legal exposure and potential defenses. He did this on his own initiative, not at counsel's direction, which he later shared with his attorneys. The documents were seized when the FBI executed a search warrant.[4]

Judge Jed S. Rakoff ruled that the documents were not protected. An AI platform is not an attorney and cannot form an attorney-client relationship. The defendant's exchanges with a publicly available platform were not confidential communications with counsel. The documents were not work product because they were not prepared by or at counsel's direction. The decision treats the AI provider as a third party and underscores the risk of entering confidential information into consumer AI tools.[5]

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[3] Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools, Journal of Empirical Legal Studies, 2025; 0:1-27, https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf

[4] United States v. Heppner, Guo, Elizabeth, Harvard Law Review, https://harvardlawreview.org/blog/2026/03/united-states-v-heppner

[5] *See* Heppner

RESPONSIBLE AI USE IN LAW FIRMS

Responsible AI use does not require a new ethical framework. Instead, it requires applying existing rules of professional conduct to new tools.[6] On July 29, 2024, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 512, *Generative Artificial Intelligence Tools*, its first comprehensive guidance on the subject. Opinion 512 maps generative AI use onto the ABA Model Rules.[7]

Competence (Rule 1.1)

Rule 1.1 requires competent representation, including the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Comment 8 provides that lawyers should keep abreast of changes in the law and its practice, including the benefits and risks of relevant technology. Opinion 512 applies these principles: a lawyer need not be an expert, but must reasonably understand the capabilities and limitations of the tools used, including what a tool does with entered data and how reliable its output is.

Confidentiality (Rule 1.6)

Rule 1.6(a) prohibits revealing information relating to client representation absent informed consent or an applicable exception, and Rule 1.6(c) requires reasonable efforts to prevent inadvertent or unauthorized disclosure. Practitioners must evaluate where client data goes when entered into an AI tool.

Opinion 512 addresses "self-learning" tools (those that may use inputs to inform later outputs). Because information entered by one user could be disclosed in response to a later prompt, the opinion concludes that informed client consent is required before entering client information into such a tool. Consent must actually be informed: "merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient." A meaningful conversation with the client about the tool and associated risks is required.

Communication and Fees (Rules 1.4 and 1.5)

Rule 1.4 requires lawyers to reasonably consult with clients about the means of accomplishing objectives and to explain matters as necessary for informed decisions. Depending on circumstances, clients may need to know when AI affects the representation.

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[6] See American Bar Association Model Rules of Professional Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

[7] American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 512, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf

Rule 1.5 prohibits unreasonable fees or expenses. Under Opinion 512, a lawyer billing hourly must bill for time actually spent, not the time the task would have taken without AI. If AI reduces a three-hour task to thirty minutes, the bill should reflect thirty minutes. Lawyers generally should not charge for time spent learning a general-purpose tool, and any AI costs passed through must be reasonable.

Supervision and Candor (Rules 5.1, 5.3 and 3.3)

Rule 5.1 requires partners and lawyers with managerial authority to ensure the firm has measures giving reasonable assurance that all lawyers conform to the rules. Rule 5.3 imposes a parallel obligation for nonlawyer assistance. Opinion 512 applies these directly: "[m]anagerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools."

Rule 3.3(a)(1) prohibits knowingly making a false statement to a tribunal or failing to correct one previously made. With Rule 11, discussed in the context of *Mata*, the lesson is straightforward: the lawyer owns every citation filed with the court, and every filing must be verified.

State Guidance

Many states have issued their own guidance. Florida Bar Ethics Opinion 24-1 (January 19, 2024)[8] concludes that lawyers may use generative AI but must protect confidentiality, provide accurate and competent services, avoid improper billing, and comply with advertising restrictions. The New Jersey Supreme Court's *Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers* (January 24, 2024)[9] emphasize that AI does not change fundamental duties but lawyers must be aware of new technology challenges. Practitioners should review current guidance in each jurisdiction where they practice.

Quality Control and Human Review

Regardless of how capable a tool may be, it must never substitute for critical thinking or produce finalized work product on its own. AI may assist with drafting and analysis, but it is a support tool, not a decision maker. No finalized material should be submitted to a colleague, client, court, or agency without thorough verification and review for accuracy, completeness, and legal sufficiency.

[8] https://www.floridabar.org/etopinions/opinion-24-1/

[9] https://www.njcourts.gov/sites/default/files/notices/2026/03/n260330c.pdf

Attorneys are also responsible for adhering to court or client requirements regarding AI disclosure. Many judges have standing orders on this issue, and many corporate clients address AI in outside counsel guidelines.

Bias and Content Standards

AI-generated content can reflect and amplify biases embedded in training data, including stereotyping, exclusionary language, or overemphasis on certain perspectives. Tools used in hiring, lending, tenant screening, or risk assessment can produce discriminatory outcomes, but the same concern applies to everyday drafting. Prompts must be drafted carefully, lawyers and staff should never use AI to generate offensive or discriminatory content, and all output should be reviewed with a critical eye for bias.

WHY YOUR FIRM NEEDS AN AI POLICY

Whether the practice is a large firm, a solo office, or an in-house department, a written AI policy is quickly becoming a basic expectation for three principal reasons.

First, AI is already in the office. Staff may be using free tools on personal devices without approval. The question is not whether AI is being used, but whether with guidance or without. A clear policy brings "shadow AI" into the open.

Second, the rules require reasonable measures. Rules 5.1 and 5.3 place partners and managers on the hook for ensuring compliance. Opinion 512 specifically identifies clear policies and training as part of meeting that duty.

Third, clients, courts, and carriers are asking. Corporate clients add AI provisions to outside counsel guidelines. Judges have issued standing orders on AI use and disclosure. Malpractice and cyber insurers increasingly ask about AI governance.

A policy also protects the firm less obviously: by giving clear permission to use the right tools, it often stops people from using the wrong ones.

WHAT YOUR AI POLICY SHOULD INCLUDE

The components below are drawn from actual firm policies and the ethics guidance above. Each firm should tailor them to its size, practice areas, and technology environment.

Scope and Purpose

The policy should define what counts as an AI tool, identify who is covered (attorneys, staff, contractors, and vendors), and explain why the policy exists. A well-drafted purpose statement acknowledges both sides: AI platforms can be useful for brainstorming, outlining, stylistic tasks, drafting, summarizing documents, and preparing materials. At the same time, they pose risks to data

security and confidentiality, can result in privilege waiver, and do not always produce accurate or unbiased output.

Approved Tools and the Approval Process

The firm should maintain a published list of tools vetted by IT and security, easily accessible to all. The policy should establish a clear process for requesting and approving new tools, including advance approval for tools carrying additional cost. Many firms also monitor usage and revoke underutilized licenses.

Prohibited Inputs and Data Protection

The policy should specify what may never be entered into an AI tool, and where. General instructions such as "be careful with client data" are insufficient; people need concrete examples. The following language is adapted from an actual firm policy:

> *Employees are prohibited from entering into AI platforms any information that is sensitive, confidential, privileged, or protected by law, except for in firm-approved GAI Tools that guarantee prompts will not be captured outside the firm's technical boundaries. This prohibition includes any information that contains personal data, i.e., any information that can be linked to an identifiable person (such as name, location, date of birth, an online device identifier, etc.), trade secrets, intellectual property, financial information, or other sensitive data of our clients, our firm and employees, or third parties.*

This language identifies both the prohibited categories and the limited exception for firm-approved tools that keep data within the firm's control.

Human Review and Verification

The policy should make explicit that AI assists but does not decide, and that no AI output leaves the firm until a responsible attorney or staff member has reviewed and verified it.

Disclosure and Client Communication

The policy should address when the firm will tell clients and courts about AI use, assign responsibility for tracking court rules and client guidelines, and decide when it will proactively disclose AI use to clients.

Billing for AI-Assisted Work

Consistent with Opinion 512, the policy should require billing for time actually spent, prohibit charging for time learning general-purpose tools, and require disclosure of any AI costs passed through. Firms should also consider whether value-based or flat fees make more sense for AI-assisted work.

Training, Incident Reporting and Enforcement

The policy should require training before access to a tool and tell people what to do if something goes wrong. Reportable incidents include inadvertent inclusion of confidential information in a prompt, or the realization that AI has produced incorrect output used in work product. Incidents and policy violations should be reported immediately to IT and security personnel.

The policy should state that violations may result in disciplinary action, including access limitation or termination. It should make clear that all users are responsible for protecting confidential data and that proper use supports ethical obligations and client trust. The policy should supplement existing policies on confidentiality, privacy, and professional conduct. Finally, the firm should commit to reviewing the policy regularly, because the technology will not stand still.

DEPLOYING YOUR AI POLICY

A policy in a drawer protects no one. Deployment is where most firms succeed or fail. The following roadmap works for firms of any size.

1. **Form an AI governance team.** In a large firm, this may include IT, security, general counsel, risk management, and practice group leaders. In a small firm, it may be two partners and the IT consultant. Either way, include someone who does the day-to-day work.
2. **Inventory how AI is already being used.** Find out what is happening and where the pain points are. A short anonymous survey is often eye-opening.
3. **Define the jobs to be done.** Identify where people lose time (i.e. research, drafting, intake, or billing). That list should drive tool selection, not the other way around.
4. **Vet vendors and pilot.** Start small. Never pilot with live client confidential information until the tool has been approved; use non-client or anonymized data.
5. **Launch with training.** Roll out the policy with training and a published list of approved tools. People need to know what is allowed, not just what is forbidden.
6. **Monitor and update.** Track usage, audit outputs, and revisit the policy at least annually.

Match the Tool to the Task

This is the heart of the matter. Too many firms purchase the tool everyone is talking about, then look for ways to use it. The better approach is to flip that sequence and begin with the problem. If the firm's greatest pain point is time entry, a research platform will not help. If the need is contract review, a general-purpose chatbot is wrong. The best tool is the one built for the job.

Once the job has been defined, vet the vendor and then pilot the tool. This means confirming how data is stored, used, and protected before anyone uploads a single document. A pilot with a small

group on realistic, non-client scenarios reveals whether the tool saves time and how often its output requires correction. Time saved and error rates should be measured before firm-wide rollout.

Vendor Due Diligence

The following questions should be put to every vendor, with answers obtained in writing.

Data Use and Retention. The most important question is whether firm inputs will train the vendor's models. Enterprise agreements usually say no; consumer terms often say yes unless the user opts out. Also ask how long prompts and outputs are retained and whether they can be deleted.

Security and Access. Ask about encryption, independent audit reports (such as SOC 2 Type II or ISO 27001), single sign-on, and access controls. Determine where data is hosted and who at the vendor can access it.

Contract Protections. The agreement should include confidentiality obligations, prompt breach notification, limits on subcontractors, and confirmation that the firm and client own inputs and outputs. If the firm handles health information, a business associate agreement under HIPAA may be required.

One Firm's AI Toolbox

Matching tools to tasks rarely results in a single product. My firm did not choose one AI product; it chose several, each for a specific job:

- **Copilot**, an enterprise AI assistant embedded in Microsoft tools, for secure drafting, summarization, and workflow support;
- **Spellbook**, a contract-focused tool designed to enhance drafting accuracy, identify risks, and improve review efficiency;
- **Harvey**, a legal AI platform supporting research, analysis, and complex drafting tailored to legal professionals;
- **Laurel**, an AI-driven timekeeping system that automates time capture and improves billing accuracy; and
- **Blue J**, an AI-powered tax research tool that analyzes case law and predicts likely outcomes based on fact patterns.

Each tool went through IT and security review, each has its own training, and each appears on the firm's approved list. That is the screwdriver-not-hammer approach in action.

CHOOSING THE RIGHT TOOL: TYPES OF AI PRODUCTS

With the policy framework in place, practitioners can turn to the toolbox itself. For each category below, this paper identifies examples, best uses, and the guardrails practitioners should observe. Product names are examples, not endorsements, and the market changes monthly.

General-Purpose AI Chatbots

General-purpose chatbots, like consumer versions of ChatGPT, Claude, Gemini, and Copilot, are the most accessible AI tools and the most frequently misused. Often free or low cost, they are well suited for brainstorming, explaining a concept in plain language for a client newsletter, outlining a presentation, or tightening a paragraph containing no confidential information.

Treat a consumer chatbot like a public space. Do not enter client names, facts, or documents into a consumer plan. Review privacy settings, including whether conversations are used for training, and never rely on a chatbot for legal authority without independent verification. *Heppner* bears repeating: the court treated a consumer AI platform as a third party. This is a reason to counsel clients about using these tools to analyze their own legal matters.

Enterprise AI Assistants

Enterprise AI assistants, like Microsoft 365 Copilot, ChatGPT Enterprise, Claude for Enterprise, and Gemini for Google Workspace, are licensed to the organization, typically with commitments not to train on organizational data and with administrative controls. They are most useful inside the firm's environment: summarizing email threads, drafting responses, or locating documents.

The key guardrail is permissions. An enterprise assistant can see whatever the user can see. If document management or SharePoint permissions are loose, the AI will expose that weakness. For example, by summarizing a confidential HR file for someone who technically had access but never should have. Clean up file permissions and ethical walls before rollout, confirm that the contract bars training on firm data, and confirm retention settings, audit logging, and which features are covered by the enterprise terms.

Legal Research AI

Legal research tools, like Lexis+ AI, Westlaw with CoCounsel, vLex Vincent, Bloomberg Law, and specialty tools such as Blue J for tax, connect a language model to a curated database of cases, statutes, and secondary sources. That grounding makes them far more reliable than general-purpose chatbots, well suited to finding authority, summarizing case law, and preparing first drafts of research memoranda.

Reliable is not infallible. As the Stanford study demonstrates, these tools can misstate holdings or cite sources that do not support the proposition for which they are cited. The guardrail is simple and non-negotiable: pull and read every authority cited, confirm it says what the tool claims, and confirm it is still good law. Neither Rule 3.3 nor Rule 11 contains an AI exception. Check any applicable standing order on AI use and disclosure before filing.

Drafting and Contract Review AI

Drafting and contract review tools, like Spellbook, Harvey, and the AI features of document assembly and contract management platforms, work inside Word or on a dedicated platform. They can generate first drafts, compare clauses, redline contracts against the firm's preferred positions, and flag unusual or missing provisions.

Because these tools work on client documents by design, they must go through vendor vetting. Depending on how the tool handles data, Opinion 512 may require informed client consent before uploading client documents. The lawyer remains responsible for every word of the final draft; AI can miss context a lawyer would catch, such as a side agreement or the client's real business goals.

E-Discovery and Document Review AI

E-discovery is where AI in law has its longest track record. Courts have accepted technology-assisted review for more than a decade, and platforms such as Relativity aiR, Everlaw, and DISCO now layer generative AI on top. These tools are best used to prioritize large document sets, screen for privilege, and summarize productions.

Guardrails center on defensibility. Validate results through statistical sampling to confirm the tool is finding what it should. Protective orders and ESI protocols may restrict where data can be sent or require disclosure of the review methodology; follow them. Be prepared to explain and defend the process if challenged.

AI Meeting Notetakers and Transcription

Meeting assistants, like Zoom AI Companion, Microsoft Teams recap, and Otter, are spreading rapidly, often arriving uninvited when another participant's bot joins a call. They are useful for internal meeting notes, action items, and dictation.

Three guardrails apply. First, privilege: a third-party service recording a privileged conversation raises questions similar to *Heppner*; use only approved tools, or none, on client calls. Second, recording laws: several states, including Florida, require all-party consent, so announce the recording and obtain consent. Third, retention: transcripts are discoverable records. Know where they are stored, how long they are kept, and incorporate them into records retention.

Practice Management, Billing and Timekeeping AI

Tools such as Laurel, Clio Duo, Smokeball, and the AI features of practice management platforms address the business side of practice. Automated time capture can recover otherwise-lost time, and AI can draft billing narratives and help organize matters and deadlines.

The bill is the lawyer's representation to the client. Review every auto-generated time entry for accuracy and reasonableness before billing, consistent with Rule 1.5, and ensure narratives do not

reveal privileged details if invoices are shared or produced. Deadlines are malpractice territory; AI may suggest dates, but never calendar a deadline without human confirmation.

Client-Facing Chatbots and Intake Tools

Website chat assistants, automated intake forms, and AI answering services can handle scheduling, collect basic intake information, and answer general FAQs. These tools carry unique risks because the AI speaks for the firm to people who are not yet clients.

The tool should not give legal advice (unauthorized practice concerns) and should make clear that no attorney-client relationship yet exists and that the user is interacting with AI. Rule 1.18 provides that information from a prospective client may disqualify the lawyer from adverse representations, so limit what the tool collects and route that information into conflict checks. Anything the tool says is a communication about the lawyer's services; Rule 7.1 prohibits false or misleading communications, and Florida Bar Ethics Opinion 24-1 requires compliance with advertising restrictions. For practices serving vulnerable clients, ensure a human is easy to reach.

GUARDRAILS THAT TRAVEL WITH EVERY TOOL

The guardrails above vary by category, but four principles apply to every tool.

Know Where the Data Goes. Read the terms. Who stores the data, who can see it, and is it used for training? If the practitioner cannot answer, the tool is not ready for client information.

Get Informed Consent When Needed. Opinion 512 is clear: before confidential client information enters a tool that could disclose it, a genuine conversation with the client may be required.

Verify Before You Rely. Every citation, fact, and number must be checked. Every sanctions decision involving AI comes down to someone skipping this step; the signature on the filing belongs to the lawyer.

Supervise People and Tools. Train staff, monitor use, and treat AI the same as nonlawyer assistance under Rule 5.3. The lawyer is responsible for the work that goes out.

Before you use any AI tool, ask yourself: Is this the right tool for this job? Is this tool approved by my firm? Am I entering confidential client information, and can I anonymize it? Do I need the client's informed consent? Does the court or client require disclosure? Who will verify the output before it is used?

***

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Don't Bring a Hammer When You Need a Screwdriver: Choosing the Right AI Tool

Finding the Right Fit and Building an AI Policy That Works

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1

Agenda Overview

- Understanding the Scope of AI & Debunking Common Myths
- Responsible AI Use in Law Firms
- Why Your Firm Needs an AI Policy
- What Your AI Policy Should Include
- Deploying Your AI Policy
- Choosing the Right Tool: Types of AI Products
- Guardrails for Client Confidentiality & Attorney Ethics

2

Understanding the Scope of AI

3

The AI Toolbox: What Counts as AI?

Predictive & Analytical AI
Finds patterns and makes predictions: e-discovery review, litigation analytics, spam filters. Lawyers have used it for years.

Generative AI
Creates new text, images, or code from a prompt: ChatGPT, Claude, Gemini, Copilot. Powerful, but it can "hallucinate."

Agentic AI
Plans and carries out multi-step tasks on your behalf, such as browsing, filling in forms, or sending email. It needs the closest supervision.

Embedded AI
AI features built into tools you already own: Word, Outlook, Zoom, Westlaw, Lexis, and practice management software.

4

Myth vs. Reality

Myth: "AI looks up the answer."
Reality: Generative AI predicts likely words. It can invent cases and quotations with total confidence (Mata v. Avianca, S.D.N.Y. 2023).

Myth: "Legal-specific tools don't hallucinate."
Reality: A 2024 Stanford study found leading legal research AI tools still gave incorrect or unsupported answers roughly 17% to 33% of the time.

Myth: "AI will replace lawyers."
Reality: AI replaces tasks, not judgment. The duties of competence and supervision stay with you.

5

More Myths, Debunked

Myth: "If we don't use AI, we have no AI risk."
Reality: AI is already embedded in everyday software, and staff may be using personal accounts on their own ("shadow AI").

Myth: "My chats with AI are private."
Reality: Consumer tools may retain and train on inputs. A court held a defendant's chats with a public AI tool were not privileged (U.S. v. Heppner, S.D.N.Y. 2026).

Myth: "One tool can do it all."
Reality: Different jobs call for different tools, and different guardrails. That is the point of today's session.

6

Responsible AI Use in Law Firms



7

Ethical Foundations: ABA Formal Opinion 512

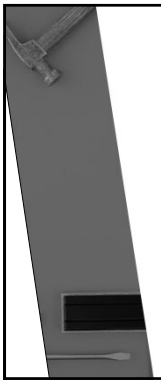
Competence (Rule 1.1)
Understand the capabilities and limits of the tools you use. You need not be an expert, but you must be reasonably informed.

Confidentiality (Rule 1.6)
Know where client data goes. Informed client consent may be required before inputting client information into self-learning tools.

Communication & Fees (Rules 1.4, 1.5)
Tell clients when AI use affects the representation. Bill for time actually spent and reasonable costs.

Supervision & Candor (Rules 5.1, 5.3, 3.3)
Set firm policies, train lawyers and staff, and verify every filing before it reaches a court.

8



Quality Control and Professional Responsibility

AI as a Support Tool (not a decision maker)
AI may assist with drafting and analysis but cannot replace attorney judgment.

Mandatory Human Review & Verification
All AI-assisted work must be reviewed for accuracy, completeness, and legal sufficiency before use or submission.

Disclosure Obligations (court/client rules)
Comply with all court and client rules regarding disclosure of AI use in legal work.

9

Risks of bias and discrimination in AI-generated content

Risk of Bias in AI Outputs

AI may reflect biases present in training data, leading to incomplete or unfair results.

User Responsibility (Input Controls)

Prompts must be carefully drafted to avoid generating inappropriate or misleading content.

Prohibited Content

Do not generate or rely on output that is offensive, discriminatory, or exclusionary.

10

Why Your Firm Needs an AI Policy



11

Why a Policy, and Why Now?

AI Is Already in Your Office

Staff may be using free tools on personal devices whether or not you have approved them. A policy brings "shadow AI" into the open.

The Rules Require Reasonable Measures

Rules 5.1 and 5.3 require managers to ensure that lawyers, staff, and the tools they use comply with professional obligations.

Clients, Courts & Carriers Are Asking

Outside counsel guidelines, judicial standing orders, and malpractice and cyber insurers increasingly ask about your AI rules.

12

What Your AI Policy Should Include



13

Core Policy Components

Scope & Purpose
Who is covered (attorneys, staff, contractors, vendors), which tools, and why the policy exists.

Approved Tools & Approval Process
A published list of vetted tools and a clear process for requesting and approving new ones.

Prohibited Inputs & Data Protection
What may never go into an AI tool, especially consumer tools without firm-level protections.

Human Review & Verification
No AI output leaves the firm without review by a responsible attorney or staff member.

14

Sample Policy Language: Prohibited Inputs

Strict Prohibition of Sensitive Data Input
Employees must not enter confidential or legally protected information into AI platforms unless using approved tools.

Approved Exceptions (firm tools only)
Only firm-approved generative AI tools that keep prompts within the firm's technical boundaries may be used with protected data.

Examples of Protected Data
Personal data, trade secrets, intellectual property, financial information, and other sensitive client, firm, employee, or third-party information.

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Core Policy Components (cont.)

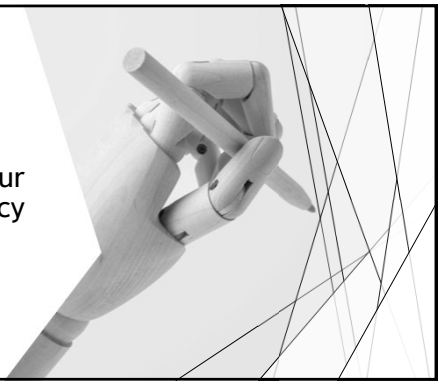
Disclosure & Client Communication
When to tell clients and courts about AI use, and how the firm tracks court rules and standing orders.

Billing for AI-Assisted Work
Bill for time actually spent, don't charge for learning general-purpose tools, and disclose any AI costs passed through.

Training, Reporting & Enforcement
Required training, a clear path for reporting incidents, consequences for violations, and a schedule for review.

16

Deploying Your AI Policy



17

Deploying Your Policy: A Roadmap

1. Form an AI governance team: leadership, IT and security, risk management, and staff
2. Inventory how AI is already being used and where the pain points are
3. Define the jobs to be done before shopping for tools
4. Vet vendors and pilot with non-client or anonymized data
5. Launch with training and a published approved-tools list
6. Monitor use, audit outputs, and revisit the policy at least annually

18



Finding the Right Tool: Match the Tool to the Task

Define the Job First
Start with the problem (research, drafting, intake, billing), not the product. The best tool is the one built for the job.

Vet the Vendor
Confirm how data is stored, used, and protected before anyone uploads a single document.

Pilot Before You Commit
Test with a small group on realistic, non-client scenarios. Measure time saved and error rates before a firm-wide rollout.

19

Vendor Due Diligence: Questions to Ask

Data Use & Retention
Is our data used to train the model? How long are prompts and outputs kept, and can we delete them?

Security & Access
Encryption, SOC 2 Type II or ISO 27001 reports, single sign-on, access controls, and where data is hosted.

Contract Protections
- Confidentiality terms and prompt breach notification
- A business associate agreement if health information is involved
- Clear ownership of inputs and outputs

20

Choosing the Right Tool: Types of AI Products



21

General-Purpose AI Chatbots

Examples
Consumer versions of ChatGPT, Claude, Gemini, and Copilot, often free or low cost.

Best Used For
Brainstorming, plain-language explanations, outlines, and polishing non-confidential writing.

Guardrails
No client information on consumer plans. Check whether inputs train the model, adjust privacy settings, and verify every fact.

22

Enterprise AI Assistants

Examples
Microsoft 365 Copilot, ChatGPT Enterprise, Claude for Enterprise, and Gemini for Google Workspace.

Best Used For
Summarizing internal documents, drafting emails, and working across the firm's own files.

Guardrails
They can see whatever the user can see, so clean up file permissions first. Confirm the contract bars training on firm data.

23

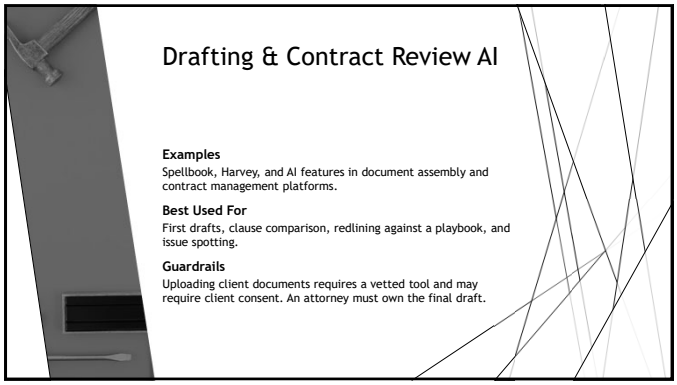
Legal Research AI

Examples
Lexis+ AI, Westlaw with CoCounsel, vLex Vincent, Bloomberg Law, and specialty tools such as Blue J for tax.

Best Used For
Finding authority, summarizing case law, and first drafts of research memos grounded in real sources.

Guardrails
Not hallucination-proof. Read every case you cite, confirm it says what the tool claims, and check that it is still good law.

24



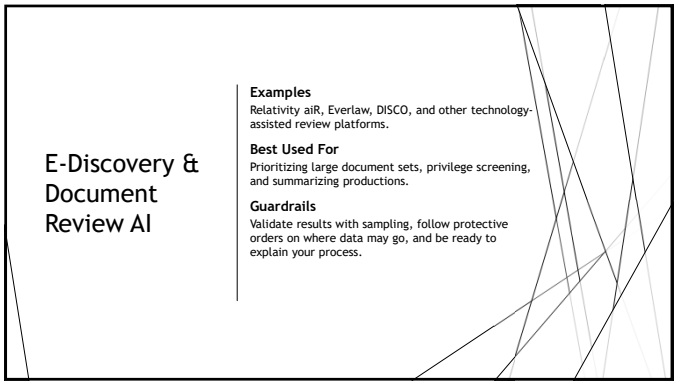
Drafting & Contract Review AI

Examples
Spellbook, Harvey, and AI features in document assembly and contract management platforms.

Best Used For
First drafts, clause comparison, redlining against a playbook, and issue spotting.

Guardrails
Uploading client documents requires a vetted tool and may require client consent. An attorney must own the final draft.

25



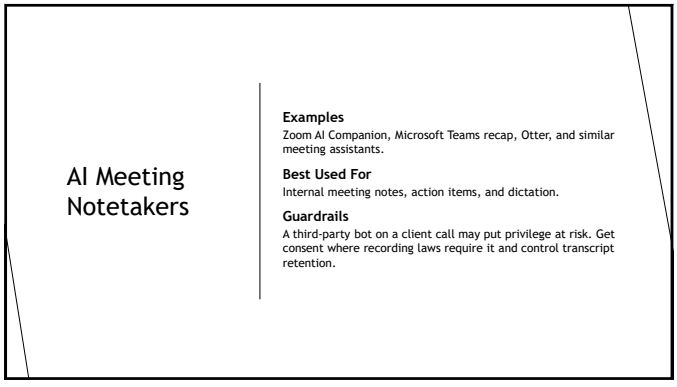
E-Discovery & Document Review AI

Examples
Relativity aiR, Everlaw, DISCO, and other technology-assisted review platforms.

Best Used For
Prioritizing large document sets, privilege screening, and summarizing productions.

Guardrails
Validate results with sampling, follow protective orders on where data may go, and be ready to explain your process.

26



AI Meeting Notetakers

Examples
Zoom AI Companion, Microsoft Teams recap, Otter, and similar meeting assistants.

Best Used For
Internal meeting notes, action items, and dictation.

Guardrails
A third-party bot on a client call may put privilege at risk. Get consent where recording laws require it and control transcript retention.

27

Practice Management, Billing & Timekeeping AI

Examples
Laurel, Clio Duo, Smokeball, and AI features in practice management platforms.

Best Used For
Capturing time automatically, drafting billing narratives, and organizing matters and deadlines.

Guardrails
Review every auto-generated time entry before billing (Rule 1.5). Never let a tool calendar a deadline without human confirmation.

28

Client-Facing Chatbots & Intake Tools

Examples
Website chat assistants, automated intake forms, and AI answering services.

Best Used For
Scheduling, collecting basic intake information, and answering general FAQs.

Guardrails
Don't give legal advice, protect prospective-client information (Rule 1.18), disclose that users are talking to AI, and keep marketing claims truthful (Rule 7.1).

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One Firm's AI Toolbox



- **COPILOT** - Enterprise AI assistant embedded in Microsoft tools for secure drafting, summarization, and workflow support
- **SPELLBOOK** - Contract-focused AI tool designed to enhance drafting accuracy, identify risks, and improve review efficiency
- **HARVEY** - Legal AI platform supporting research, analysis, and complex drafting tailored to legal professionals
- **LAUREL** - AI-driven timekeeping system that automates time capture and improves billing accuracy
- **BLUE J** - AI-powered tax research tool that analyzes case law and predicts likely outcomes based on fact patterns. Supports faster, more data-informed legal analysis and decision-making

30

Guardrails for Client Confidentiality & Attorney Ethics



31

Universal Guardrails for Every Tool

Know Where the Data Goes
Read the terms. Who stores it, who can see it, and is it used for training?

Get Informed Consent When Needed
Before putting confidential client information into a tool that could disclose it, talk to the client.

Verify Before You Rely
Check every citation, fact, and number. The signature on the filing is yours.

Supervise People and Tools
Train staff, monitor use, and treat AI like a nonlawyer assistant under Rule 5.3.

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Before You Use Any AI Tool, Ask:

- Is this the right tool for this job?
- Is this tool approved by my firm?
- Am I entering confidential client information, and can I anonymize it?
- Do I need the client's informed consent?
- Does the court or client require disclosure?
- Who will verify the output before it is used?

33

Right Tool, Right Job

- Start with the task, then choose the tool
- Put your AI policy in writing, and train on it
- Confidentiality, verification, and supervision go with every tool
- Questions? cwedwards@pbnlaw.com

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STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

Friday
October 23, 2026

Beyond Preservation: Balancing Beneficiary Quality of Life, Fiduciary Duties, and Public Benefits

STETSON LAW

Center for Elder Justice

Access and Justice For All®

Beyond Preservation: Balancing Beneficiary Quality of Life, Fiduciary Duties, and Public Benefits in Special Needs Trust Administration

Eric J. Einhart, Esq.
Stetson Special Needs Trust Conference • 2026

October 23, 2026

CLE Written Materials

I. Beyond Preservation: What is the Trust For?

Special needs trust administration is often taught through warnings. Do not make a distribution that turns an excluded trust into a countable resource. Do not create avoidable SSI income. Do not jeopardize Medicaid eligibility. Do not make an imprudent expenditure. Do not exhaust the trust. Those warnings matter. They reflect real legal rules and legitimate fiduciary concerns. But they can distort the inquiry if they become the inquiry itself.

The trustee must exercise the discretion the trust confers, for the purposes for which it was created, and in light of the beneficiary's circumstances. Public-benefit preservation, prudent stewardship, and quality of life all matter; none should automatically substitute for the others.

The New York Court of Appeals captured that balance in *Matter of Abraham XX.*, describing a supplemental needs trust as serving the dual purpose of securing or maintaining eligibility for publicly funded services while enhancing the beneficiary's quality of life through supplemental care paid from the trust.[1] Although *Abraham XX.* arises under New York law, the formulation identifies the tension that fiduciaries and their counsel confront nationally: preserving access to important public benefits while deciding how trust assets can appropriately be used for the person the trust was created to benefit.[2]

Thoughtful administration does not mean approving every request. A proposed distribution may fall outside the instrument, threaten an important benefit, disproportionately benefit someone else, create an unsustainable obligation, or consume assets needed later. Caution is appropriate. The problem is when caution substitutes for discretion.

Difficult distribution decisions are easier to analyze if counsel keeps four questions separate:

1. **Authority.** Does the governing instrument, read together with applicable fiduciary law, authorize the proposed distribution?

[1] *Matter of Abraham XX.*, 11 N.Y.3d 429, 434, 900 N.E.2d 136, 138 (2008) (describing a supplemental needs trust as a planning tool used for the dual purpose of "securing or maintaining eligibility for state-funded services" and "enhancing the disabled person's quality of life with supplemental care paid by his or her trust assets")

[2] See Frederick M. Misilo Jr. & Theresa M. Varnet, *Understanding Special Needs Planning*, ABA GPSolo eReport (Oct. 24, 2023) (describing an SNT as a property-management tool that can maximize eligibility for means-tested benefits, pay for supplemental services and supports that enhance quality of life, and protect trust assets from loss or exploitation). https://www.americanbar.org/groups/gpsolo/resources/ereport/2023-october/understanding-special-needs-planning/. See also Special Needs Alliance, *Frequently Asked Questions*, https://www.specialneedsalliance.org/frequently-asked-questions/.

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2. **Public benefits.** What consequences, if any, will the distribution or proposed method of payment have for SSI, Medicaid, housing assistance, or other benefits the beneficiary actually receives?
3. **Fiduciary judgment.** Is the expenditure reasonable and prudent in light of this beneficiary's circumstances, the purposes of this trust, its available resources, and reasonably foreseeable future needs?
4. **Structure.** Can the beneficiary's objective be accomplished in another way that better preserves benefits, reduces cost, limits unnecessary benefit to third parties, or otherwise improves the result?

These questions overlap, but they are not interchangeable. A distribution may be authorized by the trust and still reduce SSI. A distribution may have no adverse SSI consequence and still be outside the trustee's authority or imprudent under the circumstances. An expenditure may be legally permissible but financially unsustainable. And, in an appropriate case, accepting a known public-benefit consequence may produce a better overall result for the beneficiary than preserving every available benefit dollar.

Public-benefit rules identify consequences. They do not necessarily decide whether the trustee should act. That judgment begins with the governing instrument and applicable fiduciary law and requires attention to the beneficiary, trust purposes and resources, and practical alternatives.

The objective, is neither maximum spending nor maximum preservation, but thoughtful administration. The question throughout is simple: *what is this trust actually for?*

II. Know the Trust You Are Administering

A. "Special Needs Trust" Does Not Describe One Uniform Arrangement

Before analyzing a distribution, identify the trust being administered. "Special needs trust" does not describe a single legal arrangement or uniform set of distribution rules.

A first-party trust established under 42 U.S.C. § 1396p(d)(4)(A) contains the assets of an individual with a disability who is under age 65 when the trust is established. The trust must be established for that individual's benefit by the individual, a parent, grandparent, legal guardian, or court, and must provide for reimbursement to the State or States at the beneficiary's death up to the amount of Medicaid assistance paid on the beneficiary's behalf.[3]

A pooled trust under § 1396p(d)(4)(C) is established and managed by a nonprofit association. Although funds may be pooled for investment and management, a separate account must be maintained for each beneficiary, and the account must be established solely for the benefit of an

[3] 42 U.S.C. § 1396p(d)(4)(A) (excluding from the general Medicaid trust rules a trust containing the assets of an individual under age 65 who is disabled, established for the individual's benefit by the individual, parent, grandparent, legal guardian, or court, and containing the required Medicaid reimbursement provision). The authority for the individual to establish the trust directly was added by the 21st Century Cures Act, Pub. L. No. 114-255, § 5007, 130 Stat. 1033, 1191 (2016). See also CMS, State Medicaid Director Letter No. 17-001 (May 15, 2017).

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individual with a disability. At death, amounts remaining in the account that are not retained by the pooled trust are subject to the statutory Medicaid reimbursement requirement.[4]

A third-party SNT is different. It is funded with assets belonging to someone other than the beneficiary or the beneficiary's spouse.[5] It does not become a § 1396p(d)(4)(A) trust merely because it contains supplemental-needs language or is intended to preserve means-tested benefits. For SSI purposes, a third-party trust is generally evaluated under ordinary trust-resource principles, including whether, under the instrument and applicable state law, the beneficiary can revoke or terminate the trust or direct the use of trust principal for the beneficiary's own support and maintenance.[6]

These classifications affect the governing distribution framework First-party trusts carry federal statutory requirements, including Medicaid reimbursement at death; pooled trust also operate under their master trust and joinder agreement; and third-party trusts reflect a settlor's choices and may create materially different remainder interests and distribution priorities.

Do not begin with a generic rule about what an "SNT" can pay for. Begin with the particular trust.

B. Start With the Governing Instrument

The instrument should be read before the POMS.

The POMS is indispensable when SSI eligibility or distribution treatment is at issue, but it answers a different question: how SSA will evaluate the trust or distribution. It does not define the trustee's discretion under the governing instrument.

Counsel should therefore begin by asking what the trust actually authorizes. What is its stated purpose? What distribution standard applies? Is the trustee directed to supplement but not supplant public benefits, or merely authorized to consider them? Is discretion broad, or tied to health, education, maintenance, support, comfort, welfare, or another standard? Does the instrument address housing, transportation, caregivers, companions, travel, technology, education, recreation, or professional services? Must the trustee consider other resources? Does another person, committee, trust protector, or co-trustee have a role in distribution decisions?

