There’s a New Marshall in Town: Trustee Duties When Trust Payments Go Off Track

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Introduction:

Pooled and individual special needs trusts often depend on funding sources governed by court orders, settlement agreements, or statutory obligations. Trustees must not only understand their fiduciary duty to secure these payments but also navigate the legal mechanisms available when payments lapse. This presentation examines the intersection of trust administration and enforcement: identifying funding obligations, pursuing delinquent payments, identifying when to engage counsel and then coordinating with them and documenting compliance. We will also discuss scalable tracking systems that help trustees manage recurring payments across multiple beneficiaries and avoid gaps that could jeopardize benefits or trust viability.

Types of Payments that may be assigned to a trust:

There are a number of different types of payments that may be assigned to a trust. As a trust administrator, the most common we see are:

a. Annuities (such as Structured Settlements for Personal Injury)
b. Military Survivor Benefit Plan (SBP)
c. A stand-alone contract or agreement through a court settlement
d. Child or Spousal Support
e. A judgement or lien
    i. Erroneous filings in court to consider trust a conservatorship asset. Judge assesses attorney fees to the petitioning party.
    ii. Trustee must petition the court to protect an asset such as a home and pays for the attorney fees (due to limited resources) and then records a lien against the property for payment when it is sold.
f. A will that is directed to pay into a 3rd party trust
g. Conserved Assets that are court ordered to fund a trust

What can and cannot be assigned to trust

The Social Security Program Operations Manual System[1] (POMS) gives us great direction about what can and cannot be assigned to trust. Specifically, POMS SI0120.200 G.1.c. states the following cannot be assigned to trust:

h. Temporary Assistance to Needy Families (TANF)/Aid to Families with Dependent Children (AFDC);
i. Railroad Retirement Board-administered pensions;
j. Veterans' pensions and assistance;

[1] https://secure.ssa.gov/apps10/poms.nsf/Home?readform

k. Federal employee retirement payments (CSRS, FERS) administered by the Office of Personnel Management;
l. Social Security Title II and SSI payments;
m. Private pensions under the Employee Retirement Income Security Act (ERISA) 29 U.S.C.A. § 1056(d)).

How to Properly structure the payments to trust:

POMS SI0120.200 G.1.d.[2] addresses the Assignment of Income and Irrevocable assignment through court order. It states as follows: "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. We consider assignment of payment by court orders to be irrevocable. For example, child support or alimony payments paid directly to a trust or trustee because of a court order are considered irrevocably assigned and thus not income. Also, U.S. Military Survivor Benefit Plan (SBP) payments assigned to a special needs trust are not income because the assignment of an SPB annuity is irrevocable. For more information on SPB annuities, see SI 01120.201J.1.e."

A Properly drafted Will should include language such as "I give all my remaining estate to my son, John Doe, if he survives me, to be held in trust subject to the provisions of Article 3 of The John Doe Supplemental Needs Trust".

For Court Orders and Settlement Documents it is important to direct payments to Trust rather than the Beneficiary –"Pay to the Order of John Doe" vs. "Pay to the Order of the John Doe Special Needs Trust". Similarly for Beneficiary Designations, name the Trust rather than the Beneficiary (Example: Beneficiary—Jane Doe vs. The Jane Doe Special Needs Trust).

As discussed above, Annuities, Structured Settlements, and other Periodic Payments – if the assignment is revocable, the payment can be counted as income to the beneficiary. The attorney should identify the source of every anticipated trust payment before deciding how the payment should be structured.

"Payable to the Trust" is preferable to "Payable to the Beneficiary then deposited into the Trust"

All the ways in which this can go off track:

[2] https://secure.ssa.gov/apps10/poms.nsf/Home?readform

As a trust administrator and attorney who represents them and other fiduciaries, the authors have seen many ways in which payments assigned to trust can go off track. Please consider the following examples by way of case scenario.

- Beneficiary and/or their representative calls or writes the annuity company and redirects the payment to them personally instead of the trust.
  Tyler: is entitled to annuity benefit for a PI Settlement in which he was injured as a minor. Payments were irrevocably assigned to the pooled trust FBO Tyler. Fast forward to the point in time in which Tyler is an adult. He is not happy with his pooled trust administrator because they have denied some of his requests for Medical Marijuana and other expenses because they were not preapproved or properly documented. Tyler calls the annuity company and directs the next annuity payment to himself. The annuity company complies.

- The individual or entity directed to pay the trust files for bankruptcy. The individual or entity directed to pay the trust simply stops paying.
  Eleanor: Eleanor is injured significantly in an accident and sustains a brain injury and her fiancé is killed. In addition to the meager insurance payout, her attorney negotiates a separate settlement in which the driver and his parents are ordered to pay one monthly payment to the pooled trust. The court orders this arrangement. Eleanor spends her trust down nearly every month to meet her needs. Case manager notices her balance is dwindling quickly and realizes the monthly deposits have ceased. Trustee discusses with Eleanor. Eleanor is hesitant to agree to trustee bringing in counsel due to cost. Trustee ultimately determines they have an obligation to pursue this payment. In the meantime, counsel for trustee learns that the son is filing for bankruptcy, his parents are divorcing and his father is also contemplating bankruptcy.

- Successor trustee to initial trust ordered to pay does not see the order in their file review
  Jack: Jack and his attorney worked out an arrangement in which a family trust paid out a lump sum for funds due to him to the 3rd party pooled trust and then made ongoing monthly payments to the 3rd party pooled trust. The family trust was quite substantial. This was all codified in a court order. Fast forward a few years and the pooled trust trustee receives an agreement to release and indemnify the trustee of the family trust. It turns out that when the bank trustee changed from one financial institution to the other, the monthly deposits did not continue.

- Personal Representative of Estate steals the money intended for the trust or there is gross negligence

  Sally and John, both born with intellectual developmental disabilities, are the beneficiaries of their father's estate, along with their sister Cheryl. When their father Dan died, he named his lifelong friend and attorney, Bob, as Personal Representative of his estate. Years before Dan's death, Bob had drafted Dan's will, and created a testamentary special needs trust for Sally and John. The will left the estate in equal shares for each of Dan's children, but contained a confusing clause to equalize the estate if the assets in his estate were not liquid at the time of his death. After Dan's death, Bob sold Dan's house, liquidated his assets, and made a large distribution to Cheryl to help fund a new business she was starting. Three years went by, and Bob never funded the special needs trusts for Sally and John. The named trustee of Sally and John's trust opens a trust action with the court to seek an accounting, inventory for the estate and request the funding of the trust. Bob, an attorney, hires counsel who then begins litigation fighting the trustee of the SNT. After years of costly litigation and not having their Trusts funded, the stress and frustration of the litigation has exhausted what little assets the Beneficiaries do have and it becomes evident that the Estate no longer has the assets to fully fund the Trusts. The Personal Representative proposes a settlement wherein they would fund the Trusts with the remaining Estate funds, in exchange for a full release of liability.

- Court orders the attorney and/or party to pay an obligation, but the trustee must reduce it to a judgement or lien

  Olivia: Olivia, a teenager, has a significant developmental disability due to an injury at birth. Due to numerous circumstances, the Professional Guardian decides to move Olivia out of the trust-owned home to a host home (Dad had been paid, live-in caregiver). Trustee makes the decision to