The instrument may also establish priorities that become obscured when administration is viewed primarily through the lens of public benefits. A trust may expressly prioritize the beneficiary's lifetime needs and quality of life. Another may place greater emphasis on preservation or require consideration of other beneficiaries. Some instruments authorize distributions even when doing so may reduce or eliminate a public benefit if the trustee concludes that the expenditure better serves the beneficiary. Others are considerably more restrictive.

Counsel should not replace the distribution standard selected by the settlor, court, or statute with a generic rule that the trustee must always preserve benefits or principal.

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[4] 42 U.S.C. § 1396p(d)(4)(C); SSA Program Operations Manual System (POMS) SI 01120.203 (setting forth the requirements applicable to pooled trusts and the treatment of amounts remaining at death).

[5] SSA POMS SI 01120.200.B.16 (defining a third-party trust as a trust established with the assets of someone other than the trust beneficiary or the beneficiary's spouse).

[6] SSA POMS SI 01120.200.D.1–2 (explaining that resource treatment depends on the beneficiary's legal authority to revoke or terminate the trust or direct use of trust assets for the beneficiary's own support and maintenance, with revocability and control determined by the trust terms and applicable state or tribal law).

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C. Governing Law Matters

Trust administration remains largely a matter of state law. The Uniform Trust Code offers a useful national framework for duties such as prudence, loyalty, impartiality, delegation, and discretionary powers, but states have adopted and modified its provisions differently, and some rely substantially on other statutory and common-law principles.[7]

Judicial decisions require the same caution. A decision from one state may illuminate a recurring fiduciary problem, without establishing a national rule. Counsel should confirm that the principle fits the governing instrument and applicable law.

For national practice, keep the sources distinct: identify controlling federal public-benefit law, the governing instrument, and applicable state fiduciary law. None should silently substitute for another.

D. Determine Whether the Court has an Ongoing Role

Some special needs trusts, particularly first-party trusts created or approved in a guardianship, settlement, or other judicial proceeding, remain subject to court supervision. Federal law permits certain first-party special needs trusts to be established through the action of a court, but it does not prescribe a uniform system of continuing judicial oversight.[8] Depending on applicable state law, court rules, and the order governing the trust, a trustee may be required to obtain court approval for certain distributions or transactions, file periodic accountings, or otherwise remain subject to judicial review.[9]

The extent of court involvement is jurisdiction-specific and may also depend on the proceeding and governing order.[10] The fact that a court established or approved a first-party trust does not, by itself, establish that the court retained continuing supervisory jurisdiction over its administration. Counsel should therefore review the specific establishing order, together with applicable state law and court rules, to determine whether the proceeding has concluded or the court retained an ongoing role and, if so, whether the trustee may act independently, must obtain prior approval for particular transactions, must file periodic accountings, or will otherwise be subject to judicial review.

Court oversight should not be viewed solely as a reason to avoid distributions. Judicial scrutiny may extend to a trustee's failure to investigate the beneficiary's circumstances and meaningfully exercise discretion for the beneficiary's benefit. In Matter of J.P. Morgan Chase Bank, N.A. (Marie H.), the court emphasized the trustees' obligation to remain informed about the beneficiary's condition, needs, and quality of life and to use trust assets for his actual benefit.[11] Marsman v. Nasca, although not a special needs trust case, similarly illustrates that a trustee with discretionary distribution authority

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[7] Uniform Law Commission, *Uniform Trust Code*, Final Act with Comments (2025); see also Uniform Law Commission, *Trust Code—Enactment Kit* (2025) (providing the uniform text and state enactment materials).
[8] 42 U.S.C. § 1396p(d)(4)(A); SSA Program Operations Manual System (POMS) SI 01120.203.B.7.
[9] See, e.g., Cal. Prob. Code § 3604(a)(1); Cal. R. Ct. 7.903(b)–(c); *Matter of Martin*, 38 Misc. 3d 895, 898–902, 957 N.Y.S.2d 608, 611–14 (Sup. Ct. Suffolk Cnty. 2012).
[10] Compare Cal. Prob. Code § 3604(a)(1) and Cal. R. Ct. 7.903 with *Matter of Martin*, 38 Misc. 3d 895, 957 N.Y.S.2d 608. See also Robert Dinerstein, Frank A. Johns & Patricia E. Kefalas Dudek, *Guardianships vs. Special Needs Trusts, and Other Protective Arrangements: Ensuring Judicial Accountability and Beneficiary Autonomy*, 72 Syracuse L. Rev. 423 (2022).
[11] *Matter of J.P. Morgan Chase Bank, N.A. (Marie H.)*, 38 Misc. 3d 363, 368–70, 956 N.Y.S.2d 856, 860–62 (Sur. Ct. N.Y. Cnty. 2012).

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may be required to make sufficient inquiry into the beneficiary's circumstances to exercise that discretion meaningfully.[12]

E. Identify the Interests the Trust Actually Creates

The identity of the trust also matters because not every person or entity that may receive trust property in the future has the same interest in current administration.

In a third-party trust, the settlor may create remainder interests for siblings, charities, or others and may direct the trustee to consider preservation of principal. Another settlor may make clear that the current beneficiary's lifetime welfare takes priority and that preservation for remainder beneficiaries is secondary. Applicable state law may impose duties concerning multiple beneficiaries, but the nature of those duties must be evaluated in light of the interests the instrument actually creates.

A first-party § 1396p(d)(4)(A) trust presents a different issue. Federal law requires the trust to provide for reimbursement to the State or States at the beneficiary's death, up to the amount of Medicaid assistance paid on the beneficiary's behalf.[13] That reimbursement requirement is significant, but it should not automatically be treated as a direction to maximize the eventual Medicaid recovery by minimizing otherwise appropriate lifetime distributions. The statute establishes a right of reimbursement from amounts remaining at death; the trustee's authority to make lifetime distributions must still be determined from the trust, applicable federal requirements, and governing fiduciary law.[14]

A pooled trust may present yet another structure. Federal law permits the nonprofit association to retain amounts remaining in a beneficiary's account at death; to the extent amounts are not retained, the statutory Medicaid reimbursement provision applies.[15] The master trust and joinder agreement may further define the disposition of the account and the fiduciary's administrative responsibilities.

For counsel, the better question is therefore not simply, "Who receives what is left?" It is: *whose interests does this trust require the fiduciary to consider during the beneficiary's lifetime, what is the nature of those interests, and how do they bear on the particular distribution decision?*

III. Fiduciary Duties in the Special Needs Trust Context

A. Administering According to Terms and Purposes

The Uniform Trust Code Sections 801 and 804 provide a useful frame work. A trustee administers the trust in good faith according to its terms and purposes, and prudence is measured against the

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[12] *Marsman v. Nasca*, 30 Mass. App. Ct. 789, 795–97, 573 N.E.2d 1025, 1029–30 (1991).

[13] 42 U.S.C. § 1396p(d)(4)(A); SSA POMS SI 01120.203.B.1.h (requiring qualifying special needs trusts to provide reimbursement to any State that provided medical assistance, up to the amount of such assistance).

[14] 42 U.S.C. § 1396p(d)(4)(A). The first sentence is primary authority for the reimbursement requirement. The proposition that this requirement does not itself create a lifetime duty to maximize Medicaid recovery is an interpretive proposition drawn from the statutory text, which conditions reimbursement on "amounts remaining in the trust upon the death" of the beneficiary. I would retain the carefully qualified language in the text rather than cite a secondary source purporting to establish a broader national rule.

[15] 42 U.S.C. § 1396p(d)(4)(C)(iv) (providing that, to the extent amounts remaining in a pooled-trust account at death are not retained by the trust, the State receives the remaining amounts up to the total Medicaid assistance paid on the beneficiary's behalf).

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trust's purposes, terms, distributional requirements, and circumstances.[16] Applicable state law controls, but the principle is important: fiduciary judgment begins with the trust actually created.

Purpose matters. A trustee is not simply managing an investment account and trying to preserve as much principal as possible. Depending on the instrument, the trust may have been created not only to preserve eligibility for means-tested benefits, but also to provide the beneficiary with greater comfort, independence, safety, community participation, education, recreation, housing, advocacy, or access to goods and services that public programs do not provide.

"Quality of life" is not an unlimited distribution standard. But where an instrument grants broad discretion for welfare or supplemental needs, the trustee should not impose an unwritten requirement that expenditures be medically necessary or essential to basic support.

B. Prudence Is Contextual

Prudence applies to decisions to spend trust assets and decisions not to spend them. Under UTC § 804, prudent administration is evaluated in light of the purposes, terms, distributional requirements, and other circumstances of the trust. The Uniform Prudent Investor Act similarly directs a trustee, in investing and managing trust assets, to consider circumstances including the trust's purposes, distribution requirements, liquidity needs, beneficiary resources, and the need for preservation or appreciation of capital.[17]

Prudence is contextual. Counsel may need to consider trust size and liquidity, the beneficiary's age and foreseeable needs, other resources, expected benefits, housing and medical needs, taxes, inflation, recurring commitments, and the practical value of the expenditure.

Recurring expenditures require particular attention. A $500 monthly expense may appear modest when viewed as a single distribution but represents $6,000 each year before inflation. Counsel should consider whether the expense is likely to continue, whether the trust can sustain it, and whether approval may create a practical expectation of continued funding. Conversely, a substantial one-time expenditure may improve independence, safety, communication, transportation, or housing in a way that reduces other costs or produces lasting value.

Prudence does not necessarily require the least expensive alternative. A more reliable wheelchair, safer vehicle, better-suited residence, or higher-quality communication device may be reasonable if the additional cost is justified by the beneficiary's circumstances, trust purposes, and resources.

Nor should preservation automatically become the answer whenever future needs are uncertain. *Marsman v. Nasca* provides a useful illustration. There, the Massachusetts Appeals Court held that a trustee administering a discretionary "comfortable support and maintenance" standard had a duty to inquire into the beneficiary's financial circumstances. In doing so, the court relied on Massachusetts

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[16] Unif. Trust Code §§ 801, 804 (Unif. L. Comm'n 2000, as amended 2025) (requiring administration in good faith in accordance with the trust's terms and purposes and the interests of beneficiaries, and prudent administration in light of the trust's purposes, terms, distributional requirements, and other circumstances). Applicable state enactments control. See Uniform Law Commission, *Uniform Trust Code, Final Act with Comments* (2025). https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d.

[17] Unif. Prudent Investor Act § 2(a)–(c) (Unif. L. Comm'n 1994). **One qualification:** the UPIA directly governs investment and management rather than establishing a freestanding distribution standard. I would therefore use it as supporting context, as the revised text does, rather than suggesting that UPIA § 2 itself governs every distribution decision.

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precedent rejecting a persistent policy of conserving trust assets for possible future medical needs when the trust had been established for the beneficiary's comfortable support.[18] *Marsman* is not an SNT case and does not establish a national distribution rule. Its value here is more basic: prudence requires attention to the purposes of the trust and the beneficiary's actual circumstances, not preservation for preservation's sake.

C. Loyalty, Conflicts, and Family Dynamics

UTC § 802 expresses the duty of loyalty as administration of the trust solely in the interests of the beneficiaries.[19] In SNT practice, that principle frequently operates in complicated family settings. A parent may serve as both trustee and caregiver. A sibling may be trustee and remainder beneficiary. A family member may seek compensation, live in a trust-owned residence, use a trust-funded vehicle, or accompany the beneficiary on travel.

A benefit to another person does not automatically make an expenditure impermissible. In the context of first-party and pooled trusts subject to the federal sole-benefit requirement, SSA guidance expressly recognizes that a payment made primarily for the beneficiary may confer a collateral benefit on another person. The POMS also recognizes that family members may be compensated for services in appropriate circumstances and that certain incidental expenses of companions may be paid by the trust.[20]

But the public-benefit analysis and the fiduciary analysis remain separate. A transaction may satisfy SSA's sole-benefit policy and still present a conflict under the governing instrument or applicable state fiduciary law. Conversely, a transaction that is permissible under state trust law may fail a federal requirement applicable to a particular first-party or pooled trust.

Counsel should ask both questions: does the expenditure satisfy applicable public-benefit requirements, and, if the trustee or a related person benefits, what do the instrument and governing fiduciary law require? Depending on the circumstances, safeguards may include independent valuation, service documentation, a disinterested decision-maker, legally effective consent, or court approval.

Family compensation illustrates the point. The relationship alone does not answer whether payment is proper. Relevant facts include the services provided, their reasonable value, other available funding, conflicts, sustainability, and who should approve the arrangement.

D. Impartiality Does Not Mean Equality

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[18] *Marsman v. Nasca*, 30 Mass. App. Ct. 789, 795–97, 573 N.E.2d 1025, 1029–30 (1991) (holding that a trustee administering a discretionary "comfortable support and maintenance" standard was required to inquire into the beneficiary's financial circumstances and citing Massachusetts authority rejecting persistent conservation of trust assets for possible future medical needs where the trust was established for beneficiaries' comfortable support).

[19] Unif. Trust Code § 802(a) (Unif. L. Comm'n 2000, as amended 2025) ("A trustee shall administer the trust solely in the interests of the beneficiaries."). Applicable state enactments and the governing instrument should be consulted concerning particular conflict rules and permissible transactions.

[20] SSA Program Operations Manual System (POMS) SI 01120.201.F.3.a (providing that third-party payments must be for the beneficiary's primary benefit but should not be construed so strictly as to preclude collateral benefit to another person; recognizing family members as permissible service providers and certain incidental companion expenses); id. SI 01120.201.F.3.b (addressing qualifying third-party travel expenses); id. SI 01120.201.F.4 (addressing reasonable trustee compensation and administrative expenses).

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UTC § 803 provides that when a trust has two or more beneficiaries, the trustee must act impartially in investing, managing, and distributing trust property, giving due regard to the beneficiaries' respective interests.[21] The important words are "respective interests." Impartiality does not necessarily require equal distributions, equal economic benefit, or preservation of equal value for current and remainder beneficiaries.

Those interests are defined principally by the governing instrument and applicable law. A settlor may create a trust principally to provide for a beneficiary during life and leave whatever remains to siblings or other remainder beneficiaries. Another instrument may reflect a meaningful preservation objective. The fiduciary analysis should respect those differences.

When remainder beneficiaries object that lifetime distributions diminish their expected inheritance, counsel should identify the nature of their interests under the instrument and governing law than assume their existence creates a principal-preservation. requirement.

E. Discretion Must Actually Be Exercised

Broad discretion does not mean arbitrary discretion. Nor should discretion become a reason for inaction. UTC § 814 and the Restatement recognize limits on the exercise of discretionary powers, although the standard of judicial review depends on the governing instrument and applicable law.[22]

A trustee needs enough information to exercise discretion intelligently.

Marsman v. Nasca illustrates the point. The trustee had discretion to distribute principal for the beneficiary's "comfortable support and maintenance," but failed to make adequate inquiry into the beneficiary's financial circumstances. The Massachusetts Appeals Court concluded that the trust imposed a duty of inquiry and that the trustee had not met his responsibilities of either inquiry or distribution.[23] The significance of *Marsman* for SNT practice is not that every trustee must follow a prescribed investigation. It is that discretion based on a beneficiary's circumstances cannot be exercised meaningfully without sufficient information about those circumstances.

The experience of Mark C.H. provides an even more compelling SNT example. During an Article 17-A guardianship proceeding, the New York Surrogate's Court learned that Mark was the beneficiary of a trust worth approximately $3 million, yet his individual co-trustee had never visited him or contacted his residential program to determine his needs, and no trust funds had been spent for his benefit. The corporate co-trustee likewise acknowledged that it had done nothing to ascertain or meet his needs. The court directed the trustees either to visit Mark and his providers themselves or retain a qualified professional to investigate and make recommendations.[24]

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[21] Unif. Trust Code § 803 (Unif. L. Comm'n 2000, as amended 2025) (requiring a trustee of a trust having two or more beneficiaries to act impartially, "giving due regard to the beneficiaries' respective interests"). Applicable state enactments control.

[22] Unif. Trust Code § 814(a) (Unif. L. Comm'n 2000, as amended 2025); Restatement (Third) of Trusts § 50 (Am. L. Inst. 2003). I would avoid trying to summarize a universal judicial-review standard more specifically here because state law and the language conferring discretion matter materially.

[23] *Marsman*, 30 Mass. App. Ct. at 795–97, 573 N.E.2d at 1029–30. The court emphasized that even discretionary authority must be exercised with reasoned judgment and concluded that the trustee failed to satisfy his responsibilities of inquiry and distribution.

[24] *Matter of Mark C.H.*, 28 Misc. 3d 765, 767–68, 906 N.Y.S.2d 419, 421–22 (Sur. Ct. N.Y. Cnty. 2010) (describing the trustees' failure to visit Mark or investigate his needs and the court's direction that they either personally investigate or engage a qualified professional to do so).

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The resulting inquiry revealed needs and opportunities that passive administration had missed. A care manager learned that Mark enjoyed restaurant outings, music, and computers; could benefit from enhanced communication technology; had not had a vacation or visitor in years; and was receiving a Medicaid-covered form of medication that caused significant adverse effects when a better-tolerated formulation was available but not covered by Medicaid. Trust funds were subsequently used for goods and services intended to improve his habilitation and quality of life.[25]

The later trust-accounting decision involving Mark made the fiduciary lesson more explicit. The Surrogate's Court emphasized the trustees' responsibility to remain informed about Mark's condition, needs, and quality of life and to use the trust assets for his actual benefit.[26] These are New York trial-court decisions, not a national rule. But they illustrate a problem that can arise anywhere: a trust can be prudently invested, carefully preserved, and administratively compliant while still failing to do much for the person it was created to benefit.

The lesson is not that every SNT requires a care manager, but that individualized discretion requires an individualized understanding of the beneficiary.

F. Delegation and Professional Advice

A trustee need not possess every form of expertise relevant to modern SNT administration. UTC § 807 permits prudent delegation, subject to reasonable care in selecting the agent, defining the delegation, and reviewing performance.[27]

Useful advisers may include benefits counsel, care managers, accountants, investment advisers, therapists, housing, and technology specialists, and vocational professionals. Their role is to inform not replace, fiduciary judgment.

The amount of professional input should be proportionate to the decision. A $300 tablet ordinarily should not require a therapist's letter merely because the purchaser is a person with a disability. A $150,000 home modification may warrant an accessibility assessment, contractor proposals, financial projections, benefits analysis, and perhaps other professional input. The same principle applies to documentation generally.

The objective is enough information to make and explain a reasoned decision, not a medical-necessity file for every aspect of ordinary life.

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[25] *Id.* at 768–69, 906 N.Y.S.2d at 422–23 (describing the care manager's assessment, including Mark's interest in restaurant outings, music and computers, potential benefit from augmentative communication technology, lack of visitors and vacations, and medication issues, followed by use of trust funds for goods and services intended to improve his habilitation and quality of life).

[26] *Matter of J.P. Morgan Chase Bank, N.A. (Marie H.)*, 38 Misc. 3d 363, 368–70, 956 N.Y.S.2d 856, 860–62 (Sur. Ct. N.Y. Cnty. 2012). The subsequent accounting decision involving Mark's trust discussed the trustees' obligation to remain informed concerning Mark's condition, needs, and quality of life and the use of trust assets for his benefit. The proposition is also quoted and applied in *Matter of Andrew C.*, 59 Misc. 3d 968, 977, 73 N.Y.S.3d 840, 848 (Sur. Ct. Erie Cnty. 2017).

[27] Unif. Trust Code § 807(a)–(c) (Unif. L. Comm'n 2000, as amended 2025) (addressing prudent delegation, selection of an agent, establishment of scope and terms, and periodic review). Applicable state enactments control.

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IV. Public Benefits: Guardrails, Not the Distribution Standard

Public-benefit rules are essential, but they answer only part of the distribution question. Counsel should identify and where possible, quantify the benefit consequence, then return to the governing instrument and fiduciary analysis.

A. Separate Resource Treatment From Distribution Treatment

For SSI purposes, two questions that are easily conflated should remain separate: is the trust principal itself a countable resource, and how will a particular disbursement from the trust be treated? A trust may be excluded as a resource while particular disbursements are treated as income or in-kind support and maintenance depending on what the beneficiary receives and how the payment is made.[28]

For trusts established with assets of an SSI applicant or recipient, or the individual's spouse, on or after January 1, 2000, § 1613(e) of the Social Security Act generally supplies special trust-counting rules. Certain trusts satisfying the requirements of 42 U.S.C. § 1396p(d)(4)(A) or (C) may qualify for statutory exceptions from those rules.[29]

Third-party trusts are generally evaluated differently. Under SSA guidance, the resource inquiry ordinarily turns on whether the beneficiary has legal authority under the instrument and applicable state law to revoke or terminate the trust and use the funds for the beneficiary's support and maintenance, or to direct the use of trust principal for that purpose.[30]

Determine first whether the trust is a resource, then how the proposed disbursement will be treated. Neither inquiry decides whether the trustee should make the distribution.

B. Cash, Vendor Payments, Cards, and Reimbursements

When trust principal is not a resource, cash paid directly from the trust to an SSI recipient is generally unearned income. SSA applies the same treatment to funds placed on the beneficiary's personal debit card.[31]

Third-party payments often produce a different result. Under current SSA guidance, payments for many non-shelter goods and services do not constitute income when the beneficiary receives an item that would be an excluded non-liquid resource if retained. SSA identifies educational expenses, therapy, transportation, professional fees, uncovered medical services, telephone bills, recreation, and entertainment as examples of trust disbursements that may not count as income.[32]

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[28] SSA Program Operations Manual System (POMS) SI 01120.200.D–E (distinguishing whether trust principal constitutes an SSI resource from the income treatment of disbursements where trust principal is not a resource); see also POMS SI 01120.201.I.

[29] 42 U.S.C. § 1382b(e); 42 U.S.C. § 1396p(d)(4)(A), (C); SSA POMS SI 01120.201, SI 01120.203. The statute establishes the SSI trust-counting rules applicable to certain trusts containing an individual's assets; the POMS supplies SSA's operating guidance for applying those provisions.

[30] SSA POMS SI 01120.200.D.1 (providing that trust principal is a resource if the beneficiary has legal authority to revoke or terminate the trust and use the funds for support and maintenance, or can direct use of principal for support and maintenance; noting the relevance of the trust instrument and applicable state law).

[31] SSA POMS SI 01120.200.E.1.a; SI 01120.201.I.1.a (treating direct cash disbursements and disbursements to the beneficiary's personal debit card as unearned income when trust principal is not a resource).

[32] SSA POMS SI 01120.200.E.1.c; SI 01120.201.I.1.c (identifying educational expenses, therapy, transportation, professional fees, uncovered medical services, telephone bills, recreation, and entertainment as illustrative trust

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The method of payment can therefore change the SSI result without changing the underlying objective.

Administrator-managed prepaid cards are a good example. When the trustee owns and controls the card account, SSA looks to the purchases made with the card. Cash withdrawals count as unearned income, while treatment of purchases depends on what the beneficiary receives. If the beneficiary instead owns the prepaid-card account, amounts loaded onto the card are generally treated as unearned income, and an unspent balance may become a resource in the following month.[33]

Gift cards and gift certificates require separate analysis. SSA generally treats them as cash equivalents when they can be converted to cash or used in a manner covered by its cash-equivalent rules. Depending on the card's restrictions, receipt may constitute unearned income, and an unspent balance may become a resource in the following month.[34]

Reimbursement can produce another result. SSA states that reimbursement from a trust to a third party for funds spent on behalf of the beneficiary is not income to the beneficiary. The POMS specifically extends that treatment to reimbursement of a third party's credit card for purchases made for the beneficiary.[35] That treatment can make third-party reimbursement useful when direct beneficiary access to cash is unnecessary, but the income rule should not be confused with sound fiduciary administration. The trustee should maintain a sufficiently clear record establishing what was purchased, for whom, and in what amount. A dedicated card used only for beneficiary expenses can simplify that record. If a family member or other third party instead uses a personal card containing mixed charges, the trustee should require itemized statements and contemporaneous supporting documentation sufficient to identify the beneficiary's expenses before reimbursement.

Before advising that an expenditure will affect SSI, identify the payee, ownership of any account or card, the item purchased, and what the beneficiary will receive.

C. Shelter After the 2024 ISM Changes

SSI's in-kind support and maintenance rules changed materially in 2024. Effective September 30, 2024, SSA removed food from the ISM calculation. Under the current regulation, ISM concerns shelter received from another person, and shelter includes room, rent, mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewerage, and garbage collection.[36]

A trust payment for shelter may therefore result in countable ISM. That does not necessarily mean the beneficiary loses SSI. The amount of the reduction depends in part on which of SSA's two ISM

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disbursements that may not constitute income and explaining treatment of noncash items that would be excluded resources).

[33] SSA POMS SI 01120.200.E.1.e; SI 01120.201.I.1.e (addressing administrator-managed prepaid cards and distinguishing accounts owned by the trustee from accounts owned by the beneficiary)

[34] SSA POMS SI 01120.200.E.1.f; SI 01120.201.I.1.f; see also POMS SI 00830.522 (addressing gift cards and gift certificates as cash equivalents and their income and resource treatment). Because SSA's trust POMS retains some pre-2024 food-related terminology after food was removed from ISM, counsel should consult the current POMS and regulations when applying the rule to a particular card.

[35] SSA POMS SI 01120.200.E.1.g; SI 01120.201.I.1.g (providing that reimbursement to a third party for funds expended on behalf of the beneficiary, including reimbursement of a third party's credit card for beneficiary purchases, is not income to the beneficiary).

[36] 20 C.F.R. §§ 416.1102, 416.1130; *Omitting Food From In-Kind Support and Maintenance Calculations*, 89 Fed. Reg. 21,199 (Mar. 27, 2024) (effective Sept. 30, 2024). See also SSA, *Helpful SSI Changes Reducing Customer Burden Take Effect* (Sept. 30, 2024). The final rule removed food from the ISM calculation and left shelter as the relevant category.

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valuation rules applies. The one-third reduction rule (VTR) applies when the beneficiary lives throughout the month in another person's household, receives shelter from others within that household, and others within the household provide or pay for all of the beneficiary's meals. When the VTR applies, the federal benefit rate is reduced by one-third, and the reduction is not rebuttable by showing that the actual value of the support was lower. In other circumstances involving countable ISM, SSA generally applies the presumed maximum value (PMV) rule. The PMV is one-third of the federal benefit rate plus $20, but the beneficiary may establish that the actual value of the ISM received was lower.[37]

The distinction remains important after the 2024 rule change. Although food is no longer valued as ISM, whether others within the household provide or pay for all of the beneficiary's meals remains relevant to determining whether the VTR applies. Counsel analyzing trust-paid shelter should therefore identify the beneficiary's living arrangement before assuming that the PMV rule governs.

Housing transactions illustrate why the distinction matters. SSA guidance provides that if a non-resource trust purchases a home outright and the beneficiary receives shelter as a result, the purchase may result in ISM in the month of purchase. If the trust finances the purchase, mortgage payments may result in recurring shelter ISM. By contrast, trust payments for repairs, maintenance, improvements, or renovations to the home, including accessibility modifications, generally do not themselves constitute ISM under the POMS because they preserve or increase the value of the property rather than provide current shelter.[38]

The counseling question should therefore be more precise than, "Will this reduce SSI?" Counsel should ask: *By how much? For how long? What housing benefit does the beneficiary receive in return? Are Medicaid eligibility or state supplementation affected? Is there another payment structure that produces a better result?*

An SSI reduction is a consequence to evaluate, not necessarily a reason to reject the expenditure. Depending on the beneficiary and alternatives, accepting a predictable reduction may be reasonable when housing security, accessibility, privacy, or independence materially improves.

D. Sole Benefit, Primary Benefit, and Incidental Benefit

"Sole benefit" should be used carefully because it does not operate as a universal distribution standard for every special needs trust. Federal Medicaid law expressly imposes a sole-benefit requirement on pooled-trust accounts qualifying under § 1396p(d)(4)(C), and sole-benefit concepts also appear in statutory transfer exceptions and SSA's administration of trusts established with an individual's own assets.[39]

Third-party trusts are different. A third-party SNT funded with assets belonging to someone other than the beneficiary or the beneficiary's spouse is not subject to the federal sole-benefit requirements applicable to trusts funded with the beneficiary's own assets merely because it is an SNT. Whether

[37] 20 C.F.R. § 416.1140; SSA POMS SI 00835.300 et seq. (addressing valuation of ISM under the presumed maximum value rule and rebuttal based on actual value); 20 C.F.R. §§ 416.1131–416.1133, 416.1140–416.1141; SSA POMS SI 00835.200, SI 00835.300.

[38] SSA POMS SI 01120.200.F (addressing trust purchase of a home, mortgage payments, household operating expenses, and home repairs, maintenance, improvements, and renovations). The POMS states that payments for improvements such as accessibility renovations do not provide ISM because they increase or preserve the value of the resource.

[39] 42 U.S.C. §§ 1396p(c)(2)(B)(iii)–(iv), 1396p(d)(4)(C)(iii); SSA POMS SI 01120.201.F. The applicability and source of a sole-benefit requirement should be identified for the particular trust rather than assumed from the "SNT" label.

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and to what extent a third-party trust may confer a benefit on another person instead depends on the governing instrument and applicable state fiduciary law. Counsel should therefore avoid importing the sole-benefit and primary-benefit standards of POMS SI 01120.201.F into the administration of a third-party trust as though they were a universal distribution rule.[40]

Even where the requirement applies, "sole benefit" does not mean that no other person may receive any incidental advantage from an expenditure. SSA instructs that when a trust purchases goods or services from a third party, the expenditure must be for the beneficiary's primary benefit, but the policy should not be applied so strictly that any collateral benefit to another person invalidates the expenditure. SSA gives examples that include other family members living in a home purchased for the beneficiary and others watching a television purchased for the beneficiary.[41]

The limitation is equally important. SSA's guidance looks to the beneficiary's *primary* benefit. Its vehicle example distinguishes a vehicle purchased for the beneficiary and used to transport the beneficiary from one purchased primarily for another person's use. The fact that the beneficiary receives some benefit does not necessarily establish primary benefit.[42]

The facts therefore matter: who owns and uses the property, how often, who receives the economic benefit, whether cost is proportionate to the beneficiary's benefit, and whether the transaction would occur on similar terms without the beneficiary.

Family compensation presents the same need for careful analysis. SSA guidance recognizes that a family member may provide compensable services to the beneficiary and that a family relationship does not by itself prevent payment.[43] But satisfying the applicable sole-benefit policy does not resolve the separate fiduciary questions discussed in Section III. Counsel should still consider the services provided, reasonable compensation, documentation, conflicts of interest, other available funding, and the governing instrument and state law.

E. Companion and Travel Expenses

SSA guidance permits certain third-party travel expenses when assistance is necessary because of the beneficiary's disability, medical condition, or age. The POMS generally accepts the trustee's statement of need absent contrary evidence, does not require a physician's statement merely to establish medical necessity, and considers whether the number of companions is reasonable.[44]

That does not mean the trust can automatically pay for an entire family vacation whenever the beneficiary travels with family. Counsel should identify who is providing necessary assistance, why that assistance is needed, which expenses are attributable to the companion role, and whether the number of companions is reasonable under the circumstances.

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[40] SSA POMS SI 01120.200.B.16 and contrasting SI 01120.201.F.
[41] SSA POMS SI 01120.201.F.3.a (providing that goods or services purchased from third parties must be for the beneficiary's primary benefit but that the rule should not be applied so strictly as to prevent collateral benefit to others).
[42] *Id.* (using vehicle ownership and use to illustrate the distinction between a purchase primarily benefiting the trust beneficiary and one primarily benefiting another person).
[43] *Id.* (recognizing that family members may provide compensable services to a trust beneficiary and addressing payments to third-party service providers).
[44] SSA POMS SI 01120.201.F.3.b (addressing third-party travel expenses where assistance is necessary for a beneficiary to travel and directing consideration of whether the number of accompanying persons is reasonable).

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The analysis should also avoid medicalizing ordinary travel unnecessarily. The beneficiary's own vacation does not need to become "therapy" to be a legitimate trust expenditure if the governing instrument otherwise permits it. The separate question is whether paying another person's travel costs satisfies the requirements applicable to that trust.

F. Do Not Assume the SSI Answer Resolves Medicaid

Medicaid requires separate analysis. Federal law establishes important trust and transfer rules, but states administer Medicaid within that framework, so the beneficiary's eligibility category and state rules affect trust review, reporting, post-eligibility income treatment, waiver services, transfers, and related issues.[45]

For national practice, the important discipline is to avoid saying simply that "Medicaid allows" or "Medicaid prohibits" an expenditure without identifying the rule, program, and jurisdiction involved. An SSI analysis may be highly relevant to a Medicaid recipient, particularly where SSI eligibility establishes a pathway to Medicaid, but it should not automatically be treated as the complete Medicaid analysis.

Counsel should know which benefits the beneficiary actually receives before advising the trustee how a proposed distribution will affect them.

V. A Practical Framework for Distribution Decisions

The legal rules above are necessary, but they do not answer the phone call that begins, "The beneficiary wants the trust to pay for this. Can we?"

The analysis should begin with the beneficiary, the trust, and the transaction. The framework below organizes that analysis without turning every request into a legal memorandum. The inquiry should be proportionate to cost, complexity, benefit consequences, conflicts, and permanence.

Step One: Understand the Beneficiary and the Objective

Start with the person rather than the item.

What is the beneficiary trying to accomplish? Greater independence? Safety? Privacy? Social connection? Employment? Comfort? Communication? Recreation? A more stable home? Relief for an unsustainable caregiving arrangement? The same expenditure can serve very different purposes for different beneficiaries.

The beneficiary's preferences should be sought and considered when reasonably possible. A trustee may decline the request, but individualized discretion requires sufficient information about what the beneficiary wants and why it matters.[46]

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[45] 42 U.S.C. § 1396p(d); Centers for Medicare & Medicaid Services, *State Medicaid Manual*, ch. 3, §§ 3257–3259 (addressing Medicaid trust provisions).

[46] See *Marsman v. Nasca*, 30 Mass. App. Ct. 789, 795–97, 573 N.E.2d 1025, 1029–30 (1991) (holding, under Massachusetts law and the particular discretionary support standard at issue, that the trustee had a duty to inquire into the beneficiary's financial circumstances sufficiently to recognize his needs). The case is illustrative rather than a national SNT rule.

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Counsel should also identify whose request is actually being evaluated. A parent may ask the trust to purchase a larger home "for the beneficiary," while the beneficiary's principal concern is living closer to friends or having greater privacy. A residential provider may recommend technology that makes its staff's work easier but does little for the beneficiary. A family member may sincerely believe that a particular service is necessary when the beneficiary strongly prefers another arrangement.

Where direct communication is difficult, information may come from family, residential staff, care managers, advocates, clinicians, or others who know the beneficiary. Counsel should remain alert to conflicts or competing perspectives when the person describing the need may also benefit from the expenditure.

Before moving forward, counsel should be able to state the objective in a sentence. If the objective is unclear, the analysis is probably not ready to proceed.

Step Two: Define the Transaction Precisely

A vague request often hides the legal issue.

"Pay for a house" should become: Who will own the it? Who will live there? What will it cost to purchase and maintain? Who will contribute? What happens if the beneficiaries moves or dies?

"Pay Mom as caregiver" should become: What services will she provide? How many hours? At what rate? What services are already funded elsewhere? Will duties be documented? Who will approve payment if the trustee has a conflict?

The same approach applies to other requests. Identify what the trust is actually purchasing, who will own or control it, who will use it, who else will benefit, whether the obligation is one-time or continuing, and what related expenses may follow.

Ownership can matter substantially. A trust-owned vehicle, beneficiary-owned vehicle, and vehicle owned by a parent may present different trust-law, public-benefit, liability, tax, and practical considerations. The same is true of a residence, prepaid card, device, insurance policy, or other significant asset.

Counsel should analyze the actual legal and economic transaction, not the shorthand description.

Step Three: Read the Trust and Identify the Source of Authority

Next, return to the governing instrument.

Locate the operative distribution provision, but do not stop there. Review relevant definitions, statements of purpose, public-benefit provisions, administrative powers, conflict provisions, court orders, master trust agreements, joinder agreements, and restrictions on amendment or termination. Determine whether the trustee may act alone or whether a co-trustee, trust protector, distribution committee, court, or other person has a role.

Then identify the governing law. As discussed in Sections II and III, broad "discretion" does not answer the question by itself.

At this stage, counsel should be able to identify the source of authority for the proposed expenditure and any meaningful limitations. If authority remains uncertain, that uncertainty may warrant additional research, advice, consent, or, judicial guidance.

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Step Four: Map the Public Benefits

Identify the benefits the beneficiary actually receives.

A short benefits inventory may include SSI, SSDI, Medicaid and the particular basis for eligibility, Medicaid waiver services, Medicare, subsidized housing, SNAP, state supplementation, Medicare Savings Program assistance, or other state and local programs.

Then ask which the proposed transaction could actually affect.

This avoids two common errors: protecting a benefit the beneficiary does not receive and focusing on SSI while overlooking a Medicaid, housing, or other program rule that matters more.

Quantify the consequence where reasonably possible. A known $100 or $200 monthly SSI reduction differs materially from loss of eligibility for essential medical or residential services.

The level of benefits analysis should fir the decision. A substantial or unusual transaction may warrant analysis; an ordinary expenditure with a well-established result may not.

Step Five: Analyze Cost, Sustainability, Alternatives, and Timing

Place the request in the context of the trust as a whole: its significance relative to assets, whether it is one-time or recurring, follow-on costs, foreseeable needs, liquidity, and any longer-term financial value.

Recurring expenses should be annualized. A $750 monthly expenditure is also a $9,000 annual commitment. If it is likely to continue for ten years, the trustee should understand the scale of the commitment rather than evaluate the first month's invoice in isolation.

Alternatives matter, but only if meaningful. Ask whether a less expensive option, other funding source, or different structure can adequately accomplish the beneficiary's objective.

If another source will provide substantially the same benefit within a reasonable time, using it may preserve trust assets. But theoretical funding, an indefinite waiting list, or an inadequate alternative should not automatically delay an otherwise appropriate expenditure, absent a governing payer-of-last-resort requirement.

Timing also matters. A purchase that can reasonably wait six months while another funding source is pursued is different from a vehicle needed for employment next week, an accessibility modification necessary for a pending move, or technology that would immediately permit the beneficiary to communicate independently.

At the end of this step, the trustee may conclude yes, no, or **not yet**. "Not yet" may be appropriate when the decision requires additional information, pricing, professional input, benefits analysis, or financial projections.

Step Six: Choose the Payment Method

Approval of the objective does not end the analysis. Determine how the expenditure should be made.

Options may include direct payment to a vendor, reimbursement to a third party, use of a trustee-controlled prepaid card, transfer to an ABLE account, or, where legally appropriate, a bona fide loan.

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As discussed in Section IV, different payment methods can produce different SSI and administrative consequences.[47]

Where reimbursement is used, the trustee should consider whether the arrangement provides a sufficiently clear record of the beneficiary's purchases. A dedicated card or account may simplify administration, particularly when reimbursements will be frequent.

The method should also fit the practical circumstances. A payment structure that technically preserves benefits but is cumbersome, expensive, or unworkable may not be the best solution.

Payment mechanics are part of the planning, not an administrative afterthought.

Step Seven: Document in Proportion to the Decision

Create a record proportionate to the decision.

The file should allow a later reviewer to understand what was requested, why it mattered to the beneficiary, what trust authority was considered, the public-benefit consequences cost, who else would benefit, what alternatives were considered, and why the trustee approved, denied, deferred, or restructured the request.

A routine $300 purchase does not require the same record as a $100,000 vehicle, a residence, a long-term caregiver arrangement, or a transaction benefiting the trustee or a family member.

Documentation also improves decision-making by exposing missing information, conflicts, unsupported benefit assumptions, or overlooked recurring costs.

The objective is a reasoned decision and a record showing how the trustee reached it.

VI. Applying the Framework to Real Life

The framework is most useful when applied to recurring categories of SNT administration. The categories below are not lists of automatically permissible expenses. They identify the facts that tend to matter.

A. Housing and Transportation

Housing and transportation often determine whether independence, employment, medical care, relationships, and community participation are realistic. They also can consume substantial trust assets and create continuing expenses or collateral benefits to others.

For housing, counsel should focus on ownership, occupants, purchase or rental cost, financing, accessibility, carrying expenses, contributions by others, expected duration, and an exit plan. SSA's current rules may treat trust-paid shelter as ISM, while repairs, maintenance, improvements, and accessibility renovations generally receive different treatment. The relevant question is not merely

[47] See, e.g., SSA Program Operations Manual System (POMS) SI 01120.201.I.1 (addressing SSI treatment of disbursements from a trust whose principal is not a resource, including cash payments and bona fide loans); id. SI 01120.201.F.3 (addressing payments to third parties under the sole-benefit policy).

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whether SSI will be reduced, but by how much, for how long, and what the beneficiary receives in exchange.[48]

For transportation, consider ownership, expected use, driver, modifications, insurance, maintenance, useful life, replacement, and realistic alternatives. Family use should be evaluated rather than automatically rejected. Where the sole-benefit policy applies, SSA distinguishes an asset purchased primarily for the beneficiary that incidentally benefits others from one principally used by someone else.[49]

B. Technology, Recreation, Travel, and Ordinary Life

Evaluate technology by what it enables the beneficiary to do. A smartphone may support communication, navigation, employment, transportation, banking, safety, social connection, and entertainment; smart-home devices may increase independence; and digital tools may provide recreation or community. Ordinary technology need not be medical equipment to have legitimate value.

The same principle applies to recreation. Vacations, hobbies, concerts, sports, clubs, restaurants, gaming, and other ordinary enjoyment may be legitimate discretionary expenditures when authorized and reasonable. A beneficiary's life need not be organized entirely around treatment.

Travel requires additional analysis when the trust will pay another person's expenses. Where applicable, SSA guidance permits certain companion expenses when assistance is necessary and the number of companions is reasonable. The beneficiary's own vacation need not be characterized as therapy; the separate question is whether paying someone else's expenses satisfies the rules applicable to that trust.[50]

Recurring technology, entertainment, and subscription expenses should be reviewed in the aggregate. Individually modest charges can become a substantial annual commitment.

C. Caregiving and Family Support

Caregiving arrangements combine beneficiary need, family economics, conflicts, public funding, tax and employment issues, and sustainability. Begin with the service: what is provided, for how many hours, at what rate, what other program pays or could pay, and how performance and payment will be documented?

SSA's sole-benefit guidance does not categorically prohibit family compensation. But that resolves only part of the analysis. Counsel should separately consider authority, conflicts, reasonable

[48] See 20 C.F.R. §§ 416.1130(b), 416.1140; SSA POMS SI 01120.200E.1.b, F.3.b (trust-paid shelter and treatment of home-related expenditures); Omitting Food From In-Kind Support and Maintenance Calculations, 89 Fed. Reg. 21,199 (Mar. 27, 2024) (effective Sept. 30, 2024).

[49] See SSA POMS SI 01120.201F.3.a (explaining, in the sole-benefit context, that goods or services purchased primarily for the beneficiary may confer collateral benefit on others and providing vehicle-use examples).

[50] See SSA POMS SI 01120.201F.3.b (addressing payment of certain third-party travel expenses when assistance is necessary because of the beneficiary's medical condition, disability, or age, and directing consideration of whether the number of accompanying persons is reasonable).

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compensation, duplication of publicly funded services, sustainability, and who should approve the arrangement if the caregiver is also the trustee.[51]

Paying a family caregiver or providing respite may preserve a stable living arrangement that would be difficult or more expensive to replace. In another case, the proposal may shift ordinary family expenses to the trust. The facts control.

D. Education, Employment, and Personal Development

Tuition, tutoring, certifications, vocational programs, job coaching, adaptive equipment, transportation, therapies, dental care, hearing devices, counseling, exercise programs, and other services may improve independence, health, earning capacity, social connection, or personal development. Public coverage is relevant but not dispositive. A theoretical benefit that is unavailable in practice or subject to harmful delay may not be a meaningful alternative.

Consider the beneficiary's preference, expected benefit, cost, coverage, alternatives, and provider qualifications where relevant. A trial period, staged funding, or reassessment may manage uncertainty better than an immediate all-or-nothing decision.

E. Health and Wellness Expenses

Medical, dental, therapeutic, and wellness expenses may include services or equipment that are unavailable, inadequately covered, or subject to significant delay through public programs. SSA recognizes that trust payments for medical services not covered by Medicaid may not constitute income for SSI purposes.[52]

Consider the beneficiary's preferences and expected benefit, coverage, cost, alternatives, and material delay. Theoretical public coverage should not control if the service is unavailable in practice or delay would materially disadvantage the beneficiary; conversely, lack of coverage does not itself justify trust payment.

Significant, elective, or experimental interventions may warrant additional professional review proportionate to the cost, risk, and circumstances of the decision..

G. Service Animals, Emotional-Support Animals, and Pets

An animal's legal classification may matter for housing, access, and other purposes, but it does not itself determine whether a trust may pay expenses associated with the animal. The ADA generally defines a service animal as a dog individually trained to perform work or tasks related to an individual's disability and excludes emotional support, comfort, and companionship alone from that definition.[53] Other laws may apply different standards to assistance animals.

For trust-distribution purposes, the analysis should return to the governing instrument, the beneficiary's circumstances, and the reasonableness of the expenditure. An animal may provide

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[51] See SSA POMS SI 01120.201F.3.a (recognizing that family members may be compensated for services provided to the beneficiary and discussing reasonableness of compensation).
[52] SSA POMS SI 01120.200.E.1.c (identifying medical services not covered by Medicaid among illustrative third-party trust disbursements that may not constitute SSI income).
[53] 28 C.F.R. §§ 35.104, 36.104 (defining "service animal" and providing that emotional support, well-being, comfort, and companionship alone do not constitute work or tasks under the ADA definition).

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disability-related assistance, companionship, routine, enjoyment, or opportunities for social interaction. Research concerning assistance animals has identified potential benefits in areas including psychological well-being, social participation, independence, and quality of life, although the evidence is mixed.[54]

Relevant considerations include acquisition or adoption costs, training, ongoing care, housing restrictions, the beneficiary's participation in care, and responsibility when the beneficiary cannot provide it. An animal need not qualify as a service animal to have meaningful value; the fiduciary question is whether the expenditure is authorized and reasonable in light of the beneficiary, trust purposes, and resources.

VII. The Hard Cases: When Reasonable Fiduciaries May Disagree

The hardest SNT decisions are rarely resolved by locating an expense on a list. The following hypotheticals illustrate why the same framework can lead reasonable fiduciaries to different conclusions.

A. The $20,000 Vacation From a $350,000 Trust

A 38-year-old beneficiary receives SSI and Medicaid and has a third-party SNT worth approximately $350,000. The trust broadly authorizes distributions for comfort and welfare. The beneficiary wants a $20,000 trip and cannot reasonably travel without a companion.

The question is not simply whether vacations are allowed. Consider authority, SSI treatment and payment method, companion need and cost, the trip's significance, foreseeable needs, other resources, and whether spending about 5.7% of principal is sustainable.[55]

Reasonable trustees may decline, approve, or approve a less expensive version. Counsel's role is to ensure that the actual request is decided under the actual trust with adequate information, not a categorical rule about vacations.

B. Paying the Parent Who Has Always Provided Care

A parent has provided extensive uncompensated support for fifteen years and now requests $40,000 per year because caregiving prevents full-time employment. The beneficiary also receives Medicaid-funded personal care.

Neither "parents should not be paid" nor "the parent has sacrificed enough and deserves compensation" resolves the issue. The trustee should identify the services, hours, reasonable rate, possible duplication of public services, employment and tax consequences, sustainability, and any conflict. If the parent is also trustee, the decision may require a disinterested fiduciary or other safeguard under the instrument and governing law.[56]

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[54] Kerri E. Rodriguez et al., *The Effects of Assistance Dogs on Psychosocial Health and Wellbeing: A Systematic Literature Review*, 15 PLOS ONE e0243302 (2020) (reviewing evidence concerning psychological well-being, social functioning, independence, and quality of life and finding mixed results).

[55] See SSA POMS SI 01120.200E.1.c (identifying transportation, recreation, and entertainment among examples of third-party trust disbursements that may not constitute SSI income); id. SI 01120.201F.3.b (third-party travel expenses in the sole-benefit context).

[56] See SSA POMS SI 01120.201F.3.a (family members as compensated service providers and reasonableness of compensation).

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A reasonable trustee might approve, modify, document, or decline the arrangement. The family relationship alone does not answer the question.

C. The Shared Home

A $1.5 million trust is asked to purchase a $650,000 home in which the beneficiary and two family members will live. The family members will provide substantial informal support but cannot contribute significantly to the purchase price.

The home may provide stable housing and support that would be difficult or expensive to replace, while also conferring valuable housing on others. Counsel should examine the beneficiary's preference, price, title, occupancy rights, carrying costs, support provided by the family, public-benefit consequences, and what happens if the beneficiary moves, dies, or the family relationship changes.

Collateral benefit does not automatically defeat a transaction where applicable law permits it. The question is whether the arrangement as a whole is authorized, primarily serves the beneficiary where that standard applies, and is reasonable for the trust.[57]

D. The Beneficiary Who Willingly Accepts an SSI Reduction

A beneficiary wants the trust to pay rent for a safer apartment closer to work, family, and community activities. The payment will create shelter ISM and reduce SSI, while Medicaid is expected to continue under the applicable eligibility pathway.[58]

Counsel should verify the actual SSI reduction and any Medicaid or other consequences, then evaluate what the beneficiary receives in exchange. Does the move improve safety, employment stability, transportation, privacy, or social connection? Can the trust sustain the rent?

The trustee may still find the recurring cost too high. But ending the analysis solely because SSI will be reduced turns the benefit consequence into the distribution standard. Public-benefit rules supply the consequence; the trust and fiduciary judgment determine what to do with it.

These examples also expose a recurring problem of personal taste. A trustee may dislike premium concert tickets, gaming, cosmetic dental work, pets, or expensive hobbies. The trustee is entitled to exercise judgment, but personal preference is not itself the distribution standard. A denial should be explainable in terms of authority, beneficiary circumstances, cost, competing needs, risks, sustainability, or another fiduciary consideration.

VIII. Defending the Decision

Reasonable fiduciaries may disagree about difficult requests. A contemporaneous record helps show what the trustee knew, considered, and decided, and may expose missing information, conflicts, unsupported benefit assumptions, or recurring costs.[59]

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[57] See SSA POMS SI 01120.201F.3.a (stating, where the sole-benefit policy applies, that an expenditure primarily for the beneficiary may confer collateral benefit on another person without necessarily violating the sole-benefit requirement).
[58] See 20 C.F.R. §§ 416.1130(b), 416.1140; SSA POMS SI 00835.300 (presumed maximum value rule); SSA, Living Arrangements, Supplemental Security Income (SSI) (2026) (explaining current ISM treatment and the 2026 maximum reduction attributable to in-kind shelter under the applicable rule).

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A. Documentation Should Be Proportionate

Not every distribution requires a memorandum. Routine purchases may need only ordinary trust records. A major housing transaction, substantial vehicle purchase, family-compensation arrangement, conflicted transaction, unusual transfer, or significant recurring commitment ordinarily warrants more.

For a substantial decision, a short memorandum can identify the request and beneficiary objective; relevant trust authority; material benefit consequences; cost and effect on trust resources; ownership and payment structure; third-party benefits or conflicts; meaningful alternatives; professional input; sustainability; and the trustee's decision and reasons. The objective is not a brief. It is a record that allows a later reviewer to understand the exercise of discretion.

Beneficiary input should be included where material and reasonably available. The trustee need not follow the beneficiary's preference, but a decision about the beneficiary's life should reflect an effort to understand what the beneficiary wants and why.[60]

B. Defending the Yes, No, and Not Yet

A significant approval is easier to defend when the file shows that the trustee identified authority, understood material benefit consequences, evaluated cost and sustainability, considered third-party effects and realistic alternatives, and connected the expenditure to the beneficiary and trust purpose. If the trustee knowingly accepts an SSI reduction or chooses a more expensive alternative, the record should say why.

A denial deserves the same discipline. "It might affect benefits," "the trust needs to last," or "we do not pay for vacations" is not enough without the underlying analysis. A reasoned denial may rest on lack of authority, material benefit consequences, disproportionate cost, duplication, excessive third-party benefit, unresolved conflict, inadequate information, or a realistic alternative.

Sometimes the answer is "not yet" or "not this way." Additional information, an appraisal, benefits analysis, trial period, staged commitment, different payment method, cost sharing, ABLE account, or another funding source may permit the trustee to accomplish the objective more effectively. A deferral should identify what would allow the request to be reconsidered.[61]

C. Revisit Material Continuing Arrangements

Some decisions depend on facts that change. Caregiver hours and public funding change. Technology becomes obsolete. A residence may stop meeting the beneficiary's needs. Recurring expenses may become significant after a decline in trust assets.

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[59] See Unif. Tr. Code § 810(a) (Unif. L. Comm'n 2023) (requiring a trustee to keep adequate records of trust administration). Applicable state law and the governing instrument control.

[60] See *Matter of Mark C.H.*, 28 Misc. 3d 765, 767–69, 906 N.Y.S.2d 419, 421–23 (Sur. Ct. N.Y. Cnty. 2010) (illustrating the problems created when trustees failed to ascertain the beneficiary's circumstances and needs). The decision is illustrative New York trial-court authority, not a national rule.

[61] See SSA POMS SI 01120.200E.1.h (excluding from SSI income funds transferred from a non-resource trust into an ABLE account established by the beneficiary); 26 U.S.C. § 529A.

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Material continuing arrangements should therefore be reviewed when circumstances warrant rather than treated as permanent. The point is not constant reapproval of ordinary life. It is to recognize when the facts supporting an earlier decision have materially changed.

A good record does not make a difficult decision indisputable. It makes the reasoning understandable.

IX. Drafting Today for Better Administration Tomorrow

Many administration problems begin with a document that says little about the life the trust is intended to support. Drafting cannot predict future technology, benefit rules, family arrangements, or care models, but can give the trustee clearer guidance.

A. State Purpose and Priorities

A purpose provision can identify goals such as independence, safety, comfort, privacy, community participation, relationships, recreation, education, employment, and appropriate services, but should be coordinated with the operative distribution standard to avoid inadvertently creating a mandatory support obligation or distribution right.[62]

The instrument should also clarify the priority of the current beneficiary and any meaningful preservation objective. If the beneficiary's lifetime welfare is intended to take priority over preserving an inheritance for remainder beneficiaries, consider saying so. If preservation is a co-equal objective, say that instead.

B. Address Benefits and Other Resources With Flexibility

A direction to consider public benefits is different from an absolute direction never to reduce them. Benefit programs and beneficiary circumstances change. If the settlor intends preservation to be important but not absolute, the instrument can authorize the trustee to weigh the value of the benefit against what a proposed expenditure would accomplish.[63]

The same precision should apply to other resources. "Consider other resources," "use reasonable efforts to obtain other resources," and "exhaust other resources first" are materially different instructions. The drafting should reflect the settlor's actual intent rather than leave the future trustee to infer a payer-of-last-resort rule.

C. Anticipate Family Involvement, Incidental Benefit, and Conflicts

Housing, vehicles, caregiving, companionship, and travel often create some benefit to family members. Where consistent with applicable law and the settlor's objectives, the instrument can authorize reasonable incidental benefits, family compensation under appropriate standards, and

[62] See Unif. Tr. Code §§ 801, 803, 814(a) (Unif. L. Comm'n 2023) (administration according to trust terms and purposes, impartiality among beneficiaries according to their respective interests, and exercise of discretionary powers in good faith and consistently with the trust's terms and purposes and beneficiaries' interests). State enactments vary.

[63] The importance of drafting flexibility is reinforced by changing benefit rules. For example, SSA removed food from SSI in-kind support and maintenance calculations effective September 30, 2024. See Omitting Food From In-Kind Support and Maintenance Calculations, 89 Fed. Reg. 21,199 (Mar. 27, 2024); 20 C.F.R. § 416.1130(b).

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necessary companion expenses. Such provisions do not override federal sole-benefit requirements where they apply, but they can reduce unnecessary ambiguity under the instrument.[64]

The document can also provide a mechanism for decisions in which the acting trustee has a personal interest, such as review by a disinterested co-trustee, independent trustee, distribution adviser, trust protector, or other authorized person, subject to governing law.[65]

D. Authorize Expertise Without Freezing Today's Life Into Tomorrow's Trust

The instrument can authorize reasonable use of care managers, benefits counsel, tax and investment advisers, advocates, housing professionals, technology specialists, and others whose expertise may improve administration. Consultation should inform, not replace, fiduciary judgment.[66]

Examples can be useful but should not become limits by implication. Durable drafting depends less on predicting future products than on stating purposes, priorities, standards, and a decision-making structure that can adapt to the beneficiary's life.

The drafting attorney cannot eliminate difficult distribution decisions. The attorney can give the future trustee better instructions when those decisions arrive.

X. Conclusion: What Is the Trust Actually For?

Preservation matters. Trust assets should not be wasted, public-benefit consequences should be understood, and trustees must follow the instrument and their fiduciary duties. But preservation is a means, not necessarily the purpose.

A trust can preserve every dollar of principal and every dollar of SSI while doing very little for the person it was created to serve. At the other extreme, imprudent spending can undermine the beneficiary's future security. The fiduciary's task is to exercise the discretion the trust actually provides, taking into account the beneficiary's circumstances, public benefits, cost, sustainability, and the purposes of the trust.

Success should not be measured solely by the balance remaining at the beneficiary's death or by whether every possible benefit dollar was preserved. The better question is whether the trust was administered prudently and faithfully to serve its purposes and the beneficiary's life.

That brings the analysis back to the question with which it began: What is this trust actually for?

Selected Authorities and Practice Resources

- 42 U.S.C. §§ 1382b(e), 1396p(c), 1396p(d)(4)(A), 1396p(d)(4)(C).

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[64] See SSA POMS SI 01120.201F.3.a–b (addressing collateral benefit, family service providers, companion expenses, and certain third-party travel expenses within SSA's sole-benefit framework). These provisions do not displace the governing instrument or applicable fiduciary law.

[65] See, e.g., Unif. Tr. Code §§ 802, 808, 814 (Unif. L. Comm'n 2023). The availability and effect of co-trustees, directed powers, distribution advisers, trust protectors, special fiduciaries, and similar mechanisms depend on the governing instrument and applicable state law.

[66] See Unif. Tr. Code § 807 (Unif. L. Comm'n 2023) (permitting delegation of duties and powers a prudent trustee of comparable skills could properly delegate, subject to duties concerning selection, scope, and review). State enactments vary.

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- 20 C.F.R. §§ 416.1102, 416.1121, 416.1130–416.1148.
- 26 U.S.C. § 529A; 26 C.F.R. §§ 1.529A-1, 1.529A-2.
- SSA POMS SI 01120.200, SI 01120.201, SI 01120.203, SI 01130.740, SI 00835.000 et seq.
- CMS, State Medicaid Manual, Chapter 3, §§ 3257–3259.
- Uniform Trust Code §§ 801–804, 807, 814; Uniform Prudent Investor Act § 2.
- Restatement (Third) of Trusts § 50.
- Matter of Abraham XX., 11 N.Y.3d 429, 900 N.E.2d 136 (2008).
- Matter of Mark C.H., 28 Misc. 3d 765, 906 N.Y.S.2d 419 (Sur. Ct. N.Y. Cnty. 2010).
- Marsman v. Nasca, 30 Mass. App. Ct. 789, 573 N.E.2d 1025 (1991).
- Hobbs ex rel. Hobbs v. Zenderman, 579 F.3d 1171 (10th Cir. 2009).
- Special Needs Alliance, A Handbook for Trustees (2023), https://www.specialneedsalliance.org/wp-content/uploads/2023/02/SNA-2023-Handbook-02.09.23.pdf.
- Frederick M. Misilo Jr. & Theresa M. Varnet, Understanding Special Needs Planning, ABA GPSolo eReport (Oct. 2023).
- Jennifer Brannan, Third-Party Special Needs Trust: Dead or Alive in a Uniform Trust Code World, 16 Tex. Wesleyan L. Rev. 249 (2010).

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2026 National Conference on Special Needs Planning and Special Needs Trusts

Breakout Session 1

Beyond Preservation: Balancing Beneficiary Quality of Life, Fiduciary Duties, and Public Benefits

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We Will Cover…



- What is the SNT's purpose?
- Understand the SNT before administering
- Fiduciary Duties for SNTs
- Public Benefits protection
- Practical framework
- Case Studies
- Q&A

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What is the purpose of the SNT ?

- Preserve SSI?
- Preserve Medicaid?
- Preserve trust assets?
- Avoid fiduciary liability?
- ***Or*** improve the beneficiary's life within the trust's purposes?

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Preservation is important. But it is not the whole inquiry.



- Public-benefit preservation matters
- Prudent stewardship matters
- Beneficiary quality of life matters
- Future needs matter
- The ***objective*** is neither maximum spending nor maximum preservation

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Overarching Considerations

- **Authority:** Can the trust make the distribution?
- **Public Benefits:** What are the consequences?
- **Fiduciary Judgment:** Is it reasonable and prudent?
- **Structure:** Is there a better way to accomplish the objective?

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Know the Trust You Are Administering

- First-party SNT
- Pooled trust
- Third-party SNT
- Different trusts may involve different rules, interests, and limitations
- ***Ask:*** "Can this trust pay for this?"



7

Read the Trust Before the POMS

- What is the trust's purpose?
- What is the distribution standard?
- What discretion does the trustee have?
- What does the trust say about benefits and other resources?
- Who has authority to make the decision?
- The POMS addresses benefit consequences, not the scope of fiduciary authority



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Fiduciary Duties: What Do They Require Here?

- Administer according to the trust's terms and purposes
- Exercise prudence
- Identify loyalty and conflict issues
- Consider competing interests where applicable
- Actually exercise the discretion granted

9

Prudence Applies to Spending *and* Not Spending

- Beneficiary's circumstances and objectives
- Trust size and liquidity
- Current and foreseeable future needs
- One-time versus recurring obligations
- Other resources and realistic alternatives
- **The least expensive choice is not necessarily the most prudent**



10

Individualized Discretion Requires Individualized Information



- What does the beneficiary need and want?
- What are the beneficiary's living and support circumstances?
- What other resources are realistically available?
- What would the proposed expenditure accomplish?
- **A trustee cannot meaningfully exercise discretion without adequate information**

11

Loyalty, Conflicts, and Benefits to Others



- Family caregivers
- Shared housing
- Vehicles
- Companion travel
- Incidental benefit does not necessarily end the analysis
- Identify and appropriately manage conflicts

12

Public Benefits: Guardrails, Not the Distribution Standard

- Public-benefit rules matter
- But they answer a specific question:
  "What happens if the trust does this?"
- Not necessarily:
  "Should the trustee do this?



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Which Benefits Are We Actually Protecting?

- SSI
- Medicaid and the applicable eligibility pathway
- Medicaid waiver services
- Medicare
- Housing assistance
- SNAP and other federal, state, or local benefits
- Identify the benefits the beneficiary actually receives

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Payment Method Can Change the Result

- Cash
- Direct vendor payment
- Reimbursement
- Trustee-controlled payment mechanisms
- ABLE account
- **Same objective. Different benefit consequences.**



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Don't Just Say: *It Will Affect SSI*

- **How much?**
- **For how long?**
- Will Medicaid be affected?
- Will another benefit be affected?
- What does the beneficiary receive in exchange?
- **Quantify the consequence whenever reasonably possible**



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Sole Benefit Does Not Mean Nobody Else Can Benefit

- Determine whether a sole-benefit rule actually applies
- Identify the beneficiary's primary benefit
- Identify benefits to third parties
- Distinguish incidental benefit from a transaction primarily benefiting someone else
- Separately consider fiduciary conflicts



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A Practical Framework for Distribution Decisions

1. Understand the Beneficiary and Objective
2. Define the Transaction
3. Identify Authority
4. Map Public Benefits
5. Analyze Cost, Sustainability, Alternatives, and Timing
6. Choose the Payment Method
7. Document the Decision



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Case # 1: The $20,000 Vacation

- Beneficiary: age 38
- SSI and Medicaid
- Third-party SNT: **$350,000**
- Broad comfort-and-welfare standard
- Proposed vacation: **$20,000**
- Companion required
- **Approve? Deny? Not Yet? Not This Way?**



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Case # 1: Apply the Framework

- Is the expenditure authorized?
- What are the benefit and companion-expense consequences?
- What does the trip mean to the beneficiary?
- What future needs are foreseeable?
- Is spending approximately **5.7% of principal** sustainable?
- Could the objective be accomplished differently?
- **Reasonable fiduciaries may reach different conclusions**

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Case # 2: Paying the Parent Caregiver

- Parent has provided 15 years of uncompensated care
- Requests **$40,000 per year**
- Beneficiary receives Medicaid-funded personal care
- What services and hours will the parent provide?
- Is there duplication? Is compensation reasonable?
- Is the parent also the trustee?
- **The family relationship does not answer the fiduciary question**



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Case # 3: The Shared Home

- Trust assets: **$1.5 million**
- Proposed home: **$650,000**
- Beneficiary and two family members will reside there
- Family provides substantial informal support
- Who owns the home and pays ongoing expenses?
- What benefit do the family members receive?
- **What is the exit strategy if circumstances change?**



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Case # 4: Would You Accept the SSI Reduction?

- Safer apartment
- Closer to work, family, transportation, and community
- Trust-paid rent will reduce SSI
- Medicaid expected to continue
- What is the actual financial consequence?
- What does the beneficiary gain in exchange?
- **Is preserving every SSI dollar necessarily the best outcome?**



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Defending the Decision

- What did the beneficiary request and why?
- What authority did the trustee rely upon?
- What benefit consequences were identified?
- Were cost, sustainability, alternatives, and conflicts considered?
- Why did the trustee reach this result?
- **"No" deserves the same analytical discipline as "Yes"**

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QUESTIONS?



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Disclaimer

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When Is the Trust a (Joint) Employer?



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Is The Trust A (Joint) Employer?

Jason R. Bent

Professor of Law, Director of the Martin H. Malin Institute for Law and the Workplace

Chicago-Kent College of Law

Illinois Institute of Technology

Is The Trust A (Joint) Employer?

Presentation Outline

Session Description: Think your trust is not the employer? Think again. This session will address the times when the trustee hires a person to provide services to the beneficiary. Does this create an employment relationship? If the trustee hires a payroll and employment services provider, are the trustee and the services provider "joint employers?" Trustees need to consider the independent contractor/employee distinction and the joint employer tests under relevant employment laws. Potential employment law implications include payroll tax withholding, workers' compensation insurance, immigration status, accommodations, and more.

I. **Introduction** to the Employee/Independent Contractor classification problem

A. The shift from "status" (Master/Servant) to "contract"

1. Richard Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to stop Trying*, 22 Berk. J. Emp. & Lab. L. 295 (2001)
2. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004).

B. The introduction and eventual survival of statutory employment protections during the New Deal, overcoming *Lochner* era substantive due process challenge.

C. The relevance of contractual characterization of a hiring relationship as "independent contractor" relationship, in light of bargaining power disparities

D. The scale of misclassification problem.

a. Kyla Miller, *The Misclassification Trend: How Independent Contractor Status Could Affect Consumers*, 28 Loy. Consumer L. Rev. 333 (2016)

b. Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. Davis Bus. L.J. 111 (2009).

E. Brief identification of some statutory coverage issues most likely to be relevant to SNT scenarios, including federal payroll tax withholding, unemployment insurance, workers' compensation insurance coverage, wage and hour protections, and wage payment and collection protections.

F. The modern workplace and new difficulties in employee classification in the fissured workplace and gig/platform economy. Applicability to home caregivers.

1. DAVID WEIL, THE FISSURED WORKPLACE (2014)
2. Robert Sprague, *Updating Legal Norms for a Precarious Workforce*, 35 ABA J. Lab. & Emp. L. 85 (2020).
3. Kenneth Dau-Schmidt, *The Problem of "Misclassification" or How to Define Who Is An "Employee" Under Protective Legislations in the Information Age* (2019).
4. Griffin Pivateau & Gina Nerger, *The Worker Classification Dilemma: The IRS Test and the Platform Economy*, 53 Texas Tech. L. Rev. 535 (2021).

G. Overview of the three primary approaches to distinguishing between employees and independent contractors: (1) common law control test; (2) economic realities test; and (3) ABC test.

II. <u>The Common Law Control Test</u>

A. History and Development. Roots in the doctrine of *respondeat superior*, in the context of imposing tort liability on a principal for injuries caused by the negligence of the agent.

1. Restatement (Second) Agency 220(1)
2. Carlson, *Why the Law Still Can't Tell An Employee, supra*

B. Adoption as the default rule in federal statutory employment protections by U.S. Supreme Court in *Nationwide Mutual v. Darden*, 503 U.S. 318 (1992)

C. Development of the 12 factor (*Darden*) common law test: (1) skill required; (2) source of instrumentalities and tools; (3) location of work; (4) duration of relationship between the parties; (5) whether hiring party has right to assign additional projects to the hired party; (6) extent of hired party's discretion over when and how long to work; (7) method of payment; (8) hired party's role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party. *Darden; Community for Creative Non-Violence v. Reid,* 490 U.S. 730 (1989).

III. <u>The Economic Realities Test</u>

A. Development in the context of the FLSA, with the broadest statutory definition of "employ" = "suffer or permit to work." 29 U.S.C. s. 203(e)(1).

B. Key focus of the inquiry is on "dependence" rather than "control," although there are some overlapping factors.

C. Factors: (1) degree of alleged employer's right to control the manner in which the work is to be performed; (2) alleged employee's opportunity for profit or loss depending upon their managerial skill; (3) alleged employee's investment in equipment or materials required for the task, or employment of helpers; (4) whether the service rendered requires a special skill; (5) degree of permanence of the working relationship; and (6) whether service rendered is an integral part of

the alleged employer's business. *See Donovan v. DialAmerica Mktg*., 757 F.2d 1376 (3d Cir. 1985); *Sec. of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987).

D. Brief note on the "Hybrid" ("relative nature of the work") Test – a test that "encompasses both the 'right to control' and the 'economic realities' test. *See, e.g., D'Annunzio v. Prudential Ins. Co*., 192 N.J. 110 (2007); *Franz v. Raymond Eisenhardt & Sons*, 732 F. Supp. 521 (D.N.J. 1990).

E. DOL Regulatory reversals on application of "economic realities" test to FLSA; 2021 DOL rule focusing on two "core" factors; to 2024 DOL rule back to 6 factor test, see 29 C.F.R. 780, 788, 795.

F. **DOL** - February 2026 NPRM on Employee/Independent Contractor Status Under the FLSA, FMLA, and Seasonal Agricultural Worker Protection Act (MSPA). https://www.federalregister.gov/documents/2026/02/27/2026-03962/employee-or-independent-contractor-status-under-the-fair-labor-standards-act-family-and-medical

Would revert to 2021 rule, with some modifications. Five factor test with greater weight on two "core" factors: (1) nature and degree of control over the work, and (2) worker's opportunity for profit or loss based on initiative and/or investment. The other three factors are: (3) amount of skill required for the work; (4) degree and permanence of the working relationship between the individual and the potential employer; and (5) whether the work is part of an integrated unit of production.

IV. The ABC Test

A. Thus far, only adopted (in whole or partially, in some form) at the state level, and not at the federal level; efforts to advance legislation at the federal level have not yet been successful.

B. The leading type of reform aimed at the misclassification issue in recent years.

C. Cataloguing states' adoption of the ABC test, whether in whole or partially.

    1. Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. Pa. J.L. & Soc. Change 53 (2015)
    2. John Pearce II & Jonathan Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on From a Common Law Standard*, 14 Hastings Bus. L.J. 1 (2018).
    3. Jon Shimabukuro, Cong. Research Service, *Worker Classification: Employee Status Under the NLRA, the FLSA, and the ABC Test* (2021).
    4. Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 William & Mary Bus. L. Rev. 733 (2020).
    5. Broad adoptions in Massachusetts, New Jersey, California, and Oregon, across multiple employment statutes and all sectors.
    6. Many other states more narrowly adopt ABC for Unemployment Insurance purposes and for select other statutory purposes or sectors. Over 20 states have adopted for purposes of UI. E.g., Illinois adopts the ABC test by statute for UI, for Wage Payment & Collection statute, and

for the construction sector under the Employee Classification Act, 820 ILCS 185/1, et seq.

7. Some states adopt modified ABC tests, looking only to elements A and C, and not to element B. Others require either (A+B) or (A+C) to establish independent contractor status.

D. Operation of the ABC Test

1. Origin – Maine Employment Security Law, *see Pearce & Silva, The Future of Independent Contractors, supra*.
2. Name Origin – Mass. Gen. Laws. Ann. Ch. 149, s.148B
3. Application – Hargrove v. Sleepy's, LLC, 220 N.J. 289 (N.J. 2015); Eric Markovits, *Easy As ABC: Why the ABC Test Should Be Adopted as the Sole Test of Employee-Independent Contractor Status*, Cardozo L. Rev. de novo (2020).
4. Three Components of ABC Test: (A) purported employer neither exercised control over the work, nor had the *ability* to exercise control in terms of completion of work; (B) services provided were either outside the usual course of the business or performed outside of the all the places of business of the enterprise; and (C) enterprise that exists and can continue to exist independently of and apart from the particular service relationship. Must be stable and lasting, such that it will survive the termination of the challenged relationship.
5. Operation of the presumption and placement of burden of proof on the employer.

V. **<u>Application to SNT Context</u>**: Considering specific statutory employment protections most likely to be relevant in SNT contexts.

A. These are context specific determinations, such that individual could be "employee" for some statutory protections, but "independent contractor" for others. Highly individualized determinations driven by facts of individual cases.

B. Note the criticism of this resulting lack of predictability by Judge Easterbrook in concurrence in FLSA case, *Sec. of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987). "People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an approach under which no one can know where he stands until litigation has been completed."

C. Payroll taxes and Withholding

1. FICA – Federal Insurance Contributions Act, 26 U.S.C. 3101, et seq.
2. FUTA – Federal Unemployment Tax Act, 26 U.S.C. 3301, et seq.
3. Common law control test under *Darden* default; I.R.C., 26 U.S.C. s. 3121(d) definition of "employee"
4. IRS Test – 20 factor test in making determination. See 26 C.F.R. s. 31.3121(d)-1, 31.3306(i)-1, 31.3401(c)-1.

D. State Unemployment Insurance coverage

1. Several states have adopted ABC test in context of unemployment insurance coverage. *Pearce & Silva, The Future of Independent Contractors, supra*; Deknatel & Hoff-Downing, *ABC on the Books, supra*

E. Workers' Compensation

1. ABC Test will apply in those states where more comprehensive adoption of ABC test. *Id.*
2. Note most states (38) with workers' compensation coverage requirements for even very small employers, including as few as only 1 employee. States' early legislative responses to 1972 National Commission on State Workmen's Compensation Laws.
3. Workers' compensation is one area where, post-injury, the hiring entity will often *prefer* to be the employer of the hired individual ("employee"), because that conclusion triggers application of the workers' compensation exclusivity bar; no tort claim available to injured worker absent application of the "intentional tort" exception, and workers' compensation recovery is limited to medical expenses and statutorily-defined impairment compensation or income replacement (often 2/3 of pre-injury compensation, subject to statutory caps). Trade-off is no need to prove negligence, quick recovery resolved administratively, avoids litigation.

F. Federal Wage and Hour Protections – FLSA
   1. Application of "Economic Realities" test, given broadest "suffer or permit to work" statutory language; uncertainty in application and misclassification abuse; Department of Labor enforcement.

G. State Wage and Hour Protections

H. State Wage Payment and Collection Laws

VI. <u>Who Is the Worker's "Employer?"</u>

A. Consider possible application of "joint employer" rules.

1. This can affect application of statutory protections by aggregation of the total number of employees; i.e., the employee-counting issue
2. Also can affect which parties are liable for violation of the employee statutory protection, defeating attempts at outsourcing employment liability. See, e.g., *Becerra v. Expert Janitorial*, 332 P.3d 415 (Wash. 2014) (state wage and hour); *Zheng v. Liberty Apparel*, 355 F.3d 61 (2d Cir. 2003) (federal wage and hour).
3. Prior DOL regulatory movement on "joint employer," from Jan. 2020 Final Rule (applying Bonnette (9th Cir.), to July 2021 rescission of final rule; various circuit court law on "joint employer" doctrine.
4. Vertical vs. Horizontal joint employer situations (U.S. Department of Labor NPRM illustrations). See NPRM, proposed §791.110.

Figure A: Vertical Joint Employment

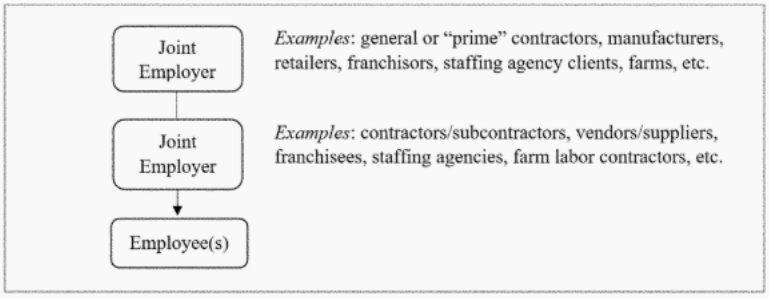
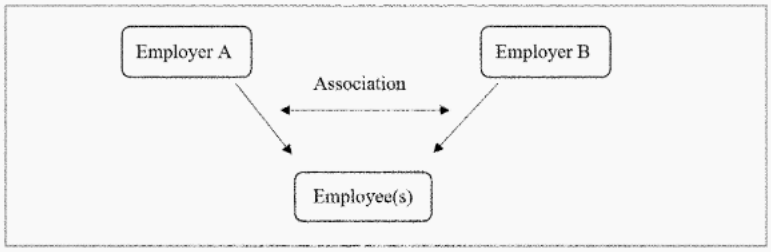


Figure B: Horizontal Joint Employment



5. Trump administration significant movement on “joint employer” rules at federal level. But state laws on joint employer may apply different standards and tests.
6. **NLRB** – new Feb. 2026 final rule withdrawing a prior 2023 rule on joint employer status and returning to 2020 standard.

   https://www.federalregister.gov/documents/2026/02/27/2026-03955/withdrawal-of-2023-standard-for-determining-joint-employer-status

   Joint employment requires “substantial direct and immediate control” over at least one of eight defined essential terms or conditions of employment:

   1. Wages
   2. Benefits
   3. Hours of Work
   4. Hiring
   5. Discharge
   6. Discipline
   7. Supervision
   8. Direction

   - Even where an employer exercises direct control over another employer’s workers in one of these categories, it will not be a joint employer if that control is “sporadic, isolated, or de minimis.”
   - Indirect control or reserved but never exercised control is probative of joint employer status, “but only to the extent it supplements and reinforces evidence of the entity’s possession or exercise of direct and immediate control” over an essential term and condition.

7. **DOL** – April 22, 2026 NPRM applies to FLSA, FMLA, and Migrant & Seasonal Agricultural Worker Protection Act (MSPA). https://www.federalregister.gov/documents/2026/04/23/2026-07959/joint-employer-status-under-the-fair-labor-standards-act-family-and-medical-leave-act-and-migrant

    - NPRM "Vertical" Four Factors: whether the person (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records. No single factor dispositive.
    - "Reserved control" is "relevant" but the potential joint employer's actual exercise of control is more relevant than such ability, power, or right. "For example, a potential joint employer's contractual authority to supervise, discipline, or fire employees is less relevant if in practice the potential joint employer never exercises such authority."
    - "Indirect control" is exercised by potential joint employer through mandatory decisions to another employer that controls the employee. But voluntary decisions to grant potential joint employer's "request, recommendation, or suggestion" does not constitute indirect control.

B. SNT Context – Is trustee the "employer" for purposes of statutory coverage, even where the trustee outsources employment management?

C. *Risk Management Strategies Inc. v. Texas Workforce Comm*., 464 S.W.3d 864 (Ct. App. Tex. 2015).

1. SNT specific context involving outsourcing of employment services.
2. Facts: RMS clients were financial institutions appointed as trustees of several SNTs. Beneficiaries of the trusts often need extensive in-home care, and caregiver is often a family member. Trustees outsource employment management of caregivers through "Client Services Agreement," whereby RMS agrees to "provide and perform . . . for and on behalf of the Trustee . . . employment and related services" for the individuals engaged in caring for the trust's beneficiary. This includes paying wages, collecting, reporting and payment of payroll taxes, and payment of unemployment insurance. The agreement provided that the parties agree that RMS would "do all acts necessary to employ or contract with individuals who will be the employees or independent contractors of RMS and that the Trustees shall not in any manner be deemed to be the employer of such persons."
3. RMS argued that, by contract, all the control over the caregivers was vested in RMS, and not in the SNT trustees.
4. Texas Workforce Commission determination that trustees were employers, not RMS; Commission's concern about the practice of "payrolling"

5. Judicial review and specific limitations in Texas; Texas Court of Appeals determination at pleading stage re: *ultra vires* challenge to Commission's action.

VII. Related Issue for Caregivers – Federal FLSA Exemption

A. History of FLSA exemption for caregivers

1. 1974 FLSA extended to cover "domestic service"
2. Exemption for domestic service employment – **companionship** services for individuals who (because of age or infirmity) are unable to care for themselves (Min. Wage and OT exemption); 29 U.S.C. s. 213(a)(15). Under current DOL regulations, this exemption does not include performance of medical tasks which typically require training and are performed by medical personnel, such as registered nurses, LPNs, or CNAs. 29 C.F.R. s. 552.6
3. Exemption for domestic service in household who **resides in** household (OT exemption only); 29 U.S.C. s. 213(b)(21); 29 C.F.R. 552.102
4. 2013 – DOL revision to regulation added important limitations on these exemptions.
    - Companionship exemption as applied to "provision of **care**" (dressing, grooming, feeding, bathing, toileting) could not exceed 20% of hours worked. 2013 regulation placed focus on protection and fellowship.
    - Companionship and live-in domestic service by **third party employers** not exempt, "even if the employee is jointly employed

by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption." 29 C.F.R. s. 552.109. *See Home Care Association of America v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015) (upholding 2013 regulation as applied to third-party employers, applying *Chevron* deference).

B. Notice of Proposed Rulemaking, Dept. of Labor, WHD, *Application of the Fair Labor Standards Act to Domestic Service*, 29 C.F.R. s.552 (July 2, 2025).

1. Intent to return to broader exemption for companionship and in-home caregivers. Includes: (1) reversal of limitation on third-party employer's ability to use exemption; (2) reversal of "companionship" limitations relating to 20% limit for "care," to fully include "care" along with "fellowship" and "protection" as covered by the exemption. Proposal would rescind 2013 regulation in its entirety and return to the 1975 regulations regarding domestic services.
2. Reversal of *Chevron* deference in *Loper Bright Enterp. v. Raimondo*, 603 U.S. 369 (2024), as basis for revisiting regulation. "The Department has thus far taken the position in litigation that the 2013 rule is still valid despite the 2024 Loper Bright decision, but is now taking a fresh look at arguments to the contrary. . . . In sum, the Department seeks to determine whether, with respect to third party employers, its original interpretation of

the section 13(a)(15) and 13(b)(21) exemptions is the better reading of the FLSA's statutory text."

C. Commentary: Joshua Vaughn, et al, Littler ASAP, *DOL Proposes Rule to Reinstate Companionship and Live-In Exemptions from Minimum Wage and Overtime for Third-Party Employers*, available at: https://www.littler.com/news-analysis/asap/dol-proposes-rule-reinstate-companionship-live-exemptions-minimum-wage-and

VIII. Related Issue for Caregivers – State Domestic Workers Bill of Rights Legislation

A. Domestic Worker Bill of Rights (DWBR)

1. See generally National Domestic Workers Alliance, available at: https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/domestic-workers-bill-of-rights/
2. California example. Kevin Rehwald, *Rights for Caregivers*, 42 L.A. Lawyer 26 (2019). Summary of key provisions.
3. Illinois example. See Cesar Rosado Marzan, *Personal and Political: How the Illinois Domestic Workers' Bill of Rights Connected Lives*, 57 U.C. Davis L. Rev. 3033 (2024). 820 ILCS 182/1, 182/5, 182/10, 182/90, 182/99. Summary of key provisions.

WHEN IS THE TRUST A (JOINT) EMPLOYER?

Jason R. Bent
Director, Institute for Law and the Workplace

Chicago-Kent College of Law | ILLINOIS TECH

1

EMPLOYEE OR I/C?

- Control (common law test)
- Economic Realities (dependence)
- Hybrid (either control OR dependence)
- ABC Test (trend in some states)

2

CONTROL TEST

- Origins in CL Agency – *respondeat superior* doctrine; should that extend to employment law protections?
- *Darden* (ERISA) – 12 factors to consider in determining control
- Default for federal statutes w/ unhelpful or circular definitions of "employee," "employer," or "employ"
- Many state WC statutes

3

ECONOMIC REALITIES

- Key is economic dependence
- Federal statutes where Congress indicates an intent to cover more broadly than the CL test
- FLSA – employ = "to suffer or permit to work"
- FMLA – incorporates FLSA definition
- **New** DOL NPRM for FLSA & FMLA - a five-factor test with greater weight on two "core" factors (not yet final).

4

ECONOMIC REALITIES UNDER DOL's NPRM

1. Nature & degree of control over worker
2. Worker's opportunity for profit or loss
3. Amount of skill required for the work
4. Degree of permanence of the relationship
5. Whether the work is part of an integrated unit of production

5

ECONOMIC REALITIES

Criticism:

> "It is comforting to know that 'economic reality' is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy. But 'reality' encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why?"
>
> - Judge Frank Easterbrook

6

ECONOMIC REALITIES

"People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an approach under which no one can know where he stands until litigation has been completed . . ."

- Judge Frank Easterbrook

7

HYBRID

- Results in somewhat broader coverage
- Either control OR dependence
- Some courts have applied to:
  - ADA – disability
  - ADEA – age
  - Several different state statutes

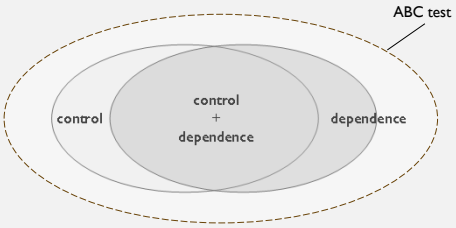
8

ABC TEST

- Trend only in some states, not federal (…so far)
- Rebuttable presumption that worker is "employee," unless D carries its burden to show all 3:
  - **(A)** Absence of D's control
  - **(B)** Work performed outside D's usual course of business or outside all D's places of business
  - **(C)** Worker's enterprise can exist independently; would survive in the absence of the relationship with D

9

BOUNDARIES OF PROTECTION



10

EMP'EE v. I/C IN OTHER CONTEXTS

- Beef boning workers – *Rutherford* (FLSA)
- Mattress delivery workers – *Hargrove* (NJ state W&H)
- Fed Ex home delivery drivers (NLRA, FLSA)
- Uber, Lyft, platform workers (CA state W&H)
- Commercial cleaners – *Mujo* (CT state W&H)
- Pickle harvesters – *Lauritzen* (FLSA)
- Exotic dancers – *Verma* (FLSA, PA state W&H)

11

SNT CONTEXT

Federal payroll taxes & withholding

- FICA – 26 U.S.C. 3101
- FUTA – 26 U.S.C. 3301
- IRC – 26 U.S.C. 3121(d) definition "employee"
- *Darden* default rule = **Control Test**
- IRS 20 factor test for control
- New IRS emphasis on **3 categories**: behavioral control, financial control, and relationship of the parties

12

SNT CONTEXT

State Unemployment Insurance

- About half of states have adopted some form of the ABC test in the context of unemployment insurance
- More common to see ABC test applied here than for other state employment laws

13

SNT CONTEXT

State Workers' Compensation

- States with comprehensive adoption of ABC or adoption of ABC in WC statute

  (e.g., MA, NJ, CA, OR)
- Most states no longer exempt from WC insurance obligation based on # of employees
- But will worker prefer I/C classification (post-injury), due to WC exclusive remedy tort bar?

14

SNT CONTEXT

Federal W&H - FLSA

- **Economic Realities** test
- Watch for changes in DOL regulations shifting emphasis on factors, depending on political control of the executive branch

15

SNT CONTEXT

State W&H and Wage Payment Laws

- States with comprehensive adoption of ABC or specific adoption for W&H laws
- Trend is some states moving to ABC test; though other states have weakened/modified existing ABC test
- Many other states sticking with Economic Realities test for W&H

16

WHO IS THE EMPLOYER?

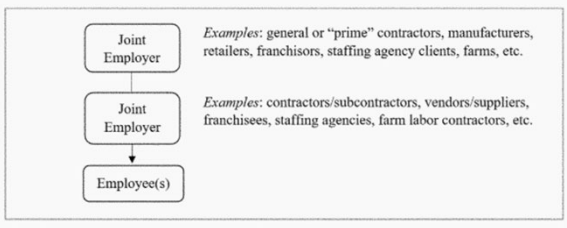
Consider possible application of "joint employer" rules. This mostly comes up in two ways:

1. Counting employees across entities for purposes of statutory coverage triggers
2. Determinations that multiple "employers" may be liable for violations

17

VERTICAL JOINT EMPLOYMENT

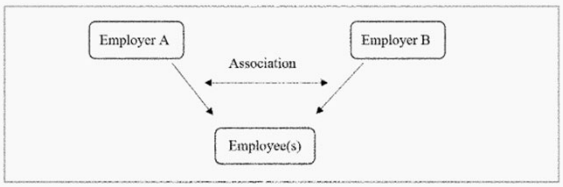
Figure A: Vertical Joint Employment



18

HORIZONTAL JOINT EMPLOYMENT

Figure B: Horizontal Joint Employment



19

JOINT EMPLOYMENT UNDER DOL's NPRM

Four factors, none dispositive. Whether the person:

1. Hires or fires the employee
2. Supervises and controls work schedule or employment conditions to substantial degree
3. Determines the employee's rate and method of pay
4. Maintains employee's employment records

Reserved control is relevant, but actual exercise of control is more relevant than such ability, power, or right.

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JOINT EMPLOYMENT UNDER NLRB's FINAL RULE

Only if "substantial direct and immediate control" over at least 1 of 8 essential terms or conditions:

1. Wages	5. Discharge
2. Benefits	6. Discipline
3. Hours of Work	7. Supervision
4. Hiring	8. Direction

21

JOINT EMPLOYMENT UNDER NLRB's FINAL RULE

Will not be a joint employer if control over one of these eight is "sporadic, isolated, or de minimis"

Indirect control or reserved control is "probative" of joint employment, "but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control" over an essential term and condition

22

JOINT EMPLOYMENT STATE LAW VARIATION

Example: IL Minimum Wage Law Regs

Five factors, none dispositive:

1. Work is to the benefit of alleged joint empr
2. Work is integral part of alleged joint empr's business
3. Direct or indirect control over terms or conditions, including schedule and quality of work
4. Owns or leases the premises or provides tools or materials used
5. Direct or indirect control over other empr's operations through K, joint mgmt, ownership interest, or economic dependence

23

IL MIN. WAGE REGS EXAMPLE

Customer contacted Home Care Agency about receiving home care services. HCA met with Customer and determined what services were needed to meet Customer's needs. HCA, along with Customer, determined the tasks to be performed for Customer and the hours per week required to perform those tasks. HCA set qualifications, recruited, and hired Home Care Worker. Customer and Customer's wife supervise Home Care Worker on a day-to-day basis, can modify the tasks that Home Care Worker performs, and can modify Home Care Worker's work schedule. Customer or family members of Customer can report issues to HCA and HCA intervenes if a problem arises, such as arranging for another home care worker should Home Care Worker become unavailable. HCA pays the home care worker directly, keeps records of hours worked, and determines the hourly rate of pay for the Home Care Worker. Customer is invoiced by HCA for the services rendered.

24

IL MIN. WAGE REGS EXAMPLE

In this example, a joint employer relationship is formed between HCA, Customer, and Customer's wife. Here, Home Care Worker's wages are paid by HCA and HCA controls the rate of pay and the method of payment. Customer is invoiced by HCA. HCA, Customer, and Customer's wife exercise considerable control over the structure and conditions of Home Care Worker's employment by determining the hours of work and what tasks are to be performed. Customer's wife can raise issues with Home Care Worker's performance with HCA. HCA intervenes in issues between Home Care Worker and Customer and/or Customer's wife.

25

WHO IS THE EMPLOYER? SNT CONTEXT

Is the trustee an "employer" for purposes of statutory coverage, even where the trustee attempts to outsource employment & payroll management and control to a separate service provider?

Risk Mgmt Strategies v. Texas Workforce Comm., 464 S.W.3d 864 (Ct. App. Tex. 2015)

26

RELATED ISSUE: FLSA EXEMPTIONS

Two relevant FLSA exemptions:

213(a)(15) – "employed in domestic service employment to provide **companionship services** for individuals who (because of age or infirmity) are unable to care for themselves"

213(b)(21) – "employed in domestic service in a household and who **resides in** such household"

27

RELATED ISSUE: FLSA EXEMPTIONS

1974 – FLSA amended to cover "domestic service," but with exemptions for companionship services and live-in domestic services

2013 – DOL regulations revised in two critical ways:

(1) no companionship exemption if "provision of care" (dressing, grooming, feeding, bathing, etc.) exceeds 20% of hours worked; focus is meant to be on protection and fellowship; and

(2) no companionship or live-in domestic service exemption can be claimed by third-party employers, even if the employee is jointly employed by the individual or member of the family or household using the services

2025 – NPRM to reverse the two restrictions implemented by 2013 Rule, expanding the domestic service exemption (still no final rule)

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RELATED ISSUE: STATE DOMESTIC WORKERS BILL OF RIGHTS

- National Domestic Workers Alliance – summary of proposed legislative reforms available at:

  https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/domestic-workers-bill-of-rights/national-domestic-workers-bill-of-rights/

- California, Illinois, and other examples

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National Conference on Special Needs Planning and Special Needs Trusts

Friday
October 23, 2026

Working with Clients with Cognitive Disabilities: Practical Strategies Client Engagement

STETSON LAW

Center for Elder Justice

Access and Justice For All®

Pre meeting accommodation checklist

- Confirm preferred communication method and accessible materials.
- Confirm helpful time, place, meeting duration, and breaks.
- Confirm chosen participants, roles, and information-sharing authority.
- Arrange private communication with necessary access supports.
- Confirm whether an interpreter, device, or specialist is needed.
- Obtain appropriate authorization for relevant records or consultation.
- Identify the particular decision and applicable legal standard.
- Confirm actual deadlines and any accommodation request procedure.
- Send a brief agenda and explain what the meeting will involve.
- Plan an accessible recap and follow-up contact.

Use notes

- Use this checklist with the person. Confirm that arrangements work rather than treating completion of a form as proof of access.
- Adapt it to the legal office, fiduciary meeting, or court proceeding and to the duties of the professional involved.

Client communication profile

- Client and matter:
- Preferred name and contact method:
- How I prefer to receive information:
- How I express agreement, disagreement, or uncertainty:
- Tools or communication methods I use:
- Helpful time, place, meeting length, and breaks:
- What makes communication harder:
- Person I want involved and the agreed role:
- Information sharing permission and limits:
- How to arrange confidential communication:
- Preferred format for documents and next steps:
- Date confirmed with client and next review:

Use notes

- Complete this with the person. Distinguish their preferences from someone else's report.
- Include only information needed for the representation or access arrangement. Handle it under applicable confidentiality and security requirements.
- This is a practice template, not a clinical assessment or capacity determination.

Decision and support documentation

- Date, setting, participants, and roles:
- Client identity and authority relevant to this matter:
- Particular decision and governing legal standard:
- Relevant information, options, risks, and consequences explained:
- Supports and accommodations provided:
- Client's expressed goals, responses, and reasons:
- Observations before and after support:
- Collateral or clinical information and its limits:
- Remaining concern and its relevance to the standard:
- Consent or other authority for consultation or disclosure:
- Conclusion, next step, and rationale:
- Follow-up date and responsible person:

Use notes

- Describe what occurred instead of labeling the person globally "competent" or "incompetent."
- When a legal conclusion is necessary, connect it to the specific standard, evidence, and task.
- This template organizes a record. It does not establish a universal capacity test or replace required jurisdiction-specific forms.

Communication phrases to use

Purpose	Sample phrase
Invite participation	"What do you want to happen?"
Offer access support	"What would make this easier to discuss?"
Introduce a choice	"Here are the options. Which parts matter most to you?"
Check meaning	"I want to check how clearly I explained this. How would this affect you?"
Invite disagreement	"You can disagree or ask for another option."
Clarify a supporter role	"What help would you like from this person?"
Offer a pause	"Would you like a break or more time?"
Confirm the next step	"What happens next, and who will help with that?"

Use notes

- Adapt the phrase to the person's language and communication method.
- A short phrase begins the conversation. It does not substitute for complete advice about legal consequences.

Court access checklist

- How can participants find and request accommodations?
- Who coordinates arrangements and confirms them before the hearing?
- Are notices forms and electronic files accessible to this participant?
- What aid service or procedural modification does the participant request?
- How will the court receive sensitive supporting information?
- Who has approved any supporter role or change to questioning?
- How will remote interpretation, captioning, and document access work?
- How will staff check effectiveness and respond if arrangements fail?
- How can the participant understand the order and next steps?
- What review grievance or other process is available if a request is denied?

Use notes

- Tailor the checklist to the court's rules and roles. Confirm arrangements and deadlines separately.
- Justice intermediaries offer one model of neutral communication assistance in some jurisdictions. Verify local availability, qualifications, and authority before proposing one. They assist communication rather than answering or deciding for the person.

Accommodation request template

Re: [Matter and proceeding date]

The participant requests [specific modification or communication aid] for [particular task or proceeding]. The access barrier is [brief functional description]. The proposed adjustment would assist participation by [explanation].

Please advise of any required form, supporting information, or approval process. Please confirm [arrangements requested] by [date], or identify an effective alternative for discussion.

Contact for coordination: [authorized name and contact information]. Please advise how sensitive supporting information should be submitted and handled under the applicable procedure.

Use notes

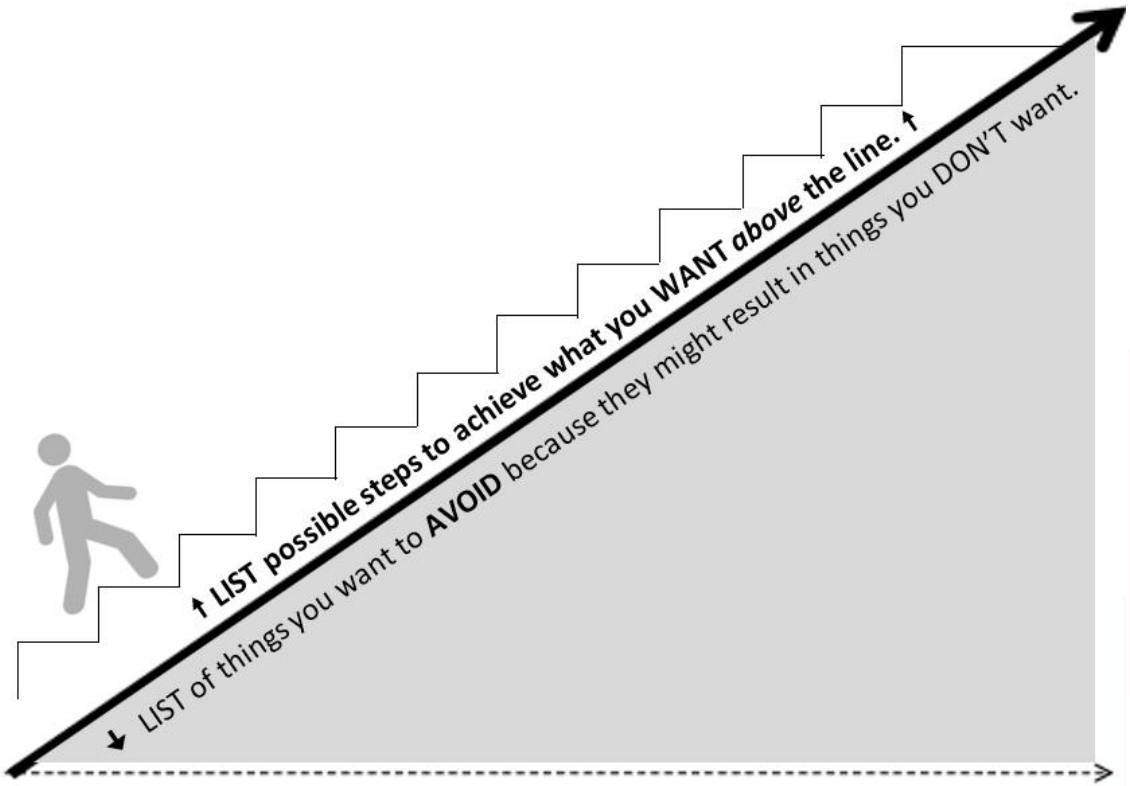
- Obtain appropriate authorization and follow the forum's request and documentation procedures.
- Disclose information appropriate to the request. Use the proper confidential filing mechanism when applicable rather than assuming the request is confidential.
- Confirm arrangements and protect deadlines independently. Assess any alternative with the person.
- A representative's supporter request, remote participation request, or change to questioning may require additional rulings.

The Arc Colorado

Name:_____

Today's date:_____

What I WANT



What I DON'T Want

This tool was originally developed by the UMKC Institute for Human Development, UCEDD (lifecoursetools.com, 2016), and modified by The Arc of Colorado (thearcofco.org, 2025)

IDENTIFYING DECISION-MAKING SUPPORTS

This tool is designed to assist with identifying an individual's ability to make decisions and manage key areas of life. It is intended to assist with exploring options for integrated decision-making services & supports.

Name of Individual: _____

Name of individual completing this form: _____

Relationship to individual *(circle one):* Self Family Friend Guardian Other: _____

How long have you known the individual? _____

Step 1: If yes, put a checkmark in the GREEN column – this means the individual is good to go. If NO, put a mark in the yellow column. Step 2: When you have completed all the questions, explore integrated services & supports options for supported decision-making for all questions marked in the yellow column. Step 3: ONLY if NO integrated services or supports can be identified should substitute decision-making be considered for those specific areas of need.	 Can individual decide or direct this activity independently most of the time?	 Can individual decide or direct this activity with assistance most of the time?	 Does the individual requires substituted decision making support?
DAILY LIVING at HOME			
Can the individual make and communicate choices in regard to getting dressed in the morning (what to wear, appropriate attire for weather/event, etc.)?			
Can the individual make and communicate choices in regard to bedtime and/or morning routines (i.e. what time to go to bed, when to get up, bathroom, etc.)?			
Is the individual able to manage their money (i.e. give change, use a debit/credit card, etc.)?			
Is the individual able to identify and resist financial exploitation?			
HEALTHY LIVING			
Does the individual make decisions about where, when, and what to eat?			
Can the individual follow a prescribed diet and/or take medicines as directed?			
Does the individual understand the need to maintain individual hygiene and dental care?			
Can the individual make and communicate decisions regarding medical treatment, including understanding the consequences of not accepting treatment?			
Does the individual understand health consequences associated with high-risk behaviors *(substance abuse, overeating, high-risk sexual activities, etc.)*?			
Can the individual alert others and seek medical help for serious health problems?			
Is the individual able to decide and direct what kinds of support they need or want, and select who provides those services or supports?			

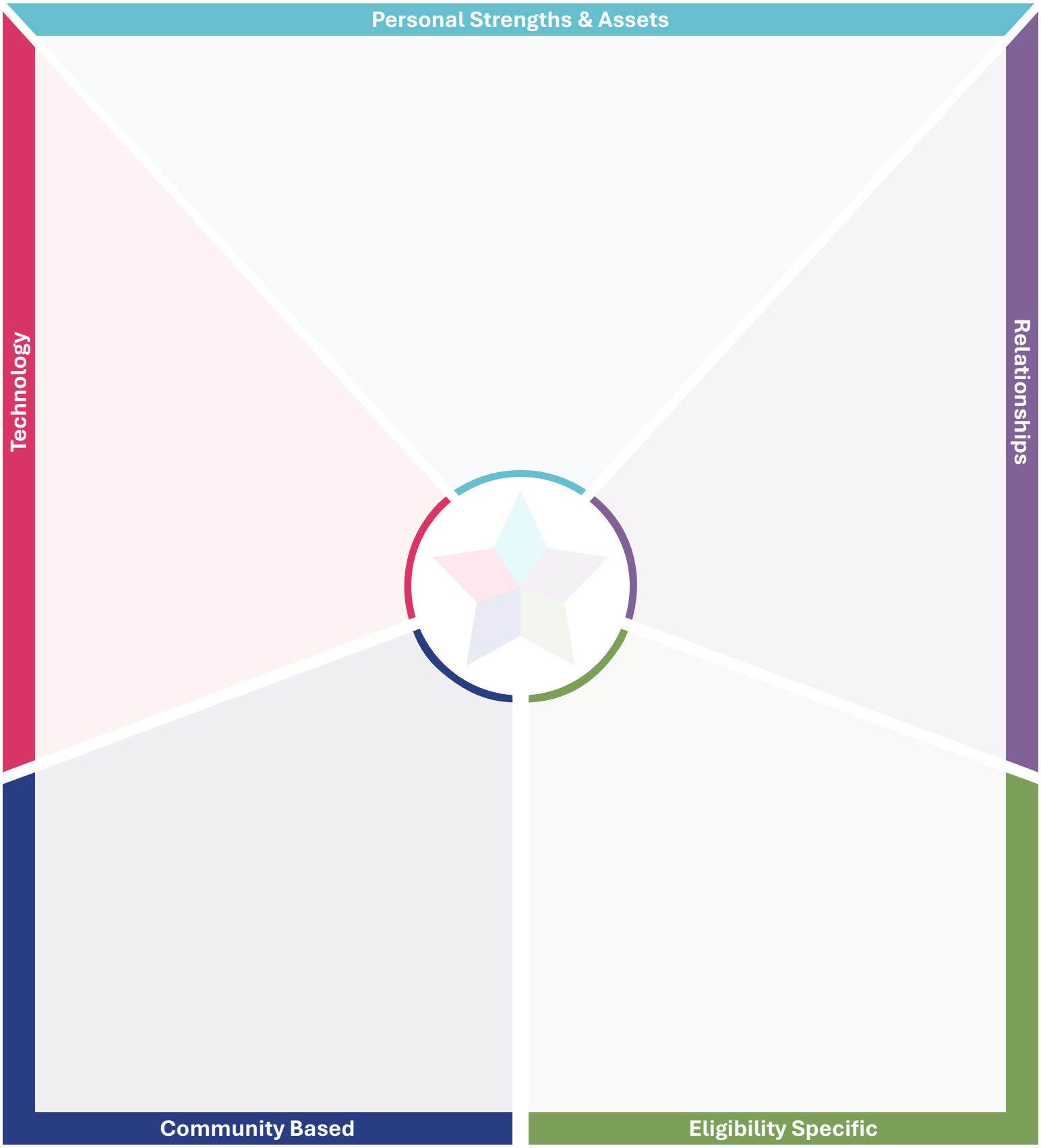
IDENTIFYING ALTERNATIVES TO GUARDIANSHIP			
SOCIAL RELATIONSHIPS			
Can the individual differentiate appropriate relationship behaviors as with family, friends, co-workers, intimate partners, etc. (*how we talk to and touch others*)?			
Is the individual able to make appropriate decisions concerning marriage and intimate relationships?			
Does the individual understand consent and permission in regards to sexual relationships?			
SAFETY & SECURITY			
Does the individual avoid common environmental dangers (*traffic, sharp objects, hot stove, poisonous products, etc.)*?			
Can the individual alert others and seek medical help for serious health problems?			
Is the individual able to recognize when someone is taking advantage of them, hurting them, or abusing them (physical, sexual, emotional) and protect themselves?			
Does the individual know who to contact if they are in danger, being exploited, or being treated unfairly (*police, DSS, Arc, Lawyer*)?			
COMMUNITY LIVING			
Is the individual able to be on their own without risk of serious harm or injury to themselves?			
Does the individual understand what is involved with managing a home that is safe *(home maintenance, sanitary conditions, secure, etc.)?*			
Is the individual able to access community resources critical to functioning successfully and safely in community settings (*post office, transportation, bank, grocery store, emergency services, church, etc.)*?			
CITIZENSHIP & ADVOCACY			
Is the individual able to identify someone they want to represent their interests and support them with decision making?			
Is the individual able to communicate approval to share information with parents, family members, and friends who are not legal guardians?			

IDENTIFYING DECISION-MAKING SUPPORTS			
SOCIAL RELATIONSHIPS			
Is the individual able to differentiate and make appropriate decisions concerning appropriate relationship behaviors with family, friends, intimate relationships (*how we talk and touch each other*)?			
SAFETY & SECURITY			
Does the individual avoid common environmental dangers (*traffic, sharp objects, hot stove, poisonous products, etc.)?*			
Can the individual alert others and seek medical help for serious health problems?			
Is the individual able to recognize when someone is taking advantage of them, hurting them, or abusing them (physical, sexual, emotional)?			
Does the individual know who to contact if they are in danger, being exploited, or being treated unfairly?			
DAILY LIVING at SCHOOL and in COMMUNITY			
Is the individual able to be on their own without risk of serious harm or injury to themselves?			
Is the individual able to identify and resist financial exploitation?			
CITIZENSHIP & ADVOCACY			
Is the individual able to identify someone they want to represent their interests and support them with decision making?			
Is the individual able to communicate approval to share information with parents, family members, and friends who are not legal guardians?			

IDENTIFYING DECISION-MAKING SUPPORTS			
OTHER			

Integrated Supports Star

My Name is:



Charting the LifeCourse Framework and Tools

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Integrated Supports Star

Prompts to help you fill out the Integrated Supports Star:
The Integrated Support Star helps anyone map out current services, solve specific problems, and plan next steps. It can be used to explore needs, find gaps, or plan how to get future support.

Personal Strengths & Assets

- Skills, personal abilities, knowledge or life experiences;
- Strengths, things a person is good at or others like and admire;
- Assets, personal belongings and resources

Technology

- Personal technology anyone uses;
- Assistive or adaptive technology with day to day tasks;
- Environmental technology designed to help with or adapt surroundings

Community Based

- Places such as businesses, parks, schools, faith-based communities, health care facilities;
- Groups or membership organizations;
- Local services or public resources everyone uses

Eligibility Specific

- Needs based services based on age, geography, income level, or employment status;
- Government paid services based on disability or diagnosis, such as special education or Medicaid

Relationships

- Family and others that love and care about each other;
- Friends that spend time together or have things in common;
- Acquaintances that come into frequent contact but don't know well

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7 Decision Making Options
For People With IDD

The Arc Aurora
www.thearcofaurora.org

THINK+change
TALKS TRAININGS TOOLS
A social enterprise of The Arc of Aurora
www.thinkchange.training

When a person with intellectual and developmental disabilities (IDD) turns 18, they are considered an adult and have the right to make decisions about their life, just like anyone else. But we all need help, sometimes! This handout explains the different ways someone with IDD can receive decision-making support in Colorado, **listed from the least to the most restrictive options.**

DID YOU KNOW?

Not everyone with IDD needs help making decisions. Many people with IDD can make their own choices, and might not need any of the options listed.

A person with IDD is not required to have a guardian when they turn 18. In many cases, people may say they are "their own guardian," meaning they can make their own decisions.

SETTING UP SUPPORT

The process to establish these support roles is different for each. Some are easy to set up, while others may require a court hearing or come with costs. There are **supportive roles that assist** the person in making their own decisions, and **surrogate roles that make** decisions on the person's behalf.

MULTIPLE SUPPORTERS

A person with IDD can have different people helping with different things. For example, one person might help with financial needs, while another helps with healthcare decisions.

ONE SIZE DOESN'T FIT ALL—AND THAT'S OKAY!

The right support looks different for everyone because everyone's needs are different. When in doubt, start with ***less*** restrictive options. It's okay to explore what works best.

01 Supported Decision-Making (SDM)

Supported Decision-Making (SDM) allows a person with IDD to choose trusted supporters to help them understand options and make decisions. Supporters can give advice and guidance—but the person still makes their own decisions. In Colorado, SDM agreements are voluntary and must be in writing. To download an agreement, visit: thinkchange.info/SDMexampleagreement

02 Authorized Representative (AR)

An AR (Authorized Representative) helps a person with IDD access the services and supports they need, as defined by the person with IDD. The person with IDD usually designates an AR through their service provider or Case Management Agency (CMA) and can be changed at any time. To become an AR in Colorado, contact the service provider or CMA for the process and paperwork.

03 Representative Payee

A Representative Payee helps manage Social Security benefits for someone who needs assistance with their finances. They can only manage Social Security funds, not other financial matters. To become a Representative Payee in Colorado, contact the local Social Security office, fill out Form SSA-11, provide ID, and go through an interview: https://www.ssa.gov/payee/

04 Medical Proxy (Healthcare Agent)

A Medical Proxy makes medical decisions for someone who can't make them themselves. Their role is limited to healthcare decisions only. To become a Medical Proxy in Colorado, the person must appoint an 'agent' in writing through a Medical Durable Power of Attorney (MDPOA), and forms are available through the Colorado Department of Public Health and Environment: https://cdphe.colorado.gov/palliative-care/advance-care-planning-for-patients-and-families

05 Power of Attorney (POA)

A Power of Attorney (POA) is a legal document that lets someone make decisions for another person, for example, like handling finances or medical care. The POA can have broad or limited authority, and it can remain in effect if the person becomes unable to make decisions. To create a POA in Colorado, fill out the form (notarization is recommended) available from the Colorado Bar Association: https://www.cobar.org/portals/cobar/repository/SLH/chap23.pdf

06 Conservator

A Conservator is a person appointed by the court to manage the finances and property of someone who cannot do so on their own. Conservators are responsible for handling money, assets, and property. To become a Conservator in Colorado, you must file a petition with the court, provide financial information about the person, and attend a court hearing.
Visit the Colorado Judicial Branch's website for more details:
https://www.coloradojudicial.gov/self-help/conservatorship-adults

07 Guardianship

A Guardian is a person appointed by the court to make personal and healthcare decisions for someone who is unable to make those decisions on their own. Guardians are often family members, friends, or professional organizations. The court determines how much decision-making authority the Guardian has. To become a Guardian in Colorado, you must file a petition with the court, attend a court hearing, file an annual Guardianship Report, and pay any required court and filing fees. For forms and more information, visit the Colorado Judicial Branch's website: https://www.coloradojudicial.gov/self-help/guardianship-adults

This 1-page guide gives an overview of these roles. For more detailed information or advice, visit the links provided and consider consulting a professional.
www.thearcofaurora.org | www.thinkchange.training

7 Opciónes de tomar deciciones

Para personas con IDD

Cuando una persona con discapacidad intelectual y del desarrollo (IDD en inglés) cumple 18 años, se la considera adulta y tiene derecho a tomar decisiones sobre su vida, como cualquier otra persona. Pero, a veces, ¡todos necesitamos ayuda! Este folleto explica las diferentes maneras en que una persona con IDD puede recibir apoyo para la toma de decisiones en Colorado, **enumeradas de la opción menos restrictiva a la más restrictiva.**

¿LO SABIA?

No todas las personas con IDD necesitan ayuda para tomar decisiones. Muchas personas con IDD pueden tomar sus propias decisiones y puede que no necesiten ninguna de las opciones enumeradas.

Una persona con IDD no está obligada a tener un tutor cuando cumple 18 años. En muchos casos, las personas pueden decir que son «sus propios tutores», lo que significa que pueden tomar sus propias decisiones.

ESTABLECER EL APOYO

El proceso para establecer estas funciones de manutención es diferente en cada caso. Algunas son fáciles de establecer, mientras que otras pueden requerir una vista judicial o conllevar costes. Hay **funciones de apoyo que <u>ayudan</u>** a la persona a tomar sus propias decisiones y **funciones de sustitución que <u>toman</u>** decisiones en su nombre.

APOYOS MÚLTIPLES

Una persona con IDD puede tener diferentes personas que le ayuden con diferentes cosas. Por ejemplo, una persona puede ayudar con las necesidades económicas y otra con las decisiones sanitarias.

LA TALLA ÚNICA NO SIRVE PARA TODOS, ¡Y NO PASA NADA!

El apoyo adecuado es diferente para cada persona, porque las necesidades de cada uno son diferentes. En caso de duda, empieza por las opciones **menos** restrictivas. No pasa nada por explorar lo que funciona mejor.

01 La Toma de Decisiones con Apoyo (SDM en inglés)

La Toma de Decisiones con Apoyo (SDM) permite a una persona con IDD elegir a personas de confianza que le ayuden a entender las opciones y a tomar decisiones. Las personas de apoyo pueden dar consejos y orientación, pero la persona sigue tomando sus propias decisiones. En Colorado, los acuerdos de SDM son voluntarios y deben hacerse por escrito. Para descargar un acuerdo, visite: thinkchange.info/SDMexampleagreement

02 Representante autorizado (AR en inglés)

Un AR (Representante Autorizado) ayuda a una persona con IDD a acceder a los servicios y apoyos que necesita, según lo definido por la persona con IDD. La persona con IDD suele designar a un AR a través de su proveedor de servicios o Agencia de Gestión de Casos (CMA) y puede cambiarlo en cualquier momento. Para convertirse en un AR en Colorado, póngase en contacto con el proveedor de servicios o CMA para el proceso y el papeleo.

03 Representante del beneficiario

Un representante del beneficiario ayuda a gestionar las prestaciones de la Seguridad Social de una persona que necesita ayuda con sus finanzas. Sólo pueden gestionar los fondos de la Seguridad Social, no otros asuntos financieros. Para convertirse en un representante del beneficiario en Colorado, póngase en contacto con la oficina local de la Seguridad Social, rellene el formulario SSA-11, proporcione un documento de identidad y pase una entrevista: https://www.ssa.gov/payee/

04 Apoderado médico (agente sanitario)

Un apoderado médico toma decisiones médicas por alguien que no puede tomarlas por sí mismo. Su función se limita únicamente a las decisiones sanitarias. Para convertirse en apoderado médico en Colorado, la persona debe nombrar a un «agente» por escrito mediante un poder médico duradero (MDPOA), y los formularios están disponibles a través del Departamento de Salud Pública y Medio Ambiente de Colorado: https://cdphe.colorado.gov/palliative-care/advance-care-planning-for-patients-and-families

05 Un poder notarial (POA en inglés)

Un poder notarial (POA, por sus siglas en inglés) es un documento legal que permite a alguien tomar decisiones por otra persona, por ejemplo, como la gestión de las finanzas o la atención médica. El poder puede tener una autoridad amplia o limitada, y puede seguir en vigor si la persona queda incapacitada para tomar decisiones. Para crear un poder en Colorado, rellene el formulario (se recomienda la notarización) disponible en el Colegio de Abogados de Colorado. https://www.cobar.org/portals/cobar/repository/SLH/chap23.pdf

06 Un Curador

Un curador es una persona designada por el tribunal para administrar las finanzas y los bienes de alguien que no puede hacerlo por sí mismo. Los curadores son responsables del manejo de dinero, bienes y propiedades. Para convertirse en curador en Colorado, debe presentar una petición ante el tribunal, proporcionar información financiera sobre la persona y asistir a una audiencia en el tribunal. Visite el sitio web del Poder Judicial de Colorado para obtener más detalles: https://www.coloradojudicial.gov/self-help/conservatorship-adults

07 Tutela

Un tutor es una persona designada por el tribunal para tomar decisiones personales y sanitarias en nombre de alguien que no puede tomarlas por sí mismo. Los tutores suelen ser familiares, amigos u organizaciones profesionales. El tribunal determina el grado de autoridad del tutor para tomar decisiones. Para convertirse en tutor en Colorado, debe presentar una petición ante el tribunal, asistir a una audiencia judicial, presentar un informe anual de tutela y pagar las tasas judiciales y de presentación requeridas. Para obtener formularios y más información, visite el sitio web del Poder Judicial de Colorado: https://www.coloradojudicial.gov/self-help/guardianship-adults

Esta guía de una página ofrece una visión general de estas funciones. Si desea información más detallada o asesoramiento, visite los enlaces indicados y considere la posibilidad de consultar a un profesional.

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Working with Clients with Cognitive Disabilities: Practical Strategies for Client Engagement

STETSON LAW | 2026 National Conference on Special Needs Planning and Special Needs Trusts

Friday, October 23, 2026

2:25 – 3:15 p.m.

presented by

Elizabeth Moran, JD | The Arc of Colorado



Our Pledge…

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



The Arc
Colorado

Communication Access & Assumptions

Assumption	Better inquiry
Physical access resolves court access	What communication, information, and procedural barriers remain?
A cognitive diagnosis establishes a need for guardianship	What is the actual legal standard and what support would help?
A helper or communication device makes the response less credible	How did the person communicate the response, and what shows authorship?
Benefits eligibility establishes inability to decide	What does the evidence show about this particular decision?

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

Diagnosis, Function & Legal Capacity

Inquiry	Relevant information
Diagnosis	A condition identified through appropriate clinical evaluation
Functional ability	What the person can do in the task and setting, with available support
Legal capacity	Ability to satisfy the governing standard for a particular act or proceeding

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An Individual with Cognitive Disabilties May…

take longer to absorb information



have difficulty understanding questions, abstract concepts or instructions



have difficulty with reading and writing and money skills



have a short attention span and might be easily distracted

find it difficult to maintain eye contact



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



find communication over the phone difficult



have difficulty expressing their needs

Disabilities Impacting Communication Can Vary...

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



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ONGOING REALITIES

- Some courtrooms remain **physically inaccessible.**
- Courts can **lack clear policies** about how to request and receive an accommodation or to file a complaint if they are denied an accommodation.
- Some court **technology platforms are inaccessible.**
- People with disabilities are **often denied their right to effective communication.**
- Litigants with disabilities **face bias and stereotypes about their credibility** and capacity.
- People with disabilities often **experience challenges accessing critical information** they need to reach the legal system.
- People with disabilities are **less likely to have access to computers and internet** than people without disabilities.
- People with disabilities more often **lack access to representation** and disproportionately must represent themselves pro se.
- Courts often **fail to provide information about how to request accommodations.**
- **People who have communication access needs are commonly presumed to need guardianship,** when often they may simply need appropriate supports and accommodations.

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ABA Revisions to MRPC 1.14

(Supporting Decisions, Preserving Autonomy)

- **Updated language:** ABA replaces “diminished capacity” with “decision-making limitations.”
- **Supports before conclusions:** Assess decision-making ability with appropriate supports and accommodations—including supported decision-making, accessible communication, *and* environmental adjustments.
- **Function over diagnosis:** Consider the particular decision, circumstances, and abilities; limitations may vary across issues and over time.
- **Keep the client’s voice central:** Preserve direct communication and client direction; clarify the authority of family members, agents, and guardians.
- **Protect without unnecessary restriction:** Use protective action only when the rule’s criteria are met; emphasize minimal intrusion and advocacy for the client’s expressed position in guardianship proceedings.

Client identity and decision authority

(do this first)

- **Who is the client?**
- **Who arranged** the meeting and **who pays?**
- **Who has authority** for this decision?
- **What does the person want** the lawyer to do?
- **Who may receive information or attend?**

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ASK:

1. How do **you** prefer to receive and share information?

2. **What makes a meeting easier** or harder for you?

3. What **time, place, and meeting length** work best?

4. What helps you **compare choices or remember** next steps?

5. Who, if anyone, would **you** like to help?

6. **How should we contact you** afterward?

Communication Profile

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Accommodations

(Standard accommodations are just the starting point. Checking boxes…*or* opening doors?)

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



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Standard Accommodations ≠ Active Participation

(Real Adjustments = Meaningful Engagement)

Potential barrier	Adjustment to explore
Noise or sensory overload	Quiet space and fewer distractions
Fatigue or slower processing	Shorter meetings, pauses, and agreed breaks
Unfamiliar setting	Advance explanation, familiar location, or orientation
Information overload	Agenda, fewer topics, and one document at a time
Remote technology	Practice connection, accessible materials, and backup method

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Strategies for Supporting Effective Communication

- **Focus on the person**, not on the disability.
- Ask the individual about themselves and **match their language.**
- **Use plain language**, concrete terms & ideas.
- Extend the person the same **dignity, consideration & respect** you would expect for yourself.
- Always assume (because it is nearly always true) that **every person has a way of communicating.**
- A diagnosis, IQ, manner of communication, assistive technology or aid, or level of support **does not determine whether a person has diminished capacity.**
- **Public benefits systems** like Medicaid Waivers, Supplemental Security Income (SSI), **are deficit based**. Remember that.
- Recognize that the presence of **accommodations may disrupt** how you typically run your meeting/courtroom. Normalize this.
- Be careful **not to provide nonverbal cues**.
- **Take short breaks.**
- **Repeat information** to improve retention.
- **Work with your court's ADA coordinator.**
- To the extent possible, try to draft your documents, orders, and opinions in **plain language.**

Plain Language for Legal Documents

Legal wording	Plain-language explanation
Execute the instrument	Sign the document
Designate an agent	Choose someone to act for you
Release claims	Give up the claims covered by this
Irrevocable	You may not be able to change or undo it



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Neutral Questions & Time to Respond

Less useful question	More useful question
You agree this is best, right?	What do you like or dislike about this option?
You understand everything?	How would this option affect you?
Your sister should decide, correct?	What help would you like from your sister?
Why can’t you manage this?	Which part is difficult, and what helps?

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Communication Methods & Respectful Language

Consider...

- Speech or writing or non-traditional communication
- Pictures or a communication board
- Gestures or signs
- A communication device
- A combination of methods

Words to Avoid...

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

Words to Use...

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

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Beyond “Do You Understand?”

(Checking clarity and inviting understanding)

- Explain a small amount.
- Invite the person to show or describe the meaning.
- Clarify the part that did not come through.
- Check again using the person’s preferred method.
- “I want to check whether I explained this clearly.”

Supported Decision-Making & Supporter Roles

- The person makes the decision with chosen assistance.
- Agree who helps with information, options, or communication.
- Clarify information sharing and the limits of the role.
- Preserve the person's own response and access to private communication.
- Check authority separately from the support arrangement.
- Revisit the arrangement when needs or participants change.

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Capacity in Context

(Making a decision-specific inquiry)

1. Identify the act and the governing legal standard.

2. Explain relevant information in accessible form.

3. Explore the person's understanding and choice with support.

4. Examine remaining concerns in context.

5. Identify the evidence and next step needed.

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The ADA in Your Office & Courtroom

(Making participation and meaningful engagement possible)

- State & local courts operate under **ADA Title II.** Covered private law offices under **ADA Title III.**
- **Reasonable modifications** can address policy and procedure barriers.
- Auxiliary aids and services can **address communication barriers.**
- Applicable standards and exceptions require an **individualized inquiry**.

Barrier to explore	Examples to discuss
Hearing or speech access	Qualified interpreter, CART captioning, assistive listening, familiar AAC
Vision or print access	Qualified reader, screen-reader-compatible file, large print, Braille, audio
Processing and concentration	Plain language, easy-read materials, advance agenda, one question at a time
Time and setting	Pauses, shorter sessions, orientation, seating or room changes
Completing and following steps	Accessible forms, permitted assistance, clear dates, accessible recap

Meaningful Participation: Before, During, & After Court

(Confirm arrangements before the proceeding = ensuring accessible proceedings)

Your request should identify:

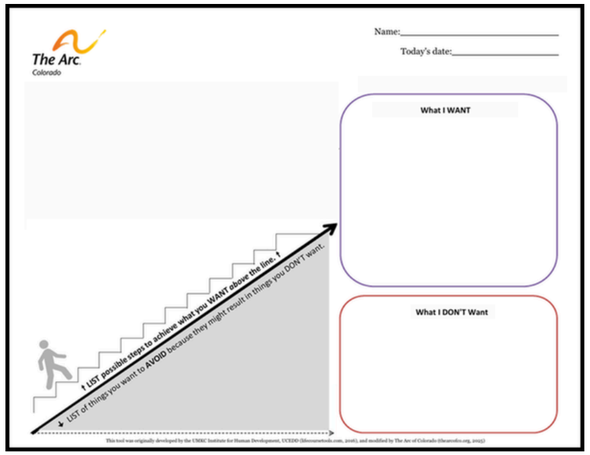
- The task or proceeding
- The functional access barrier(s)
- The requested adjustment(s)
- Why it would help participation
- Timing, contact, and follow-up

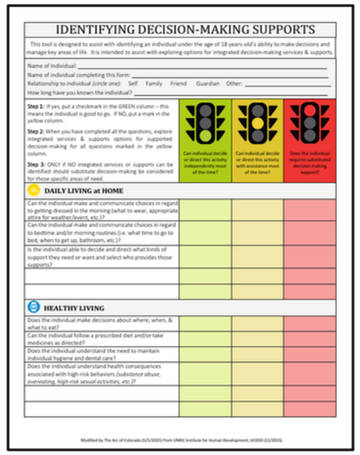


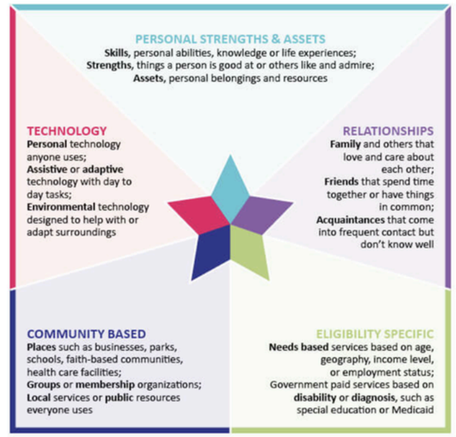
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Your Best Practice Tool Kit

- Pre meeting **accommodation checklist**
- Client **communication profile**
- **Decision and support** documentation
- Communication **phrases** to use
- Court **access checklist**
- **Accommodation request** template



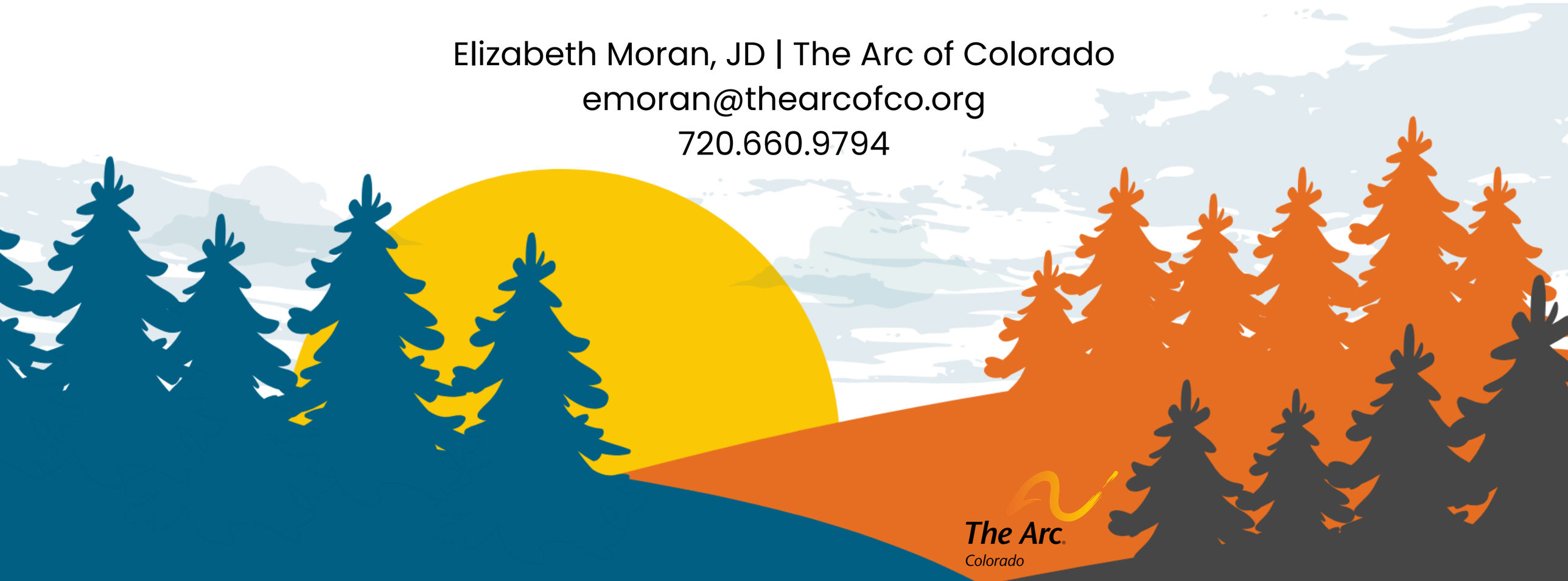




Thank You!

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Best Compliance Practices for Trustees When Administering a Special Needs Trust

Gentry Barnett Byrnes
Co-Founder & President,
Adelphi Trust Company

Best Compliance Practices for Trustees When Administering a Special Needs Trust

Individual trustees are not held to the same rigorous standards as a corporate trustee. Often advisors argue this is a good thing and that corporate trustees can be expensive. But, is that truly the case? Even if an individual family trustee decides not to charge a fee, there are often professional investment management fees and there is value in hiring an expert. Regulation also provides protection for the beneficiary. Consider the recent example in Florida of a company that was not regulated and did not have proper safeguards to protect the beneficiary from an alleged theft by an individual. and did not have proper safeguards to protect the beneficiary from an alleged theft by an individual.

This paper will examine the requirements of a corporate trustee from the standards established by the Office of the Comptroller of the Currency (OCC). Title 12, Part 9 of the Code of Federal Regulations (12 C.F.R. pt.9 (2026)) sets the minimum framework for corporate trustees: board oversight, written policies, scheduled account reviews, conflict controls, custody, recordkeeping and an independent fiduciary audit. The Comptroller's Handbook published by the OCC provides how examiners test a company's fiduciary framework. If you are an individual trustee or legal counsel representing an individual trustee, these guidelines should be a part of your procedure or practice. If there is a claim that a fiduciary duty has been breached, having proper documentation that these guidelines have been followed will help to protect the trustee.

Special needs trusts (SNTs) add a second layer of complexity. Social Security and Medicaid rules sit on top of regular fiduciary duties. We know that a single misdirected distribution can cut a beneficiary's benefits.

This paper covers four aspects of a trustee's best practices to manage compliance:

1. The regulatory sources a corporate trustee must base its policies and procedures on and best practices for individual trustees to follow as well.
2. What examiners expect to see documented to show that the trustee has made a prudent decision.
3. The additional controls for SNTs.
4. Building an evidence trail in case decisions are challenged.

Regulatory framework

A national bank's fiduciary program is governed mainly by 12 C.F.R Pt. 9. The sources below make up the baseline for a corporate trustee's policies.

Source	What it governs	Why it matters
12 C.F.R. Pt. 9	Fiduciary activities of national banks	Sets the required policies, reviews, records, custody and audit
Comptroller's Handbook: Asset Management	Risk management across fiduciary business	Examination procedures and internal control questionnaires
Comptroller's Handbook: Personal Fiduciary Activities	Personal trusts, estates, guardianships	How examiners sample and test personal trust accounts, including SNTs
Comptroller's Handbook: Conflicts of Interest	Self-dealing and conflicts in asset management	Standards for disclosure and authorization

Part 9 sets process requirements. The substance of the duties comes mainly from state law and the governing instrument. A sound program shows both: the process was followed, and the decision it produced met the standard of care.

Core compliance policies

These are the policy areas examiners expect to find documented. Each item below names the governing rule and the evidence that proves the control works.

1. Board oversight and governance

12 C.F.R. §9.4, the board manages the bank's fiduciary activities. It may delegate this work to directors, officers, employees or committees.

- Keep a board-approved fiduciary charter that delegates authority to a trust committee in writing.
- Make sure committee minutes show real deliberation: discretionary actions, exceptions, complaints, any audit findings.
- Run periodic risk assessments across all fiduciary business lines, tied to a risk appetite statement.

How this applies to Individual Trustees:

- Hire counsel that specializes in representing SNT trustees.

- Consider establishing an advisory counsel to assist the professional fiduciary.
- For a non-profit, have a strong board that questions and reviews management.

2. Written policies and procedures

12 C.F.R. §9.5 requires written policies on these topics:

- §9.5 (c) Preventing self-dealing and conflicts of interest.
- §9.5 (d) Selecting and retaining legal counsel.
- §9.5 (e) Investing fiduciary funds, including funds awaiting investment or distribution.

How this applies to Individual Trustees:

- Have written policies on self-dealing and conflicts of interest that apply to the individual trustee and anyone that works with them.
- Hire counsel that specialized in representing SNT trustees.
- Have written policies on selections of investment managers, retention of investment managers and uninvested cash.

3. Account acceptance and review

12 C.F.R. §9.6 requires three reviews. The reviews are the core evidence that duties are being met.

- **Pre-acceptance review.** Before accepting an account, decide whether the bank can properly administer it. Record the decision.
- **Initial post-acceptance review.** Promptly after acceptance, review all assets of each discretionary account. Many trust companies conduct the review within 60-90 days of account opening.
- **Annual review.** At least once every 12 months, review whether each discretionary account's investments still fit the account.
- **Administrative reviews.** Run these alongside the investment reviews to confirm distributions, notices and tax filings follow the governing instrument.
- **Tickler system.** Use one to escalate overdue reviews. Late or missing reviews are among the most frequent exam findings.

How this applies to Individual Trustees:

- Establish a practice for documenting pre-acceptance of a new account. This is difficult for a family trustee but for a professional fiduciary that serves regularly in this capacity, having a well-documented practice is prudent in determining if you have the capacity and expertise to take on the new trust.

- Most important is having a post-acceptance review process, recommend 90-120 days after accepting the trust. The checklist should make sure all information regarding the beneficiary and their needs, the investment decisions and asset allocation to meet those needs, tax and legal counsel are in place.
- Establish an annual review process to document if there are any changes to the beneficiary's needs, if the investment plan is still reasonable and performing as planned, and if the asset allocation is appropriate.

4. Audit procedures

12 C.F.R. §9.9 requires audit procedures.

- (a) ***Annual audit.*** At least once during each calendar year, a national bank shall arrange for a suitable audit (by internal or external auditors) of all significant fiduciary activities.
- (b) ***Continuous audit.*** In lieu of performing annual audits, a continuous audit system of each significant fiduciary activity commensurate with the nature and risk of that activity.
- (c) ***Fiduciary audit committee.*** The fiduciary audit committee must consist of a committee of the bank's directors or an audit committee of an affiliate of the bank.

How this applies to Individual Trustees:

- Clearly there is not an audit of the individual trustee, but this exercise can be very beneficial.
- Consider having legal counsel review policies and procedures established by the individual trustee
- Consider having outside legal counsel, an accounting firm or another trusted experienced fiduciary review a selection of files to determine if decisions by the trustee are reasonable and documented.
- For a professional fiduciary that has a larger practice, consider retaining an outside fiduciary audit and provide the results to interested parties.

5. Investment management

- Keep an approved investment list. Record the reasoning for each exception.
- Follow valuation procedures for unique and hard-to-value assets, such as real estate, closely held businesses and mineral interests.

- Do not let cash stay uninvested longer than reasonable (§9.10). Collateralize uninsured self-deposits.

How this applies to Individual Trustees:

- Keep an improved list of investment managers that have been screened.
- Establish a procedure for on-going review (consider annually) to review the relationship with the investment manager.
- Review the asset allocation annually and document if it is still appropriate.
- Have a written procedure to have cash invested.

6. Custody and safekeeping

Under 12 C.F.R. §9.13, fiduciary assets must be held under the joint custody or control of at least two designated officers or employees, separate from the bank's own assets. Reconcile regularly with sub-custodians and depositories.

How this applies to Individual Trustees:

- Dual control is not practical for a family member trustee, but they must keep detailed records of every penny spent.
- For a professional fiduciary practice, try to maintain dual control that not one person in the office can disburse funds without the sign-off of someone else.
- When dealing with personal property of the beneficiary, make sure someone else is involved (paralegal, another fiduciary) so nobody can claim something was missing.

7. Recordkeeping

Under 12 C.F.R. §9.8, keep fiduciary account records for 3 years from the later of the account's termination or the end of any related litigation.

How this applies to Individual Trustees:

- Maintain a copy of all fiduciary decisions for a set period of time after the account is closed.
- Determine with legal and tax counsel what records should be kept and for the required period of time.

- Once that time has passed, make sure all electronic copies are also destroyed and not susceptible to cyber theft.

8. Third-party risk management

Run due diligence on any third parties vendors that will have confidential information: investment advisors, technology vendors, marketing companies, etc. before engaging them, and monitor them afterward. The standard is the June 2023 interagency guidance on third-party relationships (OCC Bulletin 2023-17).

How this applies to Individual Trustees:

- Keeping client information confidential is paramount. You may have a secure system but need to confirm that all of your vendors do as well.
- Establish a procedure for on-going review (consider annually) to review the relationship with these third parties.

9. CyberSecurity

12 C.F.R. pt. 9 does not contain a provision regarding cybersecurity for fiduciary accounts, the OCC has incorporated cybersecurity governance into its supervisory framework. The OCC Cybersecurity Supervision Work Program is available through the Office of the Comptroller website under Bank Information Technology guidance.

Trustees maintain sensitive financial records, medical information, Social Security numbers, tax returns, and transfer instructions. Cybersecurity should be viewed as part of the trustee's overall fiduciary duty to safeguard trust assets and beneficiary confidentiality.

How this applies to Individual Trustees:

- Have a written policy around cybersecurity
- Hire a qualified IT firm to evaluate and implement guidelines
- Utilize encrypted devices and secure cloud storage, implement multifactor authentication on all accounts, maintain strong password controls
- Independently verify all payment instructions, avoid relying solely on email communications for financial transactions

Special Needs Trusts

The OCC has no rules specific to special needs trusts. They are governed as personal trust accounts under 12 C.F.R.pt. 9. What sets them apart is that federal benefits law decides whether the trust does its job. Examiners will ask how the trustee makes sure distributions

preserve the beneficiary's eligibility for Supplemental Security Income (SSI) and Medicaid. The Social Security Administration (SSA) guidelines must be followed.

Trust types

Type	Legal basis	Key conditions	Payback to Medicaid
First-party SNT	42 U.S.C. §1396p(d)(4)(A); POMS SI 01120.203	Beneficiary's own assets; disabled and under 65 when funded; sole benefit; may be set up by the individual, parent, grandparent, guardian or court (individuals since Dec. 13, 2016)	Yes, at death, up to total Medicaid paid
Pooled trust	42 U.S.C. §1396p(d)(4)(C); POMS SI 01120.203	Nonprofit manages pooled sub-accounts; sole benefit; no age limit to set up, though funding after 65 may trigger a transfer penalty in some states	Yes, unless the nonprofit retains the funds as the trust allows
Third-party SNT	State trust law; POMS SI 01120.200	Funded by others; beneficiary has no power to revoke or direct distributions	No

Required controls

1. **Acceptance review.** Consider having legal counsel review the trust document against the Social Security Administration Program Operations Manual System (POMS) and state Medicaid rules before accepting it. Record the trust type, establishment date and the beneficiary's age at funding in the file. Determine if the trustee has the capacity and experience to administer the trust.
2. **Distribution standards.** Write a policy covering:
    - Paying vendors directly instead of giving the beneficiary cash.
    - Treating shelter payments (rent, mortgage, utilities) as in-kind support and maintenance (ISM) that lowers SSI, up to a cap.

    - For first-party and pooled trusts, a written sole-benefit finding for each distribution, especially purchases shared with family, such as a vehicle.
    - Maintain a list of approved or prohibited categories.
3. **The 2024 food rule.** Since September 30, 2024, SSA counts only shelter as ISM, not food 89 FR 21199. Update distribution matrices and training that was written under the old rule.
4. **Benefits tracking.** Record the beneficiary's current SSI, Medicaid, SNAP and housing benefits in the account file, and confirm all benefits at each annual review. Know the reporting deadlines.
5. **Required reporting.** Comply with any reporting requirements imposed by the SSA, courts or the governing instrument, and maintain records sufficient to respond to eligibility reviews and agency inquiries.
6. **ABLE account coordination.** Since January 1, 2026, the disability onset age for ABLE eligibility is 46, up from 26 (SECURE 2.0 Act §124) Qualified housing expenses paid from an ABLE account do not result in the ISM reduction.
7. **Investment policy.** Write an investment policy for each account that establishes an asset allocation which balances a longer term horizon with the cash needed for regular distributions. Avoid illiquid assets and make sure cash is in a cash sweep to a money market at competitive rates.
8. **Termination and payback.** When a first-party trust's beneficiary dies, notify Medicaid and pay its claim before other expenses beyond what state law allows, which is usually limited taxes and administrative costs. For trusts subject to Medicaid payback, trustees should consult POMS and state law before paying post-death expenses because Medicaid reimbursement often has priority over funeral and other expenses. Make sure the specific state requirements are noted in the file.
9. **Tax treatment.** First-party SNTs are usually grantor trusts (IRC §§671–679). A third-party SNT may qualify as a Qualified Disability Trust for a higher exemption (IRC §642(b)(2)(C)). Trustees should consult with a CPA and record the treatment chosen and why.
10. **Fees and expertise.** Fees must be reasonable and disclosed, and some states require court or agency approval. Review fees every year and discuss with legal counsel if necessary, document in the account file.

Building the evidence trail

If the trustee is questioned by the beneficiary about a decision made regarding a distribution or investments, or worse, a claim of breach is filed, it is important to show a paper trail of the details behind difficult decisions. Annual reviews of the file, discretionary distribution decisions, meetings at least annually with the beneficiary and decision makers,

annual budgets, investment reviews, proper Investment Policy Statement (IPS), due diligence on the investment manager are the basic requirements for the file.

Litigation lessons: why SNT trustees are held liable

Courts usually hold special needs trustees liable for one of two opposite failures: spending too little, or spending too much carelessly. Two New York decisions are the standard examples. Each matches a control in this paper.

Leading cases

- Matter of JP Morgan Chase Bank, N.A. (Marie H.) (N.Y. Surr. Ct., N.Y. County, 2012).
    - The co-trustees spent about $3,525 over five years on the beneficiary of a $4 million trust, while still collecting fees.
    - They had not visited him or asked about his needs, and he stayed institutionalized even though there were funds to provide different care. The court held that prudent asset management alone is not enough and the trustee must understand the beneficiary's needs.
    - The court ordered amended accountings and the reduction or denial of trustee's fees for the period of time the trustee breached it's duty.
    - If the Trustee required an annual meeting (the control) with the beneficiary that was documented in the file, the outcome of this case could have been different.
- Liranzo v. LI Jewish Education/Research (N.Y. Sup. Ct., Kings County, June 25, 2013).
    - BNY Mellon approved every discretionary request from the beneficiary's mother without fully evaluating if the expense was appropriate.
- The court stated: "Here, it is apparent that BNY breached its fiduciary duty by authorizing each and every discretionary disbursement requested by the infant plaintiff's mother…" and that the distributions "ran counter" to the purpose of preserving trust assets for the beneficiary's long-term support"
    - The Trustee was surcharged over $175,000 for improper distributions.
    - The losses included expenses for home health care without checking whether Medicaid would cover it, and funds distributed for cab fares for the family.
    - Some of the payments cost the beneficiary SSI and Medicaid eligibility.
    - The court noted it was "easier to accede" to requests than to evaluate them, and that the trustee ignored trust language requiring it to consider public benefits first.

- If the Trustee required a fully documented decision on how discretionary distributions were evaluated and how the distribution would affect benefits (the control) then the outcome of this case could have been different.

Potential grounds for liability

Ground for liability	What it looks like	Control that prevents it
Failing to use trust for the beneficiary	No contact, no spending plan, fees paid while the beneficiary goes without (*Marie H.*)	Care plan for each beneficiary; regular contact recorded at each annual review
Approving requests without review	Every request granted; trust drained without regard to how long it must last (*Liranzo*)	Written analysis of each request; second-level approval above set limits
Distributions that cost SSI or Medicaid	Cash to the beneficiary, shelter costs paid without weighing the reduction, paying for care Medicaid covers	Distribution matrix; check for public benefits first; benefits information on file
Breaking the sole-benefit rule	First-party trust funds spent mainly on family	Written detail for each distribution and if it was for the sole benefit
Self-dealing and fees	Unreasonable fees, undisclosed proprietary products, commingling	Follow §9.12 and have a written conflict of interest policy; disclose all fees and review fees periodically

Ground for liability	What it looks like	Control that prevents it
Imprudent investment	No diversification; assets that can't be sold when cash is needed	Have an Investment policy for each account; document the cash needs of the beneficiary
Failure to account and report	Missed accountings; changes not reported to SSA, leading to overpayment debts	Make sure accountings follow the state statute; document reports to SSA and Medicaid
Mishandling payback at termination	Funeral costs or other creditors paid ahead of the Medicaid claim	Have a Termination checklist that is followed & documented

The remedies courts use are surcharge (the trustee personally repays losses), reduced or forfeited fees, removal of trustee, and restated accountings. Note: In Florida, an adequately disclosed matter in a trust accounting or other qualifying trust disclosure document may trigger the six-month limitations period under Fla. Stat. §736.1008.

Common examination findings and recommendations

Most fiduciary findings for trust companies trace back to a control that exists on paper but were not documented in the account file. The table below pairs the weaknesses examiners commonly cite with practical fixes. Once again, these are practices an individual trustee or non-profit pooled administrator should follow.

Common finding	Practical fix
Annual or initial account reviews late or missing	Automated tickler and way to track reviews

Common finding	Practical fix
Policies not re-approved or out of date with practice	Annual policy calendar; record each approval in the minutes
Committee minutes that only record approvals	Use minute templates that capture discussion, dissent and follow-up items
Audit findings left open	Issue tracker with owners and due dates, reported to the audit committee
SNT distributions that reduced SSI or broke the sole-benefit rule	Distribution matrix, second-level approval for gray areas, annual benefits check
SNT payback order wrong at termination	Termination checklist built from POMS SI 01120.203
Weak oversight of sub-advisors and sub-custodians	Annual due diligence package and performance review

Conclusion

A corporate trustee satisfies the OCC by tying 12 C.F.R. Pt. 9 requirement to a named control and documentation as to each decision. Special needs trusts need the same structure plus a benefits-aware distribution process, kept current with on-going rule changes. Trustees should retain a qualified attorney to advise them on policies and office procedures to protect the Trustee.

This white paper is for educational purposes and is not legal advice. Requirements vary by state law and trust document terms. Confirm specific practices with qualified counsel.

References the Trustee should know.

Regulations and statutes

1. 12 CFR Pt. 9, Fiduciary Activities of National Banks
2. 42 U.S.C. §1396p(d)(4)(A) and (C)
3. 20 CFR §416.1130 and §416.714
4. Internal Revenue Code §529A (ABLE accounts), §642(b)(2)(C) (Qualified Disability Trusts) and §§671–679 (grantor trusts).
5. SECURE 2.0 Act of 2022, §124 (ABLE Age Adjustment), Consolidated Appropriations Act, 2023.

Agency guidance

6. OCC, Comptroller's Handbook: Asset Management.
7. OCC, Comptroller's Handbook: Personal Fiduciary Activities.
8. OCC, Comptroller's Handbook: Conflicts of Interest.
9. OCC Bulletin 2023-17, Third-Party Relationships: Interagency Guidance on Risk Management (June 2023).
10. SSA POMS SI 01120.203, Exceptions to Counting Trusts Established on or after January 1, 2000.
11. SSA POMS SI 01120.200, Information on Trusts, Including Trusts Established Prior to January 1, 2000.
12. SSA, Omitting Food from In-Kind Support and Maintenance Calculations, 89 FR 21199 (Mar. 27, 2024).

Case law

13. Matter of JP Morgan Chase Bank, N.A. (Marie H.), N.Y. Surr. Ct., N.Y. County (2012).
14. Liranzo v. LI Jewish Education/Research, N.Y. Sup. Ct., Kings County (June 25, 2013).



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Name, Image, and Likeness and Public Benefits

Right of Publicity, Substantial Gainful Activity, and Special Needs Trust Planning

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September 18, 2026

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I. Introduction and Scope

Name, Image, and Likeness—commonly shortened to NIL—has received sustained attention as the college athletics landscape reorganizes around athlete compensation. However, its relevance extends beyond sports, as people increasingly monetize social media accounts and artificial intelligence enables the commercial recreation of a person's likeness. NIL is not, however, a distinct body of law. Rather, it is commercial shorthand for exploiting a person's *right of publicity*, and that right—not an NIL-specific statute—determines what a client owns, whether it can be transferred, and to whom. For a special needs planner, the central questions are not the traditional sports and business law issues, but whether NIL activity jeopardizes a disability determination and, if the client wishes to preserve public benefits, how those benefits may be protected.

This paper addresses:

1. How NIL activity is evaluated in determining disability, and why that evaluation differs between Title II (Social Security Disability Insurance) and Title XVI (Supplemental Security Income);

2. How NIL income is characterized as earned or unearned for Supplemental Security Income ("SSI") purposes; and

3. Whether and how NIL rights—as distinct from NIL income—may be assigned to a special needs trust.

This is a rapidly developing area, and several of the propositions below rest on authority that was not drafted with NIL in mind.

II. The Right of Publicity

A. History and Current Landscape of the Right of Publicity

The right of publicity is a distinctly American development that emerged from a dispute over baseball cards. In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, the Second Circuit recognized that a person possesses, apart from any privacy interest, a right in the publicity value of his own photograph and, critically, may grant that right exclusively to another.[1] Although earlier academic commentary generally treated the interest as personal, *Haelan*'s recognition of an exclusive grant helped recast it as a property right. That characterization matters for planning because a property right may be licensed, assigned, and held in trust, while a personal privacy right generally may not.

There is no federal right of publicity, and despite substantial discussion, Congress has not preempted the field. Most states recognize some form of the right, either by statute or at common law, and many follow the property characterization. The absence of a federal rule has nevertheless produced a fifty-state patchwork, requiring the planner to identify the governing jurisdiction and evaluate its particular rules concerning the right's scope, assignability, and duration.

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[1] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

Where a state treats the right as property, assignability generally follows, and some statutes say so expressly. However, in states where the right is personal, the right may not be assignable. It is necessary to review both state statute and case law regarding the right of publicity.

B. NIL in College Athletics

On June 15, 2020, several Division I college student-athletes sued the National Collegiate Athletic Association (NCAA), claiming that NCAA rules limiting student-athlete compensation violated federal antitrust law.[2] Specifically, in House v. NCAA, plaintiffs claimed that student-athletes should be permitted to profit from their NIL.[3] Prior to this litigation, benefits to student-athletes were limited to scholarships, grants-in-aid, and other education-related resources.

The NCAA settled the consolidated cases on June 6, 2025, in what is now known as the House Settlement, or *House*.[4] The result has been significant, with broad and wide-ranging changes sweeping the collegiate athletics landscape. Student-athletes are now permitted to receive, among other benefits, direct compensation for their NIL in promoting their universities and third-party businesses.[5]

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[2] In re College Athlete NIL Litigation, No. 4:20-cv-03919 (N.D. Cal. 2020).
[3] House v. NCAA, 545 F. Supp. 3d 804 (N.D. Cal. 2021).
[4] *See In re College Athlete NIL Litigation, Dkt. No. 717.*
[5] *Id., Dkt. No. 979.*

1. NIL Compensation

In its most basic form, *House* allows student-athletes to receive three separate forms of NIL compensation: revenue sharing with their university, endorsement income from third-party businesses or organizations, and back pay from the NCAA.

Revenue Sharing. The area receiving the most news coverage is revenue sharing, where universities make direct payments to student-athletes. The amount that a university may spend in any given year is capped; however, the amount paid to an individual is unlimited. For example, in 2026, universities may not spend more than approximately $21 million in revenue sharing across all sports. The university could choose the best way to allocate those dollars. The entire amount could be paid to the star tennis player, or it could be divided among athletes on any roster in any number of ways.

Universities are not, however, paying student-athletes for competitive performance. They are only allowed to share certain types of revenue with student-athletes, and in return, the university has the right to use the student-athlete's NIL to promote the athletics department. Further, revenue sharing payments may not exceed the period of the student-athlete's eligibility.

Third-Party Endorsements. Businesses and organizations that are not affiliated with the university may also pay student-athletes for the right to use their NIL in promoting their goods and services. There is no limit to the amount that a student-

athlete may receive from these third-party deals, and they may continue their business relationship after the student-athlete is no longer eligible to compete.

Back Pay. *House* did not simply open the door for current and future NIL compensation; it provided former student-athletes the right to pursue claims for prior use of their NIL. The NCAA agreed to fund more than $2 billion in a claims pool for student-athletes dating back to 2016. In other words, former student-athletes are being made whole for the NCAA's use of their NIL in broadcast and other media.

2. Standard Licensing Language

Whether through revenue sharing or third-party payments, the grant of NIL rights most often occurs through a license agreement. The basic legal terms of these agreements have become fairly standard among larger universities and their conferences. Samples of the most significant terms are provided below.

Sample NIL Grant of Rights Provision. Student-Athlete hereby grants to the University an irrevocable, non-exclusive right and license to use their name, image, likeness, right of publicity, initials or original autograph/signature or other attributes or indicia for use in the sponsorship, endorsement, promotion, or marketing related to student-athlete's participation in the University's athletic program. Student-athlete hereby consents to such use to promote the University, its athletic program, and as otherwise contemplated by this Agreement.

Sample Ownership Provision. All materials created in connection with the rights granted in this Agreement shall be referred to as the "Materials." University shall be the exclusive owner of all results and proceeds of the Materials. Such results and proceeds shall be considered a work made for hire and University shall own all rights in any such results and proceeds. To the extent the Materials are for any reason not considered a work made for hire, student-athlete hereby irrevocably grants to University a perpetual, fully paid, non-exclusive, worldwide, royalty free and freely assignable license, with the right to sublicense the results and proceeds of all of the Materials.

Sample Relationship of the Parties Provision. The Parties agree that student-athlete shall furnish all services as an independent contractor and that student-athlete shall not be deemed an employee, agent, partner, or joint venturer of University for any purpose whatsoever. University has no obligation to withhold any federal or state taxes from payments or provide any workers' compensation, unemployment insurance, medical insurance, or similar employee benefits. This Agreement does not constitute an agency, partnership or joint venture between the Parties.

III. Disability Determination: Substantial Gainful Activity

A. What SGA Means

Substantial gainful activity is work activity that is both substantial and gainful. The regulations define each half separately. Substantial work activity "is work activity that

involves doing significant physical or mental activities," and work may be substantial even if performed part-time or with less responsibility than before. Gainful work activity "is work activity that you do for pay or profit," and work is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is in fact realized.[6] An individual who builds an audience without yet monetizing it, or who performs uncompensated promotional work while income is routed elsewhere, is therefore not outside the definition. The test looks to the character of the activity, not to whether the individual banked the proceeds.

B. The Title II / Title XVI Divide

For SSI, the Social Security Administration's guidance is explicit: "SGA determinations are required to establish initial disability for SSI but are not required for continuing SSI eligibility purposes."[7] Section 1619(a) permits a recipient whose gross earnings reach or exceed the SGA level to continue in cash-payment status, and section 1619(b) preserves Medicaid where earnings displace the cash payment entirely.[8] For a client already receiving SSI, NIL work at the SGA level does not by itself end disability status; the exposure is to the income-counting rules.

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[6] 20 C.F.R. § 416.972(a)–(b); see also 20 C.F.R. § 404.1572(a)–(b) (parallel Title II provision).

[7] POMS SI 02302.010, 1619 Policy Principles.

[8] Social Security Act § 1619(a)–(b), 42 U.S.C. § 1382h(a)–(b); POMS SI 02302.010; POMS SI 02302.015.

This is not true of Title II (Social Security Disability Insurance; "SSDI") benefits. For a concurrent beneficiary or a Title II-only claimant, SGA remains a live and continuing test, absent the return to work programs and exceptions. A structure built to protect an SSI recipient may leave the same client's SSDI benefit fully exposed.

C. Title II Eligibility for College Athletes

Because a college athlete who suffers a major injury is likely very young—late teens to early twenties—he or she may not have worked at a significant enough level to qualify for Social Security Disability Insurance. The number of quarters (or credits) necessary to qualify operates on a sliding scale.[9] Per the Social Security Administration, the number of credits necessary to meet the recent work test depends on the age you become disabled. The rules are as follows:[10]

> **Before age 24. You may be eligible** if you have six credits earned in the three-year period ending when your disability starts.[11]

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[9] 42 U.S.C. § 423(c)(1)(B); 20 C.F.R. § 404.130.

[10] Soc. Sec. Admin., How Does Someone Become Eligible?, https://www.ssa.gov/benefits/disability/qualify.html (last visited Sept. 18, 2026

[11] 20 C.F.R. § 404.130(c)(3)(ii) ("If the period has less than 12 quarters, you must have at least 6 QCs in the 12-quarter period ending with that quarter."). The regulation states no

Age 24 to 31. In general, you may be eligible if you have credit for working half the time between age 21 and the time your disability began. As an example, if you develop a disability at age 27, you will need three years of work (12 credits) out of the past six years (between ages 21 and 27).[12]

Age 31 or older. In general, you must have at least 20 credits in the 10-year period immediately before your disability began.[13]

Credits are based on your total wages and self-employment income for the year. You might work all year to earn four credits, or you might earn enough for all four in less time.[14]

The amount of earnings it takes to earn a credit may change each year. In 2026, you earn one Social Security and Medicare credit for every $1,890 in covered earnings

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separate rule for claimants under age 24; the six-quarter requirement operates as a floor within the rule for claimants who have not reached age 31.

[12] 20 C.F.R. § 404.130(c)(3) (Rule II) (requiring quarters of coverage "in at least one-half of the quarters during the period ending with that quarter and beginning with the quarter after the quarter you became age 21").

[13] 20 C.F.R. § 404.130(b) (Rule I).

[14] 42 U.S.C. § 413; 20 C.F.R. §§ 404.140–.146; POMS RS 00301.230, Assignment of Quarters of Coverage (QC).

each year. You must earn $7,560 to get the maximum four credits for the year. Those earnings may be received all at once.[15]

Accordingly, an individual could now accumulate six credits through NIL within the first two years of college, by age nineteen or twenty, making SSDI a realistic option for these athletes.[16] If the credit requirement is not met, the athlete is likely limited to SSI—or, if the disabling event occurred before age twenty-two, to Childhood Disability Benefits (Disabled Adult Child) on a parent's work record, payable once the parent begins drawing Social Security, becomes disabled, or dies.[17]

D. Self-Employment and the Three Tests

Where NIL activity is conducted as self-employment, SGA is evaluated under three tests:

1. significant services and substantial income;

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[15] Soc. Sec. Admin., How You Earn Credits, SSA Pub. No. 05-10072 (Jan. 2026). Quarters of coverage are credited on total covered earnings for the calendar year rather than quarter by quarter. 20 C.F.R. § 404.140(b).

[16] This conclusion assumes the NIL proceeds are covered earnings. Quarters of coverage accrue only on wages or net earnings from self-employment.

[17] 42 U.S.C. § 402(d)(1)(B)(ii); 20 C.F.R. § 404.350(a)(5); POMS DI 10115.001.

2. comparability of the work to that of unimpaired individuals in the same community engaged in similar businesses; and

3. the worth of the work activity measured against the earnings guidelines.[18]

For a business with more than one person involved, an owner or partner renders significant services where the individual contributes more than half the total time required to manage the business, or renders management services for more than forty-five hours a month.[19]

The measure is *management* time. An individual who appears on camera as talent, and who neither owns nor manages the entity that commercializes the appearance, is not obviously rendering significant services within that test, which pushes the analysis toward wage-based evaluation of whatever the entity pays the individual rather than toward self-employment evaluation of the enterprise's profits.

E. Why Assignment Is Not a Safe Harbor

Assigning NIL income to an entity or a trust is not a safe harbor against SGA. Income-diversion addresses whose income it is, but SGA addresses what the individual *does*. These are distinct issues.

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[18] POMS DI 10510.010, SGA Criteria in Self-Employment.

[19] POMS DI 10510.015, Test One of General Evaluation Criteria: Significant Services and Substantial Income.

IV. Income Characterization Under the POMS

A. The Earned/Unearned Divide

Assuming the activity does not defeat the disability determination, the next question is whether NIL proceeds are earned or unearned income. The distinction is not academic. Earned income receives the $65 monthly exclusion and the one-half exclusion of the remainder, while unearned income is reduced only by the $20 general exclusion and otherwise offsets the benefit dollar for dollar.[20]

Characterization turns on the nature of the individual's involvement. Service-based income—coaching at a camp, paid appearances, scheduled social media posts—is likely earned. Passive income—licensing or merchandising the NIL, or residual copyright material—is likely royalty income. Where the individual conducts the activity as a trade or business, net earnings from self-employment are gross income from the business less allowable deductions, and whether an activity is a trade or business turns on holding oneself out as a provider, intent to produce income, ongoing and regular participation, a third-party customer relationship, and profit motivation.[21]

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[20] POMS SI 00820.001 (earned income); POMS SI 00830.001 (unearned income); POMS SI 00820.500 (earned income exclusions).

[21] POMS SI 00820.200, Net Earnings from Self-Employment (NESE); POMS SI 00820.210 (computation).

B. Royalties

Royalty treatment is governed by two POMS sections read together. POMS SI 00830.510 defines royalties as "compensation paid to the owner for the use of property, usually copyrighted material (e.g., books, music, or art) or natural resources," and places them in the unearned income series. POMS SI 00820.450 supplies the exceptions that move them into earned income.[22]

Therefore, royalties are unearned income unless received as part of a trade or business, or received by an individual in connection with any publication of that individual's work—a manuscript, magazine article, or artwork.[23] The trade-or-business exception is the one most likely to be triggered by an individual who has organized his NIL activity into an operating enterprise, and it converts what the parties may have drafted as a royalty into earned income. Additionally, the expense rule runs opposite to what one may expect. Expenses incurred in obtaining royalty income are deductible where the royalty is unearned, but not where it is treated as earned.[24]

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[22] POMS SI 00830.510, Royalties; POMS SI 00820.450, Royalties and Honoraria.

[23] POMS SI 00820.450(A); POMS SI 00830.510(B).

[24] POMS SI 00820.450(C).

C. Honoraria, Appearance Fees, and In-Kind Compensation

An honorarium is an honorary or free gift, reward, or donation provided gratuitously for services rendered, with no legal obligation to pay. Payment for the service itself is earned income, while any other payment received in cash or in kind in connection with the service is unearned income to the extent it exceeds the individual's expenses.[25]

NIL deals frequently pay in product rather than cash. There may be an instinct to treat this in-kind compensation as in-kind support and maintenance. However, free apparel, equipment, or travel supplied by a sponsor is not ISM and will likely be treated as "other in-kind income," valued at its current market value.[26]

D. Category Mapping

The following table states, for each common form of NIL monetization, the default SSI characterization and the factor most likely to change it.

Table 1. Default Characterization of Common NIL Monetization

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[25] POMS SI 00820.450(B), (D).

[26] POMS SI 00810.020(A)(2)(b) (ISM is unearned in-kind income that is food or shelter; "the amount of other in-kind unearned income is generally equal to its CMV, subject to the rules in SI 00835.310"). Where the in-kind item is received as remuneration for employment, see POMS SI 00820.010.

NIL activity	Default characterization	What changes it
Merchandising / trading card / video game licensing	Unearned — royalty	Trade-or-business exception where the individual operates an enterprise
Group licensing pool distributions	Unearned — royalty	Trade-or-business exception where the individual operates an enterprise
Royalty paid by an operating entity	Unearned — royalty	Whether the individual, rather than another party, operates the business
Sponsored posts / endorsements	Contested; earned where regular	Regularity and holding out; a genuine one-off falls in a gap the POMS does not cleanly resolve
Appearance fees	Earned (honorarium split)	A regular circuit converts the analysis to self-employment (NESE)
Affiliate / referral codes	Earned — NESE	Absence of regularity or profit motive
Coaching, training, camps	Earned — NESE or wages	Existence of an employment relationship
Platform content monetization	Earned — NESE	Rarely; ongoing labor and profit motive usually satisfy all factors
Speaking engagements	Earned (honorarium split)	A regular circuit converts to NESE
Collective payments	No clean default	Whether the agreement obligates services; substance controls over the recited consideration and the trade-or-business exception where the individual operates an enterprise may tip the characterization
Institutional revenue share	Unresolved	No agency guidance addresses these directly, but the authors believe this would be treated as unearned income unless the trade-or-business exception tips the characterization

V. Assigning NIL to a Special Needs Trust

A. The Irrevocability Requirement

Where the income stream is assigned, the assignment must be irrevocable: "A legally assignable payment that is assigned to a trust or trustee is income for SSI purposes, to the individual entitled or eligible to receive the payment, unless an SSI income exclusion applies or the assignment is irrevocable."[27] If the assignment is revocable, the income is counted to the beneficiary exactly as though the assignment had not been made. The same requirement applies whether what is assigned is the income stream or the underlying right.

B. The Non-Assignable Payment Bar

In an NIL matter, the bar to assignment may be contractual rather than statutory. Anti-assignment clauses in the underlying licensing, collective, or endorsement agreement are common commercial boilerplate. Such a clause can render the payment non-assignable and it is important to review the underlying agreements for an anti-assignment clause before the assignment is papered.

C. Payback and Entity Placement

Assigning NIL or NIL rights to a first-party trust subjects them to the Medicaid payback. Whether there is anything to reach depends on state law and whether the right of publicity survives death at all. Where it is not descendible, it ends, and no remainder interest exists

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[27] POMS SI 01120.200(G)(1)(d).

for the payback to attach to, though royalties already collected into the trust remain corpus subject to payback in the ordinary course.

VI. Scenarios and Fact Patterns

A. Scenario One: Jane Doe

Jane Doe is an 18-year-old with Down syndrome. She has social media accounts and a YouTube channel featuring videos of her golfing with her father and competing in adaptive opens and pro-am tournaments. Jane views golf as a fun hobby. Her role is limited to showing up and playing, and she is not involved in or concerned with the production, scheduling, promotion, or business aspects of the accounts and channel. Her father manages those matters, including filming and editing the content and handling scheduling. Jane has also entered into apparel and equipment arrangements under which she receives free gear in exchange for featuring and promoting it on her accounts and channel.

Questions and Planning Considerations

1. How might the social media accounts and YouTube channel be structured, and how could each structure affect the treatment of income?
2. How might Jane's involvement amount to work for SGA purposes?
3. How might the apparel and equipment arrangements affect eligibility for or the amount of public benefits?

B. Scenario Two: John Doe

John Doe is a junior running back for a college football team ranked among the nation's top 10. He has a one-year, $2 million revenue-sharing agreement with the school, along with a separate one-year arrangement involving the college's collective and a local car dealership. Under that arrangement, he receives the use of a car in exchange for the use of his NIL. As a sophomore, John set the school's single-season records for rushing yards and touchdowns, becoming a school legend. As a hobby, he also started a YouTube channel where he streams himself playing college football video games while talking with friends. John is projected to be a top-10 draft pick and has an insurance policy that will pay benefits if an injury prevents him from continuing his career. He has used his NIL earnings to buy homes for his parents, both sets of grandparents, and his older sister's family. Each home remains titled in his name.

A motorcycle accident leaves John paralyzed from the waist down. During his recovery, he continues producing videos for his YouTube channel. Prominent athletes and celebrities begin appearing in the videos, where John interviews them about the setbacks and challenges they have faced while they play. As the channel's popularity grows, John begins receiving offers to speak to local groups and appear on television.

Questions and Planning Considerations

1. What issues should be considered regarding the contracts and other arrangements in place before the accident?
2. How would income from the YouTube channel be treated if John manages and edits the channel himself?

3. What planning opportunities should be considered for the YouTube channel, speaking engagements, television appearances, and future income from signed memorabilia?

Appendix A — Practice Checklist

1. Identify the governing jurisdiction and determine its rules concerning the right's scope, assignability, and duration.
2. Obtain and read every underlying NIL agreement; check specifically for anti-assignment clauses and duration limits.
3. Determine which benefits the client receives—SSI, SSDI, or both—and run the SGA analysis separately for each.
4. Characterize each income stream on the property-services spectrum.
5. Where an entity is used, confirm no ownership interest is held by the beneficiary individually.
6. Where the trust will hold an operating business, confirm the trustee is willing and authorized to do so.
7. Where a related party licenses from or manages an interest, obtain independent support for the rate or the compensation.
8. Make every assignment irrevocable and document the irrevocability on its face.

Appendix B — Social Media Requirements

Below is a survey of requirements for an individual's social media account to be eligible for a platform's creator fund or partner program.

Instagram[28]

- Age 18 or older
- Have a professional account
- Reside in an eligible country
- Have at least 10,000 followers

TikTok

Pulse[29]

- At least 100,000 followers
- Content must rank in the top 4% of all TikTok content on a given day
- Age 18 or older

Creator Rewards[30]

- At least 10,000 followers

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[28] Instagram, About Product Eligibility Requirements for Monetization Tools on Instagram, https://help.instagram.com/427415519366046 (last visited Sept. 18, 2026).

[29] TikTok, TikTok Pulse: Bringing Brands Closer to Community and Entertainment, https://newsroom.tiktok.com/en-us/tiktok-pulse-is-bringing-brands-closer-to-community-and-entertainment (last visited Sept. 18, 2026).

[30] TikTok, Creator Rewards Program, https://support.tiktok.com/en/business-and-creator/creator-rewards-program/creator-rewards-program; TikTok, Creator Rewards

- Content must receive 100,000 views in the last 30 days
- Age 18 or older
- Have a personal account in good standing
- Videos must be at least one minute long
- Content must be original
- Be located in an available country

YouTube[31]

- Be in good standing with YouTube
- Follow all YouTube monetization policies
- Be located in a region where the program is available
- Meet eligibility requirements
- Become a YouTube Partner
    - 500 subscribers and 3 qualified uploads (past 90 days), AND
    - 3,000 qualified watch hours on long-form videos (past 365 days) OR
    - 3 million qualified Shorts views (past 90 days)

Program Terms (U.S.), https://www.tiktok.com/legal/page/global/creator-rewards-program-us/en (last visited Sept. 18, 2026).

[31] YouTube Partner Program Overview & Eligibility: https://support.google.com/youtube/answer/72851?hl=en&sjid=8797740589436112039-NA

- Ads and YouTube Premium Revenue
    - 1,000 subscribers with 4,000 valid public watch hours in the last 12 months, OR
    - 1,000 subscribers with 10 million valid public Shorts views in the last 90 days
- Applicants must complete a standard review process confirming compliance with platform policies and guidelines
    - Review typically takes about one month
- The creator must be 18 to open the account with the right to contract
    - If the creator is under 18, a guardian with the power to contract may open the account on the creator's behalf.

Cameo[32]

- Must have a social media account to link to.

Appendix C — People with Disabilities as "Influencers"

Jared Stancil — Down syndrome; golfer (Bradenton, Florida)

- 161,000 followers on Instagram
- 147,000 followers on TikTok (two posts with over a million views)
- 3,200 subscribers on YouTube
- Has a Cameo

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[32] Cameo, Join as Talent on Cameo, https://www.cameo.com/enroll

Amy Bockerstette — Down syndrome; golfer (Arizona)

- 12,800 followers on Instagram
- First person with Down syndrome to receive an athletic scholarship to attend college and to compete in a national collegiate championship

Tatyana McFadden — spina bifida; track and field

- 94,000 followers on Instagram
- 2,000 followers on TikTok
- Most decorated U.S. Paralympic track and field competitor.

For additional examples, see Athletes of the Special Olympics USA Games 2022, Orlando: https://mynews13.com/fl/orlando/news/2022/06/01/special-olympics-going-for-gold

2026 National Conference on Special Needs Planning and Special Needs Trusts

Name, Image, and Likeness and Public Benefits

Right of Publicity, Substantial Gainful Activity, and Special Needs Trust Planning

Travis Finchum, Esq., Special Needs Lawyers, PA

Reilly Morrison, Esq., CTFA, Southeastern Trust Company

Michael Pierce, Esq., University of Pittsburgh

1

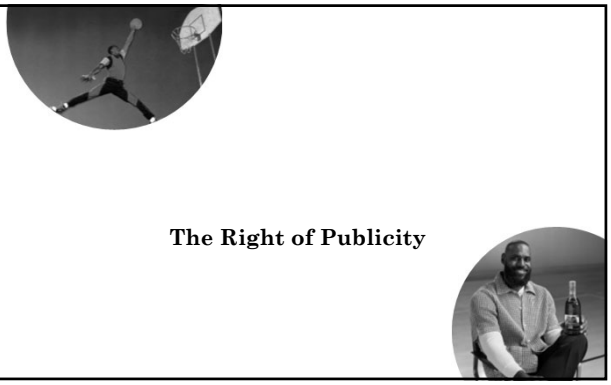
The Right of Publicity

2

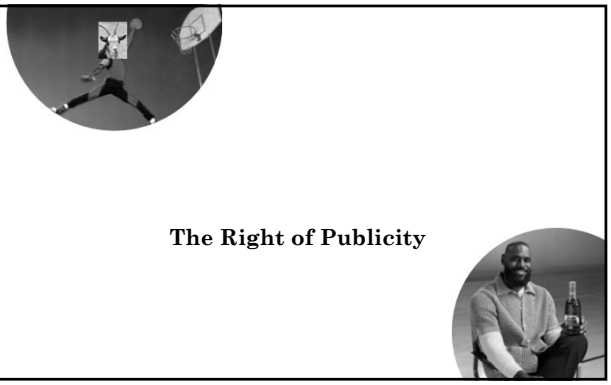


The Right of Publicity

3


The Right of Publicity

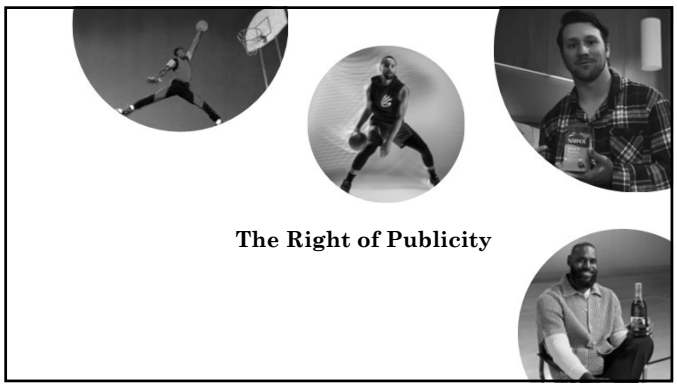
4


The Right of Publicity

5


The Right of Publicity

6



7



8

NIL and the Right of Publicity

- From privacy to publicity
- Long-term commercial value
- Personal vs. Property rights

9

Name, Image, and Likeness… AND

- Name, nickname, likeness (whether drawn or computer-generated), appearances, image and portrayals (whether photographed, filmed or otherwise), persona, performance, trademarks, right of publicity, biographical information, jersey number, statistics, data, voice, testimonials, endorsements, initials, facsimile or original autograph/signature or other attributes or indicia of persona, including as any of the foregoing may be generated by artificial intelligence

10

NIL in Collegiate Athletics

- Amateurism



11

NIL in Collegiate Athletics

- Amateurism



- Post *House*



12

NIL ≠ 0

Types of NIL Assets and Income in Collegiate Athletics

- License fees – revenue share and third-party
- Endorsements
- Royalties (passive)
- Appearance fees (earned)
- Loss of Value insurance

*Sophisticated clients

13

What does NIL have to do with Special Needs Planning and Special Needs Trusts?

14

What does NIL have to do with Special Needs Planning and Special Needs Trusts?



15

What does NIL have to do with Special Needs Planning and Special Needs Trusts?





16

What does NIL have to do with Special Needs Planning and Special Needs Trusts?





17

Not Just for College Athletes



Jared Stancil

Amy Bockerstette





Tatyana McFadden

18

Not Just for Athletes





19

Not Just for Athletes









20

"Influencers" making money



You Tube Partner Program – Early Access

- **500 subscribers**
- **3 qualified uploads AND**
- **3,000 qualified watch hours or 3 Million public short views**

Full Monetization (Ad and Premium Revenue)

- **1,000 subscribers**
- **4,000 watch hours or 10 M public short views**

21

"Influencers" making money



Instagram Professional Account
- **10,000 followers**

Sell sponsored content, brand deals, subscriptions

22

"Influencers" making money



TikTok – Pulse
- **100k followers**
- **Content in top 4% in any day**

Creator Rewards
- **10k followers**
- **Receive 100k views in last 30 days**
- **1 minute or more videos**

$0.40 to $1.00 per 1,000 qualified views

23

The earned/unearned divide

EARNED INCOME	UNEARNED INCOME
$65	**$20**
monthly exclusion — then one-half of the remainder is excluded as well	general exclusion only — the rest offsets the benefit dollar for dollar

The same NIL dollars produce materially different benefit outcomes depending on how they are characterized.

24

Characterization turns on the nature of the involvement

SERVICE-BASED → likely earned

- Coaching at a camp
- Paid appearances
- Scheduled social media posts

PASSIVE → likely royalty

- Licensing or merchandising the NIL
- Residual copyright material

Trade or business? Five factors decide whether it becomes Net Earnings from Self-Employment (NESA)

Holding oneself out as a provider	Intent to produce income	Ongoing and regular participation	Third-party customer relationship	Profit motivation

NESE = gross income from the business less allowable deductions.

25

Royalties: two sections, one rule

SI 00830.510	Royalties are "compensation paid to the owner for the use of property, usually copyrighted material (e.g., books, music, or art) or natural resources" — placed in the unearned income series.
SI 00820.450	**Supplies the exceptions that move royalties into earned income:** • Received as part of a trade or business • Received in connection with any publication of the individual's own work — a manuscript, magazine article, or artwork

The expense rule runs backwards. Expenses incurred in obtaining royalty income are deductible where the royalty is unearned — but not where it is treated as earned.

26

Honoraria, appearance fees, and in-kind pay

Honorarium: an honorary or free gift, reward, or donation provided gratuitously for services rendered, with no legal obligation to pay.

EARNED

Payment for the service itself.

UNEARNED

Any other payment in cash or in kind connected with the service, to the extent it exceeds the individual's expenses.

Do not reach for ISM. Free apparel, equipment, or travel supplied by a sponsor is not in-kind support and maintenance. It will likely be treated as "other in-kind income," valued at current market value.

27

Everything sorts along one spectrum

PROPERTY SIDE

Default: unearned — royalty

Merchandising, trading card, and video game licensing

Group licensing pool distributions

Royalty paid by an operating entity

CONTESTED

Earned where regular

Sponsored posts and endorsements

SERVICES SIDE

Default: earned

Coaching, training, camps — NESE or wages

Platform content monetization — NESE

Affiliate and referral codes — NESE

Appearance fees and speaking — honorarium split

← **toward property:** absence of regularity or profit motive · another party operates the business

→ **toward services:** operating as a trade or business · regularity and holding out · an employment relationship · a regular circuit

28

Assigning NIL to a Special Needs Trust

1. **Irrevocability**
   A legally assignable payment assigned to a trust is income to the beneficiary "unless an SSI income exclusion applies or the assignment is irrevocable." A revocable assignment counts exactly as though it had never been made — and the rule applies whether the income stream or the underlying right is assigned.

2. **The non-assignable payment bar**
   In an NIL matter the bar is usually contractual, not statutory. Anti-assignment clauses are common boilerplate in licensing, collective, and endorsement agreements. Review the underlying agreements before the assignment is papered.

3. **Payback and entity placement**
   Assignment to a first-party trust subjects the rights to the Medicaid payback. Whether there is anything to reach turns on state law: if the right of publicity is not descendible, it ends at death and no remainder interest exists. Royalties already collected into the trust remain corpus, subject to payback in the ordinary course.

29

Scenario One — Jane Doe

THE FACTS

An 18-year-old with Down syndrome. Social media accounts and a YouTube channel show her golfing with her father and competing in adaptive opens and pro-ams.

Jane treats golf as a hobby. She shows up and plays; she has no involvement in production, scheduling, promotion, or the business side. Her father films, edits, and schedules.

Apparel and equipment arrangements give her free gear in exchange for featuring and promoting it.

PLANNING QUESTIONS

1. How might the accounts and channel be structured, and how would each structure affect the treatment of income?
2. How might Jane's involvement amount to work for SGA purposes?
3. How might the apparel and equipment arrangements affect eligibility for, or the amount of, public benefits?

30

Scenario Two — John Doe

THE FACTS

A junior running back at a top-10 program. A one-year $2M revenue-sharing agreement with the school, plus a collective/dealership arrangement giving him use of a car for his NIL. School single-season rushing records as a sophomore; projected top-10 draft pick; injury insurance in place. He has bought homes for parents, both sets of grandparents, and his sister's family — all titled in his name. A hobby YouTube channel streams him playing football video games.

A motorcycle accident leaves him paralyzed from the waist down. He keeps producing videos; athletes and celebrities appear as guests, and speaking and television offers follow.

PLANNING QUESTIONS

1. What issues arise from the contracts and arrangements already in place before the accident?
2. How is YouTube income treated if John manages and edits the channel himself?
3. What planning opportunities exist for the channel, speaking engagements, television, and future signed-memorabilia income?

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Modern Drafting for Third-Party Supplemental Needs Trusts: Autonomy, Oversight, and Structural Flexibility

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Modern Drafting for Third Party Supplemental Needs Trusts

Autonomy, Oversight and Structural Flexibility

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The sample provisions in this paper are illustrative and must be conformed to the settlor's intent, the beneficiary's circumstances, governing state law, federal and state public-benefit rules, tax objectives, and the identity and capabilities of the fiduciaries.

I. Introduction The Third Party SNT Has Outgrown Its Old Form

The traditional third-party supplemental needs trust was built around a clear and important objective: preserve the beneficiary's eligibility for means-tested public benefits. The drafter therefore emphasized absolute trustee discretion, prohibited the beneficiary from compelling distributions, and repeated that the trust was intended to supplement rather than supplant government assistance. Those features remain important. But they are no longer enough.

A third-party SNT may govern nearly every aspect of a beneficiary's financial life for decades. It may be asked to support housing, transportation, caregiving, technology, education, recreation, advocacy, and relationships. It may need to function after the parents who supplied judgment, context, and informal oversight are gone. It may cross state lines, encounter new benefit programs, survive multiple fiduciaries, and adapt to laws that did not exist when the instrument was signed. A document that preserves eligibility but fails to create a durable system for decision-making is not a complete plan.

That planning takes place against an increasingly unreliable service-delivery system. Eligibility for Medicaid home- and community-based services does not guarantee timely access to a provider, an adequate number of authorized hours, a stable direct-support workforce, meaningful care coordination, or an appropriate residential option. In 2025, 41 states maintained waiting or interest lists for Medicaid home care, more than 600,000 people appeared on those lists, and the average reported wait was 32 months. Those figures materially understate unmet need because they do not capture people whose state does not offer the necessary service, people whose services are capped below need, or people who are authorized for services but cannot find a provider with capacity.[1] MACPAC has likewise identified delays, administrative complexity, and limited state use of available expedited processes as continuing barriers to timely HCBS access.[2]

These are not merely policy failures occurring outside the trust. They change the work the trust may be required to perform. A beneficiary may technically qualify for services but have no worker available to deliver them. A residential program may exist but have no opening, may be geographically impractical, or may be unable to retain staff. A public care coordinator may carry too many cases to provide the individualized attention the beneficiary needs. A sibling who expected to

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[1] Alice Burns, Abby Wolk & Molly O'Malley Watts, *A Look at Waiting Lists for Medicaid Home- and Community-Based Services from 2016 to 2025*, KFF (Nov. 20, 2025), https://www.kff.org/medicaid/a-look-at-waiting-lists-for-medicaid-home-and-community-based-services-from-2016-to-2025/. The authors caution that waiting-list data are an incomplete and nonuniform measure of unmet need.

[2] Medicaid & CHIP Payment & Access Comm'n, *Report to Congress on Medicaid and CHIP* 21-80 (Mar. 2025) (chs. 2-3, addressing timely access to HCBS and administrative complexity in Medicaid section 1915 authorities), https://www.macpac.gov/wp-content/uploads/2025/03/MACPAC_March-2025-WEB-Final-508.pdf.

provide informal oversight may move, become ill, or simply be unable to assume a second full-time responsibility.

Families often express the planning objective in much simpler terms: they want good people around the beneficiary and a safe place for the beneficiary to live. Those concerns are not separate from sophisticated drafting; they are the reason for it. A trust cannot manufacture a competent workforce or guarantee appropriate housing. It can, however, authorize the trustee to hire private care management, supplement inadequate services, compensate caregivers when appropriate, stabilize or create housing, respond to emergencies, relocate the trust or the beneficiary, and change fiduciaries when the existing structure is no longer working. Comprehensive and flexible drafting matters most precisely because the public and private delivery systems on which the beneficiary depends may be fragmented, delayed, or unavailable.

Modern drafting begins by separating two ideas that older forms often collapse. The beneficiary must not possess a legally enforceable right to reach trust assets if that right would make the trust an available resource. But the beneficiary need not be voiceless. The trustee must retain discretion, but discretion need not be unstructured or unreviewable. Public benefits should be considered, but their preservation need not defeat the beneficiary's health, dignity, independence, or quality of life. Remainder beneficiaries may receive what is left, but the trustee should not administer a lifetime trust as though preservation of their inheritance were a coequal purpose.

The central proposition is therefore straightforward: a modern third-party SNT should be drafted as a long-term governance instrument, not merely as a benefits-preservation device. That requires attention to purpose, beneficiary participation, distribution philosophy, ABLE coordination, fiduciary architecture, oversight, amendment authority, situs, information rights, privacy, and liability protections. The drafting must preserve the trustee's legal discretion while supplying enough direction to make that discretion useful.

For SSI purposes, the federal inquiry is principally one of legal availability: whether the beneficiary can revoke or terminate the trust and use the assets for support and maintenance, direct the use of principal for those purposes, or sell a right to receive payments. A trustee's discretionary authority to use principal for the beneficiary generally is not attributed to the beneficiary.[3] This framework leaves meaningful room to draft for voice, consultation, and supported participation without giving the beneficiary ownership or control.

II. Begin with Purpose Not Prohibition

Many third-party SNTs begin by describing what the trust must not do. The trust must not disqualify the beneficiary. It must not replace public assistance. It must not permit the beneficiary to compel a distribution. All of that may be technically sound, but it produces an impoverished statement of purpose. It tells the trustee what to fear without adequately identifying what the trust is meant to accomplish.

The purpose clause matters because discretionary language does not operate in a vacuum. It informs how a trustee weighs competing considerations, how a successor fiduciary understands the settlor's priorities, and how a court evaluates an exercise or nonexercise of discretion. If the only articulated

[3] Social Security Administration, Program Operations Manual System (POMS) SI 01120.200(D)(1)-(2), "Information on Trusts, Including Trusts Established Prior to January 01, 2000, Trusts Established with the Assets of Third Parties, and Trusts Not Subject to Section 1613(e) of the Social Security Act" (May 6, 2024). See also id. SI 01120.200(B)(16) (defining a third-party trust).

objective is benefits preservation, a cautious trustee may conclude that avoiding any reduction in SSI is the safest administration even when a distribution would materially improve the beneficiary's life.

A modern purpose clause should establish a hierarchy. The primary purpose is the beneficiary's welfare. Means-tested benefits are important resources to be preserved when doing so is consistent with that purpose. They are not necessarily the highest good in every circumstance. The trustee should have authority to make a distribution that reduces or eliminates a benefit when the expected value of the distribution exceeds the value of the benefit lost or when the distribution otherwise advances the beneficiary's interests.

State supplemental-needs-trust statutes and Medicaid rules vary. Some prescribe or suggest particular statements of intent; some distinguish sharply between third-party and self-settled trusts; and some expressly permit a trustee to make a benefits-impacting distribution when doing so better serves the beneficiary. The drafter should preserve any required local formulation but place it within a broader statement of beneficiary-centered purpose. Federal SSI analysis supplies the legal-availability baseline; it does not displace state trust law or state Medicaid administration.[4]

New York provides a useful example. EPTL 7-1.12 requires the instrument to evidence an intent to supplement rather than supplant government benefits and generally to prohibit distributions that impair them. At the same time, the statute expressly permits third-party payments for food, clothing, shelter, or health care when the trustee determines that the beneficiary's basic needs will be better met and that accepting the resulting effect on benefits is in the beneficiary's best interests.[5] That statutory formulation does not control trusts governed by other states' laws, but it illustrates an important drafting point: benefits preservation and beneficiary-centered discretion need not be mutually exclusive.

Illustrative purpose provision

> *The Settlor creates this trust primarily to enhance the Beneficiary's health, safety, dignity, comfort, independence, relationships, opportunities, and overall quality of life. The Trustee shall consider the availability and value of governmental and private benefits, services, and resources, but preservation of any particular benefit is not the sole or overriding purpose of this trust. The Trustee may make a distribution that reduces, suspends, or eliminates a benefit if the Trustee reasonably determines that the distribution better serves the Beneficiary's interests. The interests of all remainder beneficiaries are subordinate to the lifetime interests of the Beneficiary.*

This clause deliberately avoids converting broad aspirations into a judicially enforceable support standard. Words such as health and comfort can carry technical meaning under state trust law and federal tax law. The drafter should therefore coordinate the purpose clause with the operative distribution standard and applicable creditor, tax, and public-benefit rules. An expression of intent should guide discretion without giving the beneficiary an enforceable right to distributions.

The document should also state whether exhaustion of the trust during the beneficiary's lifetime is acceptable. If that is the settlor's intent, silence invites a trustee to preserve principal unnecessarily. A direct instruction is preferable:

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[4] SSA POMS SI 01120.200(D)(1)-(2); see also 42 U.S.C. §§ 1382b(e), 1396p(d). The drafter must separately review the governing state's trust law, Medicaid statutes, regulations, manuals, and agency practice.

[5] N.Y. Est. Powers & Trusts Law § 7-1.12(a)(5)(i)-(iii), (b)(1)-(3), (e) (McKinney 2026).

The Trustee shall not withhold an otherwise appropriate distribution merely to preserve principal for future use or for remainder beneficiaries. The Trustee may expend all trust property during the Beneficiary's lifetime if the Trustee determines that doing so appropriately advances the purposes of this trust.

That direction does not require imprudent spending. The trustee still must consider duration, foreseeable needs, other resources, and the size of the fund. It simply makes clear that conservation is a means, not the mission.

III. Distribution Standards Preserve Discretion Supply Judgment

The distribution provision remains the legal center of the SNT. The beneficiary generally should not possess a right to compel payments for support or maintenance, demand principal, revoke or terminate the trust, or direct trust assets for the beneficiary's own benefit. A third-party SNT also ordinarily avoids the federal Medicaid payback provisions applicable to certain self-settled trusts because the assets never belonged to the beneficiary.[6]

But absolute discretion is only the beginning of the analysis. The document should tell the trustee how to exercise that discretion. Relevant considerations may include:

- the beneficiary's expressed preferences, values, and goals;
- the monetary and nonmonetary value of benefits that could be affected;
- the beneficiary's health, safety, housing stability, and community integration;
- the likelihood that an expenditure will increase independence or prevent a more restrictive placement;
- the availability, reliability, and quality of public services;
- the trust's size, anticipated duration, and foreseeable extraordinary needs;
- the availability of family support and whether reliance on unpaid family labor is realistic or equitable;
- tax consequences, including whether payment directly to a provider is preferable;
- the administrative burden and dignity costs of denying ordinary expenditures; and
- the interests of the beneficiary over those of remainder beneficiaries.

Illustrative discretionary distribution provision

The Trustee may distribute to or for the benefit of the Beneficiary as much or all of the net income and principal as the Trustee determines advisable in the Trustee's sole and absolute discretion. No distribution is required, and the Beneficiary shall have no power to compel a distribution, assign or anticipate an interest, direct the use of trust property, or revoke or terminate the trust. In exercising discretion, the Trustee shall be guided by the purposes stated in this instrument and may consider the Beneficiary's preferences, abilities, needs, other resources, public and private benefits, anticipated future requirements, and the size and expected duration of the trust.

The phrase "sole and absolute discretion" should not be treated as a substitute for careful design. State law ordinarily preserves some review for abuse of discretion, bad faith, or action inconsistent

[6] 42 U.S.C. § 1396p(d)(4)(A), (C); 42 U.S.C. § 1382b(e)(5); SSA POMS SI 01120.200(B)(16), (D)(1)-(2). The federal statutory exceptions apply to specified trusts containing the individual's own assets; a true third-party trust is analyzed under its terms and applicable state law.

with the trust's purposes despite expansive language.[7] The drafter should identify the law intended to govern construction and administration and should not assume that adjectives alone will answer questions of reviewability.

The more difficult failure is sometimes not an improvident distribution but the failure to exercise judgment at all. General trust principles require a trustee to exercise discretionary power in good faith, consistently with the trust's terms and purposes, and on the basis of information appropriate to the decision.[8] A trustee cannot exercise informed discretion without an information system.

New York's *Matter of JP Morgan Chase Bank, N.A. (Marie H.)* is an especially useful illustration. The trustees of a well-funded discretionary trust made virtually no expenditures for a beneficiary with significant disabilities until court intervention led to the retention of a care manager. The court concluded that safeguarding and investing the corpus was not enough. The trustees had to remain informed about the beneficiary's condition, needs, residence, and services and use the trust for his actual benefit.[9] Although the governing fiduciary standard must be determined state by state, the administrative lesson is national: discretion cannot be exercised responsibly from a file, an investment statement, or an annual distribution request alone.

A deliberate rule for benefits impacting distributions

The trustee should be authorized to distinguish among three different questions:

1. Is the beneficiary legally eligible for a benefit?
2. What is the actual value and reliability of that benefit?
3. Would a trust expenditure produce a better practical outcome?

Those questions may lead to different answers. Preserving a modest monthly cash benefit at the cost of stable housing, effective treatment, or meaningful community participation may be irrational. Conversely, using the trust for expenses already fully and reliably covered by a public program may unnecessarily shorten the life of the fund. Modern drafting should empower a fiduciary to make that comparison, document it, and revisit it.

Illustrative benefits impact provision

> *Before making a distribution reasonably expected to affect the Beneficiary's eligibility for or receipt of a material means-tested benefit, the Trustee may consult qualified public-benefits counsel or another knowledgeable adviser. The Trustee may nevertheless make the distribution if the Trustee reasonably concludes that its expected benefit to the Beneficiary outweighs the value of the benefit that may be reduced or lost. The Trustee shall not be liable solely because a distribution causes or contributes to a reduction, suspension, or loss of benefits if the Trustee acted in good faith and in a manner reasonably consistent with the purposes of this trust.*

This is not a direction to ignore benefits. It is a direction to value them accurately.

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[7] Restatement (Third) of Trusts § 50 & cmts. b, c (Am. L. Inst. 2003); Uniform Trust Code § 814(a) (Unif. L. Comm'n 2000, last amended 2025).

[8] Restatement (Third) of Trusts §§ 50 cmt. b, 77 (Am. L. Inst. 2003); Uniform Trust Code §§ 801-804, 814(a) (Unif. L. Comm'n 2000, last amended 2025).

[9] *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, 38 Misc. 3d 363, 376-80, 956 N.Y.S.2d 856 (Sur. Ct. N.Y. Cnty. 2012); see also *Matter of Wallens*, 9 N.Y.3d 117, 122-23, 877 N.E.2d 960, 849 N.Y.S.2d 403 (2007) (broad discretion must be exercised reasonably and in good faith).

IV. Autonomy Without Ownership or Control

Older drafting sometimes treated the beneficiary's exclusion from legal control as a reason to exclude the beneficiary from the decision-making process altogether. That is neither legally required nor good administration. A beneficiary can have a voice without possessing a property right.

Current Social Security guidance focuses on legal access: whether the beneficiary can revoke or terminate the trust, compel or direct the use of principal for support and maintenance, or transfer the beneficiary's interest. A trustee's discretionary authority to use assets for the beneficiary does not, by itself, give the beneficiary ownership or control.[10] Drafting can therefore require meaningful consultation while expressly preserving fiduciary discretion.

Autonomy will look different for different beneficiaries and may change over time. It can mean managing a modest spending account, choosing between two activities, selecting a service provider, identifying a preferred support person, participating in an annual planning meeting, or communicating a preference about housing. It does not require the fiction that every beneficiary can independently evaluate complex financial or benefits consequences.

Illustrative beneficiary participation provision

> *To the extent reasonably practicable and appropriate to the Beneficiary's abilities and circumstances, the Trustee shall seek and consider the Beneficiary's preferences, values, goals, priorities, and lived experience. The Trustee shall communicate in a manner reasonably accessible to the Beneficiary and shall support the Beneficiary's participation in decisions affecting the Beneficiary. The Beneficiary may request distributions and may identify preferred goods, services, providers, and supports. These rights of participation are advisory and procedural only; they do not give the Beneficiary a right to compel a distribution or to exercise dominion or control over trust property.*

The distinction between "shall consider" and "shall follow" is important. The former creates a process; the latter may create an entitlement or improperly delegate fiduciary judgment. The trust can require the trustee to listen without requiring the trustee to agree.

Planning meetings and a written plan

Where the trust is large enough to justify the administration, the instrument may direct an annual beneficiary-centered planning process. The trustee can review present living arrangements, benefits, health, transportation, education, employment, social connection, recreation, technology, and anticipated transitions. The result should not be a rigid budget that becomes an enforceable distribution right. It should be a working plan that connects expenditures to the trust's purposes.

> *At reasonable intervals, and at least annually if practicable, the Trustee shall review the Beneficiary's circumstances and anticipated needs. The Trustee may invite the Beneficiary, a guardian or agent, members of the Beneficiary's support network, care managers, benefits advisers, and other appropriate persons to participate. Any plan or budget resulting from the review is advisory, may be revised, and does not create a right to distributions.*

[10] SSA POMS SI 01120.200(D)(1)-(2), especially SI 01120.200(D)(1)(b)(2) (the trustee generally is a third party, not the beneficiary's agent).

Building an information system around the trustee

A direction to consult the beneficiary is insufficient when the beneficiary cannot reliably identify or communicate an unmet need. The trustee may live hundreds of miles away. Family may be unavailable, conflicted, or exhausted. Medicaid-funded care coordination may be fragmented or overextended. The trust should therefore authorize the trustee to create a reliable channel for information rather than wait for a distribution request to arrive.

The authority to retain a private care manager, social worker, benefits specialist, housing advocate, or other local professional should be express. The document should also state whether those costs are ordinary expenses of administration, confirm that their payment does not reduce the trustee's otherwise allowable compensation, and preserve the trustee's responsibility for discretionary decisions. A care manager supplies facts and recommendations; the care manager should not silently become the distribution trustee.

> *The Trustee may employ and compensate from the trust a care manager, social worker, public-benefits specialist, housing advocate, daily money manager, or other professional to assess the Beneficiary's circumstances, identify unmet needs, obtain and evaluate information, coordinate services, facilitate communication, and make recommendations to the Trustee. The reasonable cost of those services shall be an expense of administration and shall not reduce compensation otherwise payable to the Trustee. Unless separately appointed to a fiduciary office under this instrument, an adviser shall not have authority to compel or direct a distribution, and the Trustee shall retain responsibility for the exercise of the Trustee's discretion.*

The drafting should authorize the trustee to receive information from any credible source while limiting disclosure of trust information to persons legally entitled to receive it. Receiving information from residential staff or a family friend is different from disclosing account balances or distribution history to that person. HIPAA authorizations, releases, and secure communication protocols ordinarily belong in the surrounding planning package rather than in the trust itself.

Letters of intent and expressions of preference

The trust should authorize the trustee to consider a settlor's letter of intent and the beneficiary's later statements of preference without incorporating either into the dispositive terms. A letter of intent can explain routines, relationships, communication methods, medical history, religious practices, sensory needs, and what a good day looks like. But a forty-year-old letter should not override the adult beneficiary's present wishes or freeze obsolete assumptions.

The better provision establishes priority and flexibility: current beneficiary preferences should ordinarily carry substantial weight; the settlor's letter supplies context; neither creates an enforceable distribution standard; and the trustee may disregard information that is outdated, impracticable, or contrary to the beneficiary's welfare.

Removal and appointment powers

Some settlors wish to give the beneficiary a role in trustee succession. That can be valuable, but the power must be carefully limited. Depending on the tax and benefits objectives, the beneficiary might be permitted to remove a trustee and appoint a successor who is independent and not related or subordinate within the meaning of applicable tax law. The instrument should address frequency, cause, notice, minimum qualifications, and whether a trust protector must consent. There is no

universal safe harbor for a beneficiary-held removal power; the provision must be tested under the estate, gift, grantor-trust, and benefits rules applicable to the particular plan.[11]

V. ABLE Accounts as a Bridge to Everyday Autonomy

ABLE accounts are not merely another benefits-preservation technique. Used properly, they can bridge the gap between fiduciary control and ordinary adult autonomy. A trustee can fund an ABLE account for qualified disability expenses, while the beneficiary or authorized individual uses the account for day-to-day transactions that would otherwise require repeated requests to a trustee.

Beginning January 1, 2026, federal law expanded ABLE eligibility to individuals whose blindness or disability began before age forty-six. The ordinary annual contribution ceiling is tied to the federal gift-tax annual exclusion and is $20,000 for 2026. An employed beneficiary may in some circumstances contribute an additional amount subject to statutory limitations. For SSI purposes, ABLE funds up to $100,000 are excluded from countable resources, although excess balances can suspend SSI cash benefits.[12]

Social Security guidance also recognizes that a transfer from a trust to an ABLE account owned by the trust beneficiary is excluded from income to the beneficiary.[13] That makes ABLE coordination particularly useful for third-party SNT administration.

Illustrative ABLE provision

> *The Trustee may establish, contribute to, and coordinate distributions with one or more accounts maintained for the Beneficiary under Internal Revenue Code section 529A. The Trustee may pay amounts directly to an ABLE account if the Trustee determines that doing so will promote the Beneficiary's independence, facilitate payment of qualified disability expenses, improve administrative efficiency, or advance another purpose of this trust. The Trustee may consider applicable contribution limits, account balances, Medicaid recovery provisions, qualified-expense rules, and the effect of distributions on means-tested benefits. The Trustee is not responsible for the administration of an ABLE account not controlled by the Trustee, but may require information reasonably necessary to coordinate distributions.*

The drafting should avoid promising that every transfer or expenditure will be protected. ABLE rules contain annual limits, documentation requirements, state-plan terms, and Medicaid-recovery consequences. The trustee should also decide whether an expense is better paid directly from the trust. Funding an ABLE account is not automatically preferable; it is a tool for circumstances in which beneficiary access and qualified-expense treatment justify it.

A practical policy can authorize periodic transfers for agreed categories of spending, coupled with periodic review rather than transaction-by-transaction approval. This reduces administrative friction and allows the beneficiary to exercise judgment within a safe structure.

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[11] See I.R.C. §§ 2036, 2038, 2041, 2514, 672(c), 674; Rev. Rul. 95-58, 1995-2 C.B. 191. Revenue Ruling 95-58 addresses a grantor's power to remove and replace a trustee and should not be treated as a universal safe harbor for a beneficiary-held power.

[12] I.R.C. § 529A(b)(2), (b)(6); Stephen Beck, Jr., ABLE Act of 2014, Pub. L. No. 113-295, div. B, tit. I, § 101, 128 Stat. 4010; ABLE Age Adjustment Act, Pub. L. No. 117-328, div. T, tit. I, § 124, 136 Stat. 4459, 5291 (2022); SSA POMS SI 01130.740(A)(1), (B)(2), (B)(4), (D)(1)-(2) (Feb. 26, 2026).

[13] SSA POMS SI 01120.200(E)(1)(h); see also SSA POMS SI 01130.740(C)(1).

VI. The Primary Beneficiary and the Problem of Remainder Interests

A third-party SNT necessarily identifies who receives property at the primary beneficiary's death. That does not mean the remainder beneficiaries should influence lifetime administration. Yet trustees, particularly family trustees, may consciously or unconsciously conserve assets for themselves, siblings, nieces, nephews, or charities.

The document should make the hierarchy unmistakable. The primary beneficiary's lifetime interests are paramount. A remainder beneficiary has only the interest granted under governing law and should not be treated as a present co-beneficiary whose expectation limits proper distributions. The precise effect of language limiting notice, accountings, or standing will depend on state law and cannot be established by declaration alone. New York again provides a useful example: in a trustee's judicial accounting, SCPA 2210 generally requires process to issue to persons entitled absolutely or contingently to share in the trust estate, subject to the representation rules in SCPA 315.[14] Those procedural rights do not make preservation of the remainder a coequal distribution objective. The instrument can respect the rights state law gives remainder beneficiaries while directing the trustee to exercise lifetime distribution discretion in favor of the beneficiary with a disability.

Illustrative priority provision

> *During the Beneficiary's lifetime, the Settlor's paramount concern is the Beneficiary. The Trustee shall administer the trust without regard to the desire of any remainder beneficiary to preserve trust property. No remainder beneficiary may object to a distribution properly made for the Beneficiary solely because the distribution reduces or exhausts the trust estate. Nothing in this paragraph limits any nonwaivable right under applicable law to challenge a breach of trust.*

That final sentence is not ornamental. A clause should not purport to immunize misconduct or eliminate rights that state law makes mandatory.

Limited testamentary power of appointment

A limited testamentary power of appointment can give the beneficiary meaningful control over the ultimate destination of property without providing current access. It also permits the remainder plan to respond to relationships and circumstances that could not be known when the trust was created. The permissible appointees might exclude the beneficiary, the beneficiary's estate, creditors, and creditors of the estate, while including descendants, siblings, charities, or a defined class.

The power requires careful tax and benefits analysis. The drafter should address the method of exercise, default takers, any prohibition on appointment to disqualified persons, and whether exercise in favor of another trust is permitted. The attorney should also consider whether the beneficiary is realistically able to execute a will and whether an agent or guardian could exercise the power under applicable law.[15]

VII. Governance One Trustee Should Not Be Expected to Do Everything

Third-party SNTs demand several distinct competencies: investment management, tax reporting, public-benefits analysis, discretionary judgment, disability knowledge, care coordination, family

[14] N.Y. Surr. Ct. Proc. Act §§ 2210(9), 315(1)-(3), (7)-(8).

[15] I.R.C. §§ 2041(b)(1), 2514(c); Treas. Reg. §§ 20.2041-1(c)(1), 25.2514-1(c)(1). State law governs creation, exercise, and delegation of a power of appointment and must be separately reviewed.

diplomacy, and communication with the beneficiary. Few individuals or institutions excel at all of them. Modern drafting should separate roles when separation improves administration, while avoiding an architecture so elaborate that it becomes unaffordable or unworkable.

Possible roles include:

- a general or administrative trustee;
- an investment adviser or directed investment trustee;
- a distribution adviser or distribution trustee;
- a trust protector or trust director;
- a public-benefits adviser;
- a care manager or social-services consultant;
- a beneficiary advocate; and
- a committee combining family knowledge and professional independence.

The title matters less than the authority attached to it. Merely declaring that a trust protector exists creates ambiguity. The instrument should identify each power, whether it is held in a fiduciary or nonfiduciary capacity, the standard governing its exercise, information-sharing duties, succession, compensation, conflicts, and liability.

The Uniform Directed Trust Act supplies a useful framework for allocating power between trustees and trust directors and for addressing duties, powers to direct, and information sharing, but it is not universally enacted and local variations matter.[16]

Trustee selection and succession

The drafting process should answer the practical questions before selecting names:

- Who knows the beneficiary?
- Who understands benefits?
- Who can say no without destroying a family relationship?
- Who can manage investments and reporting?
- Who will still be available in twenty years?
- What happens if an institution will not accept a modest trust?
- Can a family member serve with a professional, and how are disagreements resolved?

The succession provision should be operational. It should specify who may remove a trustee, with or without cause; who appoints the successor; qualification standards; whether an individual must appoint an institutional successor at a stated asset level; how incapacity is determined; and whether a resigning trustee must secure acceptance by a successor.

Resignation and transition

Trustee succession is not complete when the document merely names the next person in line. A named successor may be unwilling, unable, unqualified, geographically impractical, or uninterested when the vacancy arises. The instrument should contain a cascading appointment mechanism and an

[16] Uniform Directed Trust Act §§ 6-12 (Unif. L. Comm'n 2017, amended 2019) (trust director powers, duties, limitations on a directed trustee, and information sharing). The governing jurisdiction's enactment and local variations must be reviewed.

emergency backstop that prevents a vacancy from interrupting rent, caregivers, insurance, tax compliance, or recurring distributions.

The transition provision should address notice, the effective date of resignation, appointment when no named successor accepts, transfer of assets and records, interim authority, delivery of an accounting, and the means by which the departing trustee may obtain a release. The Uniform Trust Code supplies default rules for vacancies, successor appointments, and resignation, but enactments vary and careful private drafting may reduce the need for a proceeding when applicable law permits a nonjudicial transition.[17] In New York (where there is no enacted Uniform Trust Code provisions), EPTL 7-2.6 authorizes the court to accept a resignation and appoint a successor; the statutory backstop reinforces the value of drafting a workable private transition mechanism before a vacancy occurs.[18]

> *A Trustee may resign by written and acknowledged notice delivered at least thirty days before the effective date to each cotrustee, the person authorized to appoint a successor, the Beneficiary or the Beneficiary's legal representative, and the Beneficiary Representative. Before the resignation becomes effective, the resigning Trustee shall deliver to the successor all trust property and reasonably complete records, including current asset statements, tax returns, accountings, material contracts, recurring-payment information, benefits correspondence, and information reasonably necessary to avoid disruption of the Beneficiary's supports. If no designated successor accepts within the notice period, the person holding the appointment power may appoint a qualified individual or corporate fiduciary. The resigning Trustee remains responsible for administration before the effective date and is not released except by a judicial settlement or a binding nonjudicial settlement executed by all persons whose consent is required under applicable law.*

The last sentence matters. A clause declaring the trustee "released" upon delivering records may not bind a beneficiary under a disability, an unrepresented remainder interest, or another person whose consent is required. State rules on representation, nonjudicial settlement, accountings, and court approval must be applied before treating a release as binding.[19] New York's SCPA 315 addresses representation and the binding effect of certain nonjudicial settlements, while SCPA 2208 permits a trustee to seek voluntary judicial settlement.[20]

Trust protector powers

A protector may be given some or all of the following powers:

- remove and appoint trustees, advisers, or committee members;
- resolve deadlocks or allocate authority among fiduciaries;
- change situs, principal place of administration, or governing law;
- add an administrative trustee in another jurisdiction;
- amend administrative provisions to respond to changes in law;
- modify provisions to preserve or improve eligibility for public benefits;

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[17] Uniform Trust Code §§ 704-705 (Unif. L. Comm'n 2000, last amended 2025).

[18] N.Y. Est. Powers & Trusts Law § 7-2.6; see also N.Y. Surr. Ct. Proc. Act §§ 706, 715-716 when the fiduciary serves under Surrogate's Court authority.

[19] See Uniform Trust Code §§ 111, 301-305, 813 (Unif. L. Comm'n 2000, last amended 2025). Each state's enactment, representation rules, and procedures for approval or settlement must be reviewed.

[20] N.Y. Surr. Ct. Proc. Act §§ 315(8), 2208(3).

- correct ambiguities, scrivener's errors, or drafting defects;
- approve or direct decanting, merger, division, or nonjudicial modification;
- convert the trust to or from a directed structure;
- approve extraordinary transactions or trustee compensation; and
- restrict or remove a power when its exercise could cause adverse tax or benefits consequences.

The drafter should distinguish powers that preserve the plan from powers that rewrite it. Authority to update administrative provisions or respond to benefits law is different from authority to add beneficiaries or redirect the remainder. If dispositive amendment power is granted, the instrument should define boundaries and consider tax consequences.

Illustrative protector framework

> *The Trust Protector may exercise only the powers expressly granted by this instrument. Each power granted to the Trust Protector is intended to be a personal and nonfiduciary power, to the fullest extent permitted by applicable law. The Trust Protector shall not be a trustee, shall have no duty to monitor the Trustee's administration, and shall have no duty to exercise any power. If the Trust Protector elects to act, the Trust Protector shall act honestly, within the scope of the power granted, and consistently with the Settlor's stated purposes. The Trust Protector may rely on information supplied by a Trustee or qualified adviser without independent investigation unless the Trust Protector has actual knowledge that the information is materially incorrect. Nothing in this provision relieves the Trustee of any fiduciary duty that applicable law assigns to the Trustee.*
>
> *To the fullest extent permitted by applicable law, the Trust Protector may remove any Trustee, with or without cause, by a signed written instrument delivered to the Trustee and each other acting fiduciary. The Trust Protector may appoint a successor or additional Trustee and may specify the effective date and reasonable terms of the transition. Any appointee must satisfy the qualifications stated in this instrument and, when necessary to preserve the intended tax or public-benefit treatment, must be independent of the Settlor and the Beneficiary and must not be related or subordinate to either within the meaning of Internal Revenue Code section 672(c). Removal does not eliminate the departing Trustee's right to compensation or reimbursement properly earned, duty to transfer trust property and records, or responsibility for administration before the effective date of removal. The Trust Protector has no duty to exercise this power and need not determine that a breach has occurred before removing a Trustee without cause.*
>
> *The Trust Protector may amend administrative provisions of this trust to respond to changes in tax law, public-benefit law, trust law, or the Beneficiary's circumstances; correct an ambiguity or drafting error; facilitate a change of situs or governing law; or preserve the trust's intended treatment. The Trust Protector may not add a beneficiary, revest trust property in the Settlor, or materially alter the Beneficiary's lifetime beneficial interest except as expressly authorized elsewhere in this instrument.*

This formulation reflects a deliberate choice: the protector or monitor is not intended to be another fiduciary. The role is episodic and structural, not an invitation to co-administer the trust. But state statutes differ materially. Uniform Trust Code section 808 treats a nonbeneficiary power holder as presumptively fiduciary unless the trust terms provide otherwise, while the Uniform Directed Trust Act generally assigns a trust director the duties and liability of a similarly situated trustee and

permits variation only to the extent trustee duties and liability could be varied.[21] The drafting should therefore avoid trustee-like control over routine distributions or investments, disclaim an ongoing monitoring duty, state the intended nonfiduciary character, and preserve the trustee's own accountability. The clause must be conformed to the governing jurisdiction, and the analysis should be repeated whenever situs changes. New York has no comprehensive trust-protector statute prescribing a single default standard, but *Matter of Allen v. Annalett* confirms the practical importance of the document: the Appellate Division affirmed a declaration that a protector possessed the authority granted by the instrument to remove an independent trustee.[22]

Information sharing in a divided structure

Dividing authority can create gaps. The administrative trustee may not know what the distribution adviser promised; the investment adviser may not know that a housing purchase is anticipated; the benefits adviser may not learn of a recurring cash payment. The instrument should require each officeholder to provide information reasonably related to another's function and should protect a fiduciary who acts in reasonable reliance on information within another officeholder's assigned responsibility, to the extent permitted by law.

VIII. Drafting for Change Amendment Modification Decanting and Situs

A trust that may last fifty years should not depend entirely on the law and institutions existing on the execution date. Public-benefit rules change. State income-tax rules change. A beneficiary moves. A trustee resigns or merges. A drafting assumption proves wrong. A directed-trust statute becomes available. A third-party SNT should contain its own adaptation mechanisms while also preserving access to statutory and judicial remedies.

Amendment and modification authority

The document can authorize a protector or other independent person to amend for defined purposes, including changes in benefits, tax, or trust law; administrative efficiency; correction of errors; or implementation of the settlor's purposes. The power should specify procedural requirements, notice, consent, effective date, and prohibited changes.

The drafter should avoid an overbroad amendment power that creates estate inclusion, a general power of appointment, grantor-trust consequences, or a basis for treating the trust as revocable or available to the beneficiary. The holder should generally be independent of the beneficiary when the power could affect beneficial enjoyment.[23]

Decanting merger and division

An express decanting power provides a useful belt-and-suspenders approach even where a statute applies. The Uniform Trust Decanting Act distinguishes between trusts in which the trustee has expanded distributive discretion and those in which discretion is limited, and state enactments vary

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[21] Uniform Trust Code § 808(d) (Unif. L. Comm'n 2000, last amended 2025); Uniform Directed Trust Act §§ 5, 8-11 (Unif. L. Comm'n 2017, amended 2019). A power excluded from directed-trust legislation—such as some powers to appoint or remove a trustee—or a narrowly drafted personal power may receive different treatment. Governing law controls.

[22] *Matter of Allen v. Annalett*, 214 A.D.3d 1359, 183 N.Y.S.3d 880 (4th Dep't 2023) (affirming, for the reasons stated by Supreme Court, a declaration that the trust protector possessed authority under the instrument to remove an independent trustee).

[23] See I.R.C. §§ 2036-2038, 2041, 2514, 674; Treas. Reg. §§ 20.2041-1, 25.2514-1. See generally Uniform Trust Code §§ 411-417 (Unif. L. Comm'n 2000, amended 2010) (termination, modification, reformation, and combination or division of trusts).

in scope, notice, and permissible changes.[24] New York's EPTL 10-6.6 is a useful state-specific comparison because it establishes different rules based on the scope of the trustee's invasion power, imposes notice and fiduciary requirements, and expressly contemplates an appointed trust that may last longer than the invaded trust.[25]

A trust may also need to be divided for investment, tax, family, or administrative reasons, or merged with another trust for the same beneficiary. The instrument should permit division and merger only when the resulting arrangement remains consistent with the trust's material purposes and does not enlarge the beneficiary's enforceable rights.

Situs and governing law

Situs flexibility is not simply a tax-planning provision. A change may improve trustee availability, proximity to the beneficiary, directed-trust options, modification procedures, or administrative efficiency. But "situs," "place of administration," and "governing law" are not always interchangeable. The instrument should authorize the relevant fiduciary or protector to address each separately and to appoint a trustee or agent in the new jurisdiction if needed.

Illustrative flexibility provision

> *The Trust Protector may change the situs or principal place of administration of this trust, designate the law governing administration or construction to the extent permitted by applicable law, and appoint or require the appointment of a trustee or other fiduciary in another jurisdiction. In exercising this power, the Trust Protector may consider the Beneficiary's residence and access to fiduciaries, public-benefit consequences, state and local taxation, administrative expense, available trust structures, and procedures for modification or decanting. No change shall give the Beneficiary a right to compel distributions or otherwise defeat a material purpose of the trust.*

The trust should also authorize the fiduciaries to seek judicial modification, nonjudicial settlement, reformation, construction, or other relief available under applicable law. Express authority does not guarantee a remedy, but it demonstrates that adaptation is consistent with settlor intent.

IX. Accounting Notice Privacy and Meaningful Oversight

Accountability is particularly important when the primary beneficiary cannot independently review a fiduciary's work. At the same time, conventional accounting rules may disclose sensitive medical, behavioral, housing, or family information to remote remainder beneficiaries who play no constructive role during the beneficiary's lifetime.

The drafting should answer four questions:

1. Who must receive information during the beneficiary's lifetime?
2. What information must be supplied, and in what form?
3. Who may act for a beneficiary who cannot meaningfully review it?
4. How will the trust protect privacy while preserving enforceable oversight?

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[24] Uniform Trust Decanting Act §§ 11-12 (Unif. L. Comm'n 2015, amended 2025). The governing state's enactment and any nonuniform provisions must be reviewed.

[25] N.Y. Est. Powers & Trusts Law § 10-6.6(b)-(c), (e), (h), (j), (n), (r)-(s).

A modern instrument might provide information to the beneficiary in an accessible summary, with full statements delivered to a guardian, agent, beneficiary representative, independent advocate, or trust protector. It may restrict disclosure to remainder beneficiaries to the extent permitted by law. It may permit informal accountings and releases without foreclosing court settlement where appropriate.

Illustrative information provision

> *At least annually, the Trustee shall provide a report of trust property, receipts, disbursements, and material actions to each person entitled to information under applicable law and to any Beneficiary Representative then serving. The Trustee shall provide the Beneficiary with information in a form reasonably suited to the Beneficiary's ability to understand it, unless the Trustee reasonably determines, after consultation with the Beneficiary Representative or other qualified person, that direct disclosure would cause substantial harm. Any limitation on disclosure shall be no broader or longer than reasonably necessary and shall not eliminate disclosure to an independent person capable of protecting the Beneficiary's interests.*

The "substantial harm" concept should be used sparingly. Disability alone is not a reason to conceal information. Nor should the trustee appoint a friendly recipient who cannot or will not scrutinize administration.

The beneficiary representative

A beneficiary representative can receive notices, review accounts, participate in planning, and raise concerns without controlling distributions. The trust should specify appointment and removal, independence, compensation, access to information, and whether the representative acts in a fiduciary capacity. The role can be especially valuable where no guardian exists and supported decision-making is appropriate.

The instrument should also address virtual representation and the binding effect of releases or settlements under state law. These provisions must be drafted with care when the representative has a conflict, is also a remainder beneficiary, or is selected by the trustee whose conduct is under review.

A complete waiver of accountings is not a reliable substitute for oversight. State statutes differ on mandatory information rights, representation, limitation periods, and exculpation. The Uniform Trust Code requires information and reports for specified beneficiaries and places limits on exculpation, but local enactments and mandatory provisions must be reviewed.[26] In *Matter of JP Morgan Chase Bank*, the New York court refused to enforce a provision eliminating all but a final account where the beneficiary was under a disability and no one was protecting his interests. New York also declares void any attempt to exonerate an inter vivos or testamentary trustee from liability for failure to exercise reasonable care, diligence, and prudence.[27] These authorities are not national rules, but they illustrate why privacy protections and reasonable liability limitations should not eliminate meaningful oversight.

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[26] Uniform Trust Code §§ 105(b)(8)-(9), 813, 1008 (Unif. L. Comm'n 2000, last amended 2025). These provisions address mandatory information rights and limitations on exculpation, but state enactments vary.

[27] *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, 38 Misc. 3d at 376-80; N.Y. Est. Powers & Trusts Law § 11-1.7(a)-(c); see also *Matter of KeyBank N.A.*, 58 Misc. 3d 235, 254-56, 66 N.Y.S.3d 524 (Sur. Ct. Saratoga Cnty. 2017).

X. Liability Protection Without Immunity

Qualified trustees may be reluctant to serve if every benefits consequence creates potential surcharge exposure. Reasonable protections encourage sound decision-making. But broad exculpation combined with weak information rights can make a vulnerable beneficiary functionally powerless.

A balanced document can:

- authorize reliance on public-benefits counsel, tax counsel, investment advisers, care managers, and other specialists;
- protect good-faith decisions that incidentally reduce benefits;
- permit delegation where allowed by law;
- allocate responsibility clearly in a directed structure;
- allow reasonable compensation and reimbursement;
- require disclosure of conflicts; and
- preserve liability for bad faith, reckless indifference, willful misconduct, or another nonwaivable statutory standard.

Illustrative reliance and liability provision

> *A Trustee may obtain and rely in good faith on advice from legal counsel, accountants, investment professionals, public-benefits specialists, care managers, and other qualified advisers selected with reasonable care. To the extent permitted by applicable law, a Trustee shall not be liable for an action or omission taken in reasonable reliance on such advice or on a direction properly given by a person holding authority under this instrument. No provision of this trust excuses bad faith, willful misconduct, reckless indifference to the purposes of the trust or the interests of the Beneficiary, or liability that applicable law does not permit the Settlor to waive.*

The standard should align with governing law. States differ on exculpation, directed duties, delegation, and the effect of reliance provisions. The instrument should not promise more protection than the law permits.

The protection should also be tied to process. A trustee who identifies the relevant benefit, obtains competent advice where needed, learns the beneficiary's circumstances, considers reasonable alternatives, documents the decision, and acts consistently with the trust's purposes should be protected even when the outcome is imperfect. A trustee who never develops the information needed to exercise discretion should not be insulated by adjectives.

XI. Administration Should Be Designed at the Drafting Table

Good clauses do not administer themselves. The planning process should produce an administrative structure that is proportionate to the trust's size and the beneficiary's needs.

For a modest trust, a professional trustee plus a family adviser may be sufficient. A large trust supporting complex housing and care may require an administrative trustee, investment direction, benefits counsel, care management, and independent oversight. Too many roles can create cost, delay, and finger-pointing. Too few can concentrate responsibility in an institution that has financial competence but little knowledge of the beneficiary.

Before execution, the drafter should conduct a governance conference with the settlor and, when appropriate, the beneficiary. The agenda should include:

- the beneficiary's strengths, communication style, preferences, and current supports;
- anticipated housing and caregiving needs;
- expected trust funding and likely duration;
- the intended balance between conservation and present quality of life;
- the value and reliability of current public benefits;
- proposed fiduciaries and realistic successor options;
- family conflicts and remainder-beneficiary expectations;
- circumstances warranting professional care management or benefits advice;
- the role of an ABLE account;
- information and privacy preferences; and
- who has authority to adapt the plan after the settlor's death.

The attorney should also explain that a letter of intent, benefits inventory, contact list, and current care plan require periodic updates. These are not substitutes for operative trust language, but they allow the trustee to understand the life the trust is intended to support.

XII. A Drafting Checklist for the Unknown

Every third-party SNT should be tested against the following questions:

1. Does the purpose clause identify the beneficiary's welfare as the trust's primary objective?
2. Can the trustee spend despite an incidental loss of benefits when the expenditure is worthwhile?
3. Does the beneficiary have a meaningful voice without a right to compel distributions?
4. Can the trust coordinate effectively with an ABLE account?
5. Are remainder interests expressly subordinate during the beneficiary's lifetime?
6. Is responsibility divided among fiduciaries and advisers only where the division adds value?
7. Does every protector, director, adviser, and representative have defined powers, duties, succession rules, and information rights?
8. Can the trust change situs, governing law, or administrative structure?
9. Are decanting, modification, merger, and division available without relying solely on current default law?
10. Who receives accountings, and who protects the beneficiary if the beneficiary cannot evaluate them independently?
11. Does the document protect privacy without eliminating oversight?
12. Can fiduciaries rely reasonably on specialists without being immunized for bad faith or reckless administration?
13. Would the plan still function if the beneficiary moves, benefits rules change, family caregivers disappear, and the original trustee is unavailable?
14. Has the document created a process for learning what matters to the beneficiary over time?

XIII . Conclusion

Benefits preservation remains foundational to third-party SNT drafting, but it is not the whole assignment. The trust must support a person, not merely protect a status. The difference appears in the provisions that determine whose interests come first, who listens to the beneficiary, who makes decisions, who reviews them, and who can repair the structure when circumstances change.

The modern third-party SNT should preserve discretion without erasing autonomy; create oversight without paralyzing administration; and provide flexibility without abandoning settlor intent. It should enable a trustee to ask not only, “Will this distribution affect eligibility?” but also, “What does the beneficiary gain, what is actually being lost, and does this decision advance the life the trust was created to support?” Most importantly, it should give future decision-makers enough authority and information to pursue what families usually care about most: good people around the beneficiary and a safe place for the beneficiary to live, even when the systems expected to deliver those supports fail.

That is the shift from benefits-preservation drafting to durable beneficiary-centered planning.

Modern Drafting for Third Party Supplemental Needs Trusts

Autonomy, Oversight and Structural Flexibility

Tara Anne Pleat, Esq., CELA

Stetson Special Needs Trusts National Conference

1

A trust that preserves eligibility but creates no durable system for decision-making is not a complete plan.

Draft the third-party SNT as a long-term governance instrument.

2

Four ideas older forms collapse

Keep	And add
No right to compel distributions	A voice in decisions
Trustee discretion	Structure and review
Attention to public benefits	Welfare ahead of preservation
A remainder for the family	Lifetime interests first

3

The federal baseline is legal availability

The beneficiary must not be able to

Revoke or terminate the trust

Direct principal for support and maintenance

Sell a right to receive payments

Trustee discretion is generally not attributed to the beneficiary.
POMS SI 01120.200(D)

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4

Purpose before prohibition

1. The beneficiary's welfare	The primary purpose
2. Means-tested benefits	Preserved when consistent with that purpose
3. Remainder beneficiaries	Subordinate during the beneficiary's lifetime

WILCENSKI PLEAT LAW

5

The purpose clause

"…preservation of any particular benefit is not the sole or overriding purpose of this trust."

Guide discretion without creating an enforceable support standard.

WILCENSKI PLEAT LAW

6

Permission to exhaust the trust

> *"The Trustee may expend all trust property during the the Beneficiary's lifetime…"*

Conservation is a means, not the mission.

WILCENSKI PLEAT LAW

7

Telling the trustee how to use discretion

- Preferences and goals
- Value of benefits affected
- Independence
- Housing stability
- Reliability of public services
- Size and duration of the trust
- Realistic family support
- Tax consequences
- Dignity costs of saying no

Absolute discretion is only the beginning of the analysis.

WILCENSKI PLEAT LAW

8

The harder failure

A trustee cannot exercise informed discretion without an information system.

Not from a file, an investment statement, or an annual distribution request alone.

WILCENSKI PLEAT LAW

9

Three questions before affecting a benefit

Eligibility	Value	Outcome
Is the beneficiary legally eligible?	What is the benefit actually worth?	Would spending work better?

Not a direction to ignore benefits. A direction to value them accurately.

10

The benefits-impact clause

"…its expected benefit to the Beneficiary outweighs the value of the benefit that may be reduced or lost."

Good faith and consistency with purpose protect the trustee.

11

Autonomy without ownership or control

A beneficiary can have a voice without possessing a property right.

Excluding the beneficiary from the process is neither legally required nor good administration.

12

What autonomy can look like

Managing a spending account	Naming a support person
Choosing between two activities	Joining a planning meeting
Selecting a service provider	Stating a housing preference

Different for each beneficiary, and it may change over time.

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13

" Shall consider" and " shall follow"

Shall consider	Shall follow
Creates a process	May create an entitlement or delegate fiduciary judgment

The trust can require the trustee to listen without requiring the trustee to agree.

WILCENSKI PLEAT LAW

14

Plans, letters and preferences

Annual plan	Advisory, revisable and tied to the trust's purposes purposes
Letter of intent	Supplies context and can go out of date
Current preferences	Ordinarily carry substantial weight

None of them creates a right to distributions.

WILCENSKI PLEAT LAW

15

An information channel for the trustee

"…an adviser shall not have authority to compel or direct a distribution…"

- Express authority to hire
- An expense of administration
- No cut to trustee compensation
- Receiving is not disclosing

16

ABLE accounts as a bridge to autonomy

Age 46	$20,000	$100,000
Onset before this age now qualifies	Ordinary annual contribution limit, 2026	Excluded from SSI countable resources

A transfer from the trust to the beneficiary's ABLE account is not income to the beneficiary.

17

Remainder interests come second

"During the Beneficiary's lifetime, the Settlor's paramount concern is the Beneficiary."

Keep the savings sentence for nonwaivable rights.

Consider a limited testamentary power of appointment.

18

One trustee should not have to do everything

- Investment management
- Tax reporting
- Public-benefits analysis
- Discretionary judgment
- Disability knowledge
- Care coordination
- Family diplomacy
- Communication with the beneficiary

The title matters less than the authority attached to it.

19

Questions before choosing names

Who knows the beneficiary?

Who understands benefits?

Who can say no without destroying a family relationship?

Who can manage investments and reporting?

Who will still be available in twenty years?

20

Resignation and transition

"…not released except except by a judicial settlement or a binding binding nonjudicial settlement…"

A cascading appointment mechanism

An emergency backstop for a vacancy

Records and assets delivered first

No gap in rent, caregivers or insurance

21

Powers that preserve and powers that rewrite

Preserve the plan	Rewrite the plan
Remove and appoint trustees	Add a beneficiary
Change situs or governing law	Redirect the remainder
Amend administrative terms	Alter the lifetime interest
Correct drafting errors	

Define boundaries before granting any dispositive power.

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22

Whether the protector is a fiduciary

UTC § 808	Presumptively fiduciary unless the terms provide otherwise
UDTA	Duties and liability of a similarly situated trustee
New York	No comprehensive statute, so the instrument matters

Repeat the analysis whenever situs changes.

WILCENSKI PLEAT LAW

23

Drafting for change

A trust that may last fifty years should not depend entirely on the law at signing.

Amendment
For defined purposes only

Decanting, merger, division
Express, not left to default law

Situs and governing law
Related but not interchangeable

WILCENSKI PLEAT LAW

24

Accounting, privacy and oversight

Who receives information during the beneficiary's lifetime?

What must be supplied, and in what form?

Who acts for a beneficiary who cannot review it?

How is privacy protected while oversight stays enforceable?

A complete waiver of accountings is not a reliable substitute for oversight.

WILCENSKI PLEAT LAW

25

Liability protection without immunity

Protect	Never excuse
Reasonable reliance on advisers	Bad faith
Good-faith benefit reductions	Willful misconduct
Clear roles in a directed trust	Reckless indifference

Tie the protection to process.

WILCENSKI PLEAT LAW

26

Administration designed at the drafting table

Hold a governance conference before execution. execution.

Good clauses do not administer themselves.

A modest trust

A professional trustee plus a family adviser may be enough

A large, complex trust

May need separate roles and independent oversight

WILCENSKI PLEAT LAW

27

A stress test for the plan

Would the plan still function if…

the beneficiary moves	benefits rules change
family caregivers disappear disappear	the original trustee is unavailable

28

The trust must support a person, not merely protect a status.

Good people around the beneficiary and a safe place to live, even when the systems expected to deliver the deliver them fail.

29

STETSON LAW

National Conference on Special Needs Planning and Special Needs Trusts

Friday
October 23, 2026

Special Needs Trust "Wrap Up" Tips, Tricks and Practice Points to Consider when Directing for the End of the Administration of a Trust

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Center for Elder Justice

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SPECIAL NEEDS TRUST "WRAP UP": TIPS, TRICKS AND PRACTICE POINTS TO CONSIDER WHEN DIRECTING FOR THE END OF THE ADMINISTRATION OF A SPECIAL NEEDS TRUST

Presenter: ETHAN J. ORDOG, ESQUIRE

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Moorestown, New Jersey

I. BACKGROUND AND IMPORTANCE

It is recognized for many professionals, individuals and families that the assessment of the pros and cons of the establishment and funding of a Special Needs Trust can be daunting, particularly if there has not been prior experience and/or an understanding of the framework and administrative logistics of a Special Needs Trust by a potential beneficiary and/or their family/friends. There is no crystal ball to reflect upon or review the outcomes that will occur during the life of a beneficiary of a Trust to know answers to critical questions, i.e. How much will care costs be for the beneficiary? What will be the

length of the Trust administration? How will the assets grow or be utilized during the life of the beneficiary?

Perhaps even more pressing in initial conversations or communications related to a Special Needs Trust and funding, is the scope of the expectation of how distributions will be effectuated, but also the scope of the interplay between the assets of the Special Needs Trust and the allowable distributions therefrom, especially in the event that the Special Needs Trust shall be called upon or sought to contribute household expenses, carrying costs, or be the owner of real property, particularly if other members of the family are to reside in the home.

The understanding of a budget and corresponding demands on the Special Needs Trust allow, at the very least, the reasonableness of expectations for the utilization of the Special Needs Trust, especially when many individuals have been awaiting a resolution of certain claims that they may be pursuing, i.e. personal injury or workman's compensation, or based upon the need to take action to resolve pending termination of public benefits based upon assets being received and/or held by an individual which may make them ineligible for benefits.

Transparency and detailed discussions, while sometimes difficult, particularly in light of these considerations, especially when public benefit eligibility is sought to be maintained and/or a critical conversation point, are necessary so as to attempt to avoid displeasure by and between a beneficiary of a Special Needs Trust and/or their family and friends, and the professionals who may be involved, including Counsel, the Trustee,

Financial Advisors, Care Coordinators, etc. Moreover, and consistent with the scope of this presentation, it is recognized that there is also considerable uncertainty and/or misunderstanding upon the passing of a Special Needs Trust beneficiary and the steps which must or should be taken to allow for the transition of the administration to the corresponding termination of the Trust. Of course, there are different factors to consider if there is a 1st Party or 3rd Party Special Needs Trust as issue, in addition to the recognizable inherit conflict that can exist between the positions taken by individuals who had formerly been working together on the administration of the Special Needs Trust and how to ensure protection and finalization, as opposed to missteps which can lead to problems or delays in the finalization of the administration.

A Trustee must be mindful of communicating a process, and perhaps not an outcome, outside of ultimate goals of the finalization of the administration of a Trust, particularly when family or interested parties engage with and/or in communications with the Trustee may simply be confused as to the next steps and corresponding belief that now that the individual beneficiary has passed away that the assets of the Trust will be distributed immediately to members of the family or individuals named by the deceased Trust beneficiary, in addition to the simple "misunderstanding" that things were explained or believed to be understood that payback or other potential costs and expenses would not be required for payment until ALL of the beneficiaries, i.e. remainderman named or with a potential interest, had passed away.

The passing of a Special Needs Trust beneficiary, begins a distinct and sometimes complicated phase of the Trust administration, and it is imperative that the Trustee and other involved individuals and professionals work together to determine an appropriate and comprehensive action list. Specifically, the list of immediate action or consideration that must be undertaken, as well as a more global checklist for the termination of the Trust should take into consideration the following:

- The assets remaining and manner in which such assets are held, i.e. brokerage account, structure, real estate, vehicle, etc.;
- Are there any funds held by a Sub-Trust for Medicare Set-Aside purposes;
- Pending litigation remaining or claims which might exist against the Trust;
- Ongoing carrying costs for property/vehicle expenses-communications with those residing at property of anticipated transition of next steps required, etc.;
- Outstanding governmental benefits being received or which will end as the result of the passing of the beneficiary;
- Medicaid or other recovery which will exist against the Trust and initial communications for confirmation and review of the scope of any asserted lien;
- Status of funeral arrangements;
- Consideration of appointment of personal representative of Estate;
- Consideration of need for discharge of any Guardian/Appointed fiduciary;
- Communications with and potential disputes amongst or asserted by family members;
- Multiple states involved (critical to know and understand all jurisdictions where benefits may have been received;
- Demands for distributions;
- Unresolved creditor claims;
- Tax reporting obligations (Income, Estate, Inheritance, etc.;
- Determine outstanding Trustee compensation to be sought or termination commission;
- Status of Existing Pre-paid Funeral services;
- Accountings;
- Releases;
- Any Court related filings that would need to be directed related to distribution, termination, effective change of structure payments, etc.

It is fully recognized that certain consideration herein would be dependent upon the scope of the factors being considered, as well as the type of Trust instrument involved, as

well as the scope of action which may have been taken or effectuated during the life of the Trust administration. But it is important and must be a priority for those involved to identify the issues that will need to be resolved so as to avoid additional complications or problems arising. Similar to the underlying discussions or communications related to the establishment and funding of a Trust, it is prudent to have directed correspondence or updates provided so as to address the potential obstacles that could or might arise with the finalization of the Trust administration. Accordingly, the responsibility at death is not simply to "close the account." The Trustee must create a deliberate and thought-out wind-down plan.

PRACTICE POINT: Be sure at the time of the acceptance of an administration that every effort is made to secure information on all benefits being received by an individual so same can be documented and there is an expectation of the potential benefits that would be subject to reimbursement or repayment from the Trust at the time of the passing of the beneficiary. All too often there is uncertainty about the benefits being received and/or the source of coverage for certain services being provided. It is also wise to secure any Life Care Plan, and perhaps direct for the securing of an updated or amended Care Plan accordingly.

PRACTICE POINT: Be sure at the time of the acceptance of an administration that communications are effectuated to confirm the different jurisdictions that a beneficiary of the Trust may have resided in to ensure that anticipated lien confirmation that would need to be requested is present to ensure that any multi-state jurisdiction issues are known at

the front-end of the administration. This is also critical in any Court proceedings or related requests for distribution or accounting filings to ensure that any agency or potential remainderman lienholder is properly noticed on proceedings that might or could impact claims to be asserted or which exist at the time of termination and/or the passing of a beneficiary.

PRACTICE POINT: It is important that the Trustee and other professionals involved have a packet of important documents relevant to a matter in their possession. For example, any Court Orders, Structure Contracts, IRS documentation (TIN), Settlement Documents, Guardianship/Conservatorship paperwork, Powers of Attorney, Last Will and Testament, Information on members of the family, i.e. addresses and relationships of closest and secondary relatives, make up, at the very least, information and documentation which should be held or accessible. If the Trustee is a Successor Trustee, in addition to above referenced paperwork and documentation/information, are any prior tax filings and accountings, as well as summary of any budgeting or correspondence from state agencies approving or denying requests for distribution, etc.

II. Preliminary Checklist or Action List (Subject to Change)

Immediate — First 1–7 Days

- Obtain death certificate.
- Secure Trust assets/request date of death valuation.
- Stop unnecessary recurring payments.
- Identify outstanding obligations.
- Notify appropriate professionals.
- Identify governmental benefit programs.

- Review Trust termination provisions.
- Determine whether a probate estate exists.
- Review status of tax filings.
- Review status of accountings/filings.

Early Administration — First 30 Days

- Prepare complete asset inventory.
- Obtain current financial statements.
- Identify real estate.
- Identify vehicles.
- Obtain annuity/structured settlement contracts.
- Contact Medicaid agency (multi-state if services in other jurisdictions).
- Identify creditors/lienholders.
- Determine accounting requirements.
- Consult tax professional.

Intermediate Administration

- Obtain Medicaid payment history.
- Review governmental claims.
- Resolve disputed claims.
- Sell or transfer Trust assets.
- Address real estate.
- Address vehicle/title issues.
- Resolve structured settlement issues.
- Pay permissible expenses.
- Prepare interim/final accounting.
- Determine Trustee compensation.
- Prepare tax filings.

Final Administration

- Confirm Medicaid reimbursement paid.
- Confirm taxes.
- Confirm professional fees.
- Confirm administrative expenses.
- Complete final accounting.
- Obtain approval/release where appropriate.
- Calculate final distribution.
- Distribute remaining assets.
- Obtain receipts.
- Close financial accounts.
- Complete court proceedings, if applicable.

- Prepare final Trustee report.
- Preserve Trust records.

III. Checklist/Action Item Specifics

Upon the passing of the beneficiary, consistent with the scope of the immediate and general administration wind-down steps, it is important to secure a death certificate for the individual and it is anticipated that the Trustee should be prepared to address questions related to distribution for funeral expenses or payments (scope of same based upon the type of Trust and corresponding liens/anticipated distribution), in addition to being able to provide a general understanding of the time-line for resolution, disposition of assets, etc.

Without fail, as families or loved ones are dealing with the grief or general logistics of the passing of the Trust beneficiary, the focus shifts to how the Trust will be resolved and to what extent, if any, disposition might include disbursement to named individuals in a Will and/or intestate beneficiaries. Moreover, if there is a vehicle, home, reliance on the Trust for contribution of payments, etc., of course the individuals impacted want to have assurance or an understanding of what is to come or anticipated. Unfortunately, and often despite best efforts to inform or otherwise condition certain expectation that exist or which have arisen during the administration related to how the ultimate passing of the Trust beneficiary may result in outcomes that will require action, interested family members or other closely connected individuals do not recall the pay-back provisions, limitations on the use of funds for funeral expenses, the potential loss of the privileges associated with the former vehicle secured by the Trust, or possible sale of real property.

Depending on the circumstances of the individual beneficiary and benefits received by them formerly and/or at the time of the passing, it is also imperative to determine whether an Estate is being opened for the individual and if there are any other assets or items that would be subject to the scope of any lien, so as to understand and perhaps not duplicate efforts related to resolution thereof.

Securing Trust Assets and Information Gathering

While the Trustee may or should have a list of assets, i.e. Trust holdings, it remains imperative, upon the passing of the Trust beneficiary to create a formal inventory or assets and any continuing or ongoing anticipated costs and expenses. Bank accounts, existing credit cards, brokerage accounts, real estate, vehicle(s), personal property, structures, life insurance, digital assets, business interests, accounts receivable and/or pending settlements or ongoing litigation should be identified. Similarly, a determination of any debts or obligations, as well as amounts that are typically paid by the Trust monthly, quarterly, annually, etc., should be identified and either stopped, depending on the type of distribution and/or identified as an ongoing expense, subject to the preservation of an asset, but also in light of potential issues that might exist depending on the claim for reimbursement from Medicaid or other state agencies who provided services/benefits for the Trust beneficiary.

It is also important, in the completion of the task, to engage in communications, outside of anticipated correspondence regarding same with members of the beneficiary's family, with any accountant, financial advisor or Counsel involved to ensure that matters

are identified that could be at issue and that all steps are taken in preparation for final logistical steps that are anticipated, etc.

Real Estate Trust Ownership

How is the property titled, i.e. 100% Trust owned/other percentage?

Is there are mortgage or other liens against the property?

Is there insurance on the property and what are the present property taxes?

Who is presently residing at the property and what is the contribution requirement, if any?

How are utilities on the property held/titled?

Are there personal items in the property and how are they being disposed?

Is the property being sold, transferred, in kind, or to be determined?

Should an appraisal by secured and is there any Court requirement related to the transition of the property?

Proposed Real Estate Steps:

Secure the Property

Ensure Insurance Coverage- notification as may be required to company

Budget carrying costs until disposition- who is paying?

Obtain Appraisal

Determine claims or liens

Communications with any residents as to options and intentions

Obtain approval from Court as may be required or desired related to transfer, sale, etc.

Vehicle and Personal Property

Vehicle- ownership v. lien of title held by Trust and/or purchased to be confirmed, along with fair market value and any existing loan on the vehicle. Moreover, the status of insurance, registration and intended outcome with respect to the vehicle should be determined and communicated, especially if the vehicle is being driven or used by a relative, etc.

Personal Property- Jewelry, Furniture, Electronics, Collectibles, Household Goods and personal effects need to be discussed as to the interplay with any Trust interest therein, as well as the anticipated outcomes with respect thereto. Be careful of the disposition to or by relatives of the Trust beneficiary without consideration of value or otherwise, particularly if the Trust secured the items, etc.

Identification of Governmental Benefits and Communications

In assessing potential payback requirements, particularly from a First Party Trust, a Trustee, hopefully with an organized and/or comprehensive list of benefits received or formerly received by a beneficiary of a Trust, is able to have information on and be able to direct correspondence to ensure the notification of the passing of the beneficiary, but also to start the process of ensuring that all lien information is gathered or secured. It is recognized that many Trustees maintain a data base of contacts, addresses and important information on the payback requirements of certain programs that exist. While not exhaustive because of the requirements and position of different state programs as it

pertains to payback requirements, a Trustee looking to finalize the transition of the Trust and assets therein should be mindful of the following programs/agencies:

Medicaid	State Medicaid Agency
Social Security	Social Security Administration
Medicare	
State Medical Assistance Programs	
Housing Assistance	
Food Assistance Programs (SNAP)	
Veterans Benefits	
State Specific Benefits Programs	
County/Local Benefits Programs	
Any other benefits programs	

In addition to the identification of the programs and potential payback, it is also important to consider the following logistical/procedural questions:

1. Which State or States provided Medicaid or other benefits to the Trust beneficiary?
2. What benefits constitute recoverable medical assistance?
3. Are there any known or stated exemptions that would apply to any recovery?
4. What are the allowable administration expenses that can be paid by the Trust before payback is effectuated, particularly if the assets of the Trust are insufficient to cover the lien amount, etc.?
5. Has a full statement of the payment history been provided? If so, has same been reviewed and is the amount correct?

6. Is there any differentiation from the Trust payback requirements and the Estate recovery rules in that jurisdiction?
7. Are there any concerns about Medicaid questioning the administration of amounts remaining which would prompt the need for Court filing to approve and secure a release related to the administration?

Establishment of Priorities/considerations for Balance of Assets and Claims

Tier 1

A. Determination of governmental reimbursement obligations (Medicaid-potentially more than on jurisdiction, State Agencies, Other Governmental Claims)

Tier 2

A. Determine Permissible Administrative Expenses
    1. Trustee Compensation;
    2. Legal Fees;
    3. Accounting Fees;
    4. Tax Preparation and Fees;
    5. Court filings;
    6. Other allowable expenses under the Trust or allowed by Medicaid.

Tier 3

A. Resolution and Tax Reporting
    1. Income Tax Liability
    2. Filings
    3. State Obligations for Taxes
    4. Estate and Inheritance Filings/Amounts Due

Tier 4

A. Identification, Confirmation and Resolution of Liabilities of the Trust, if any
    1. Only if assets are sufficient and required for payment
    2. Take into consideration other assets or access to funds by beneficiary and/or their Estate
    3. Priority of Credit Claims important
    4. Any insolvency filings

Tier 5

A. Determine Remaining Distribution, if any
    1. After all obligations resolved, any distribution based upon terms of the Trust and considerations included- Will, intestacy, probate related issues to be addressed- releases signed by any beneficiary, as well as confirmation of information, i.e. addresses, phone numbers, social security numbers for potential beneficiaries. In some instances, it is not until this time, albeit not advisable, for issues related to intestate succession to arise in so far as disputes over parentage, obligations of a potential parent, etc.

PRACTICE POINT: Often, the specifics of a structured settlement annuity are understood, i.e. term of payments or guarantees, as well as the payee, i.e. the Trust, although the actual contract and residual pages which detail commutation, remainder provisions, remainder payee designations, etc., are often not in the possession of the Trustee or Parties, often remaining with civil counsel, etc. It is important to have these documents, and hopefully, have participation by Trust/Estate Counsel and/or the Trustee, in these types of communications when a settlement if being effectuated, particularly depending on the amount being directed for structure or the terms thereof, to allow discussion on the

scope of the potential options or considerations that should be discussed. In the absence thereof, some of these matters can be corrected or resolved during the lifetime of the beneficiary, so it should still be a point of review/discussion. Some Questions and Ideas to Consider for Structured Settlement Annuities:

1. Who owned the annuity and who is the Payee?
2. Does the annuity benefit terminate upon the death of a beneficiary or is there a guaranteed payment term?
3. Is there a death benefit?
4. Who or what, i.e. Trust, is named as the Successor Beneficiary or Payee?
5. Is there a commutation rider or provisions to allow access to funds?
6. Can the annuity be assigned or sold, and is Court approval required?

IV. Accounting and Court Proceedings

For most Trustees, the end of the administration is directly connected to the desire to ensure the finalization of their role as Trustee, with limited to no expectation that a creditor, lienholder, beneficiary, etc., would assert claims against them accordingly. It is of course the hope that a Trustee has prepared annual accountings and has back up connected to all expenses paid or amounts distributed, as well as calculations reflecting fees and costs associated with the administration of the Trust, in addition to back-up for other costs incurred during the administration. Moreover, it is anticipated the tracking has been effectuated on all assets received and the increase of holdings attributable to the Trust.

In consideration thereof, the Trustee has to make a determination depending on the scope of and manner of prior production of the Trust, often depending on the requirements of the jurisdiction with authority over the Trust, as to how to effectuate a final accounting, so as to secure a release or Order which covers the scope of the time served and does not open the door to potential claims or questions, particularly in the event that the end of the Trust administration would include the final disposition of assets.

Most Trustees consider and weigh options carefully, but it is important to make sure that each set of circumstances from the administration is contemplated in the documentation prepared so as to allow the final reporting of the global activity of the Trust administration, particularly at the time of final disposition. More and more, Trustees are going beyond formal release documents being directed to individuals or representatives, in favor of the presentation of the full accounting for review, audit and approval by the Court. It is collectively an opportunity for the presentation of the accounting to all interested or conceivably interested parties to direct response/exceptions to the administration, etc. It also often allows the Trustee to address any other prayers for relief including fees and costs which might be allowable but desired to be approved. In many instances, there is also request for approval of the final distribution of Trust assets, etc.

In addition to accounting actions/filings with the Court, many Trustees have also sought direction from the Court and/or authorization to take action that may be contemplated but perhaps not agreed upon and/or believed to be in conflict, including distributions to creditors, approval for the sale of certain assets for a proposed price or

range of prices, dealings with the scope of the class of beneficiaries of a Trust, in the event that funds exist for allowable distribution after the payment of lienholders and creditors, etc. There have also been considerable filings seeking to eject or otherwise remove holdover parties or seeking to compel the return of assets, i.e. vehicle/personalty.

It is recognized that the Trustee, as well as most parties involved, would want to find ways to avoid any court proceeding, but it is an avenue by which resolution and finality can be brought to matters that have issues arising that are in question and/or which have not been resolved in normal course. It is also an avenue to address anticipated concerns or issues that would otherwise arise in the finalization of the administration of a Trust.

V. Taxes

For most Trustees or Trust companies, especially given the fiduciary context of their appointment and involvement in the Trust administration, great emphasis is placed on the requirement of tax filings for the Trust, as well as the certainty that the Trust beneficiary is also filing appropriate individual tax returns. Notwithstanding the basic concept that the Trust beneficiary is filing 1040s, often with the assistance from the Trust and/or Trustee in the coordination of such filing, is the corresponding 1041 filings for the Trust. Depending on the size of the Trust, as well as the holdings and activity regarding the assets, the complexity of the 1041 is relative thereto. The development of an internal tax plan for filings by the Trustee and/or the efforts to establish a relationship with a CPA or other tax professional is essential to the successful administration of the Trust and the role of the

Trustee to satisfy their obligations. Of course, at the end of the administration of the Trust, final 1041 filings, in addition to any K-1s issued, are crucial to ensure that there is no remaining liability or reporting issues related to the income of the Trust. In certain administrations, there are pending issues which might still need to be resolved related to income taxes, etc.

That said, at the time of the termination or end of the Trust, there should be consideration given to any fees, costs and potential tax liability that will be incurred related to the administration to ensure that sufficient funds are available for the resolution of same. Additionally, confirmation of the status of any beneficiary 1040s should be dealt with annually to ensure that no issues arise that might otherwise impact on the finalization of the Trust and/or its distribution that could have otherwise been addressed during the life of the beneficiary, i.e. failure to file personal returns. Most Trustees make a point of emphasis to confirm that the beneficiary has tax assistance, if necessary, to ensure that filings are being effectuated.

Another factor to consider, depending on the jurisdiction in which the Trust beneficiary resides, is the posthumous filings required for potential State Estate or Inheritance Tax, depending on the assessment or imposition of same, as well as consideration related to any Federal 706 filing requirements. The interplay between the disposition of same by the Trust and/or the Estate of the beneficiary needs to be addressed to ensure that proper consideration is given to these issues, as well as any required filings or tax payments depending on the logistics of state or federal provisions

that exist in furtherance thereof. It is important to be mindful of the identification of the potential need to address same in the file of the Trustee to ensure that these issues are not overlooked and/or considered during the life of the administration.

VI. Closing Out the Trust and Trustee Compensation

Notwithstanding numerous considerations or direct points of emphasis listed herein regarding the Trustee and the transition of the Trust upon the passing of the beneficiary, most Trustees have policies and fee schedules which dictate compensation during the administration, as well as reference to final fees and costs upon the proposed termination of the Trust. Some compensation is based upon Court Order and/or the terms of the Trust document approved, with other Trustees subject to state statutory provisions as it pertains to compensation.

While compensation is an important factor and drives the involvement of Trustees and the role they play in accepting the administration of a Trust, final letter, releases, confirmation of distribution, etc., are often the last action steps that are required to be taken to ensure that the Trust administration is properly ended. It is recognized that, assuming all of the items set forth herein have been resolved or considered, that every distribution or close of the Estate should have documented releases effectuated that serve as confirmation of the acceptance of the administration, approval of any accounting presented, or acknowledgement of the steps taken by the Trustee related to resolution of any payback requirement which might exhaust the assets of the Trust. The interplay

between Trust administration and final releases and acknowledgements, especially if there is a considerable payback requirement and perhaps limited to no distribution to remainderman will or intestate beneficiaries, has prompted more and more Trustees to seek judicial direction or Order so as to allow for the close out of the Trust and waiver of liability/indemnification, especially if there are anticipated issues which might be presented or if there had been the imposition of a surety bond or other requirements of the Court in the establishment and funding of the Trust.

While most corporate Trustees are authorized to serve as Trustee without the requirement of the posting of a surety bond, some Courts have directed for same to be imposed as a condition of the appointment. In that instance, additional steps must be taken to secure the release of the bond, either by Court Order or other avenue as confirmed with the company in which the bond has been processed.

Most Trustees have trusted professionals, i.e. attorneys, tax professionals, etc. on whom they rely on to address and discuss these types of issues. The rise of Trustee representation has grown considerably in seeking to address issues that arise during the administration of the Trust, but perhaps, more consistently, in the wind-down of the Trust and corresponding final steps to close out the Trust and make any final distributions, etc.

Additional Practice Points, Tips and Tricks

1. At the time of the termination and wind-up of the Special Needs Trust, be sure to READ, once again, the terms of the Trust and any inclusions therein, as well as any amendments, accountings, court Orders, structure documents, settlement documents or important notes on the file to be certain that the process or considerations related thereto are being resolved globally without any missteps.

2. Do not make distributions to individuals or requesting parties too early and make sure there is certainty in final claims or liens, as well as secured releases, if any, related to the Trust termination before releasing funds. It always seems prudent to maintain an escrow as well for anticipated action set forth herein that might arise that will require payment or retention of a professional.

3. Document all communications related to the wind-down of the Trust and make sure that clear correspondence is directed that details decisions or action taken by the Trustee in working to get ultimate finality of the administration of the Trust. Early discussions in the process with family, professionals and any creditors will direct and guide certain considerations of the Trustee in fulfilling obligations and resolutions sought accordingly.

4. CONSIDER/ANALYZE Court Protection and the types of issues that have arisen in a matter with requests for distribution, interactions with relatives or interested parties, and the scope of assets and potential liens that exist, as well as the nature of the anticipated final accounting and complexity thereof.

SPECIAL NEEDS TRUST "WRAP UP"

Tips, Tricks & Practice Points to Consider for the End of the Administration of a Special Needs Trust

with
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Why the Wind-Down Matters

- A beneficiary's passing begins a distinct phase of trust administration.
- Trust assets are not necessarily distributed immediately.
- Claims, taxes, expenses, court requirements, and trust terms may affect timing and outcome.
- The Trustee's role is to develop a deliberate wind-down plan—not simply close accounts.

Speaker notes: Families may expect prompt distributions to relatives or individuals named in a Will. Explain early that the process depends on the trust instrument, beneficiary interactions, claims/liens, and applicable court or agency requirements.

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Set Expectations Early

- Discuss likely expenses, benefits, and possible reimbursement obligations.
- Explain that outcomes and timing cannot be predicted with certainty.
- Communicate the process—not a promised result.
- Keep the beneficiary, family, Trustee, and professionals informed.
- Document will dictate certain discussions and decisions, as well as applicable rules and regulations.
- Determine status of prior accountings, tax returns, as well as set understanding of final accounting, income or estate tax filings, payback/lien impact on Trust, etc.

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Three Practice Points for the File

- Track benefits: Identify programs, coverage, disbursements and possible recovery obligations.
- Track jurisdictions: Record every state where the beneficiary received benefits or lived- possible need for communications to determine payment/pro rata contribution depending on amount of liens and remaining balance of assets.
- Secure and Keep core documents accessible: Trust, court Order settlement documents, tax filings, benefits received, and family records(who are the potential beneficiaries)

Speaker notes: For successor Trustees, also gather prior tax filings, accountings, budgets, and agency decisions or correspondence. A Life Care Plan—and any updates—can help clarify services and funding history, particularly if any dispute over services rendered.

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First 1-7 Days: Immediate Actions

- Obtain a death certificate.
- Secure/identify trust assets and request date-of-death valuations.
- Stop unnecessary recurring payments.
- Identify urgent obligations and ongoing carrying costs.
- Notify appropriate professionals and benefit programs.
- Review trust termination provisions.
- Determine whether a probate estate exists/will be created.
- Check tax status, accountings, and any potential Court filing need

Speaker notes: Funeral-related payments and other immediate expenses may depend on the trust terms, available assets, and potential claims. Avoid promising that a particular expense can be paid initially given the potential claims that could exist.

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First 30 Days: Build the Picture

- Prepare a complete asset inventory.
- Obtain current financial statements.
- Identify real estate, vehicles, and personal property (How owned).
- Locate annuity and structured-settlement contracts.
- Identify creditors, lienholders, and benefit agencies.
- Contact Medicaid agencies in relevant jurisdictions.
- Determine accounting requirements.
- Consult tax and legal professionals as needed.

Speaker notes: The inventory should include both assets and recurring obligations. Identify amounts normally paid monthly, quarterly, or annually, then determine whether each payment should stop or continue to preserve an asset.

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Identify Benefits and Potential Claims

- Medicaid and state medical assistance.
- Social Security and Medicare.
- Housing assistance and SNAP.
- Veterans benefits.
- State, County, and local programs.
- Other benefit programs.

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Identify Benefits and Potential Claims (cont'd)

- Key Questions
  - Which states provided benefits?
  - What benefits may be recoverable?
  - Is a payment history available and accurate?
  - Are exemptions or limits relevant?
  - How do trust-recovery rules differ from estate-recovery rules?

Speaker notes: Program rules and recovery requirements vary. Confirm the applicable agency, jurisdiction, and claim rather than relying on assumptions or a general benefits list.

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Secure Trust Assets and Information

- Inventory assets and obligations, including:
  - Bank and brokerage accounts.
  - Real estate and vehicles.
  - Personal property and digital assets.
  - Insurance, business interests, and receivables.
  - Annuities, structures, and pending settlements.
  - Loans, credit cards, and recurring expenses.
- Coordinate with the accountant, financial advisor, counsel, and family as appropriate.

Speaker notes: Confirm how each asset is titled and held. Also identify pending litigation, claims against the trust, or matters that could affect disposition.

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Real Estate: Questions Before Action

- How is the property titled, and what percentage is trust-owned?
- Are there mortgages, liens, taxes, or insurance issues?
- Who lives there, and who pays carrying costs?
- How are utilities titled and paid?
- What personal property remains?
- Will the property be sold, transferred, or distributed in kind?
- Is an appraisal or court approval needed?

Speaker notes: Secure the property, confirm insurance requirements, budget carrying costs, identify claims and liens, and communicate options and next steps to residents.

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Vehicles and Personal Property

- Vehicles
  - Confirm ownership, title, fair market value, and any loan.
  - Review insurance and registration.
  - Determine who is using the vehicle and the intended disposition.
- Personal Property
  - Identify trust-owned items and their value.
  - Discuss disposition of jewelry, electronics, furniture, collectibles, and household goods.
  - Avoid informal transfers without considering trust ownership and value.

Speaker notes: A relative's use of an asset does not by itself establish ownership or authorize transfer. Clarify the trust's interest and document the decision.

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Structured Settlements and Annuities

Locate and review the complete contract, including residual and remainder provisions.

- Who owns the annuity, and who is the payee?
- Do payments end at death, or is there a guaranteed term?
- Is there a death benefit?
- Who is named as successor beneficiary or payee?
- Is there a commutation provision or rider?
- Can the annuity be assigned or sold?
- Is court approval required?

Speaker notes: Settlement and structure documents often remain with prior counsel or another party. Obtain a copy and involve trust or estate counsel when appropriate.

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A Practical Order for Resolving Claims

- Government reimbursement claims: Confirm agencies, jurisdictions, payment histories, and asserted amounts.
- Permissible administration expenses: Consider Trustee, legal, accounting, tax, court, and other allowable costs.
- Tax obligations and reporting: Address trust, state, estate, inheritance, and other potential filings.
- Other liabilities and creditor claims: Review priority, available assets, and potential insolvency issues.
- Any remaining distribution: Apply the trust terms and address probate, Will, or intestacy issues.

Speaker notes: The governing trust document, applicable law, claim type, and court direction may affect the order and treatment of payments.

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Accountings and Court Protection

- Assemble records of receipts, investments, expenses, distributions, and fees.
- Prepare a final accounting that covers the administration and proposed closeout.
- Consider releases or court review and approval.
- Seek court direction when disputes or uncertain actions remain.
- Address proposed asset sales, distributions, or recovery of trust property.
- Complete any required court filings before final distribution.

Speaker notes: Court proceedings may help resolve contested or unclear issues and establish finality. Consider whether the accounting should be presented to interested parties for review and whether court approval is appropriate.

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Tax Planning at Termination

- Confirm final trust income-tax filings, including any required Form 1041.
- Address final K-1s, if applicable.
- Check the beneficiary's individual filing status.
- Reserve funds for outstanding tax preparation costs and liabilities.
- Consider possible state estate or inheritance tax filings.
- Evaluate whether a federal estate-tax filing may be required.

Speaker notes: Tax obligations depend on the trust's activity, assets, and jurisdiction. Coordinate with a tax professional, and do not distribute funds needed for known or reasonably anticipated obligations.

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Closing the Trust and Trustee Role

Before closeout, confirm as applicable:

- Claims, taxes, fees, and administrative expenses are addressed.
- Final accounting is complete.
- Required approvals or releases are obtained.
- Remaining assets are distributed under the trust terms.
- Receipts and final Trustee reporting are documented.
- Financial accounts are closed and records preserved.
- Any court-ordered surety bond is released.

Speaker notes: Trustee compensation and termination fees may be governed by the trust, a court order, or applicable law. Confirm the amount before final distribution.

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Avoid Common Wind-Down Missteps

- Do not distribute too early/Confirm claims and liens before releasing funds.
- Maintain an appropriate reserve or escrow for anticipated costs.
- Read the trust, amendments, court orders, and settlement documents again, while also documenting communications and decisions, especially ones to potential beneficiaries who may not be receiving a distribution as expected by them.
- Consider court protection when disputes, complex claims, or uncertainty exist.

Speaker notes: Clear correspondence can help families and interested parties understand what is known, what remains unresolved, and what steps are anticipated to be completed.

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Final Takeaways

- Start planning for termination during the administration.
- Keep benefit, jurisdiction, asset, and document records current.
- Inventory assets and obligations promptly after death.
- Verify claims and tax responsibilities before distributing.
- Communicate the process without promising an outcome.
- Use court direction and professional advice when needed.
- Close the trust deliberately, with a documented final record.

Closing: A careful wind-down protects the trust administration and helps bring clarity and finality to everyone involved.

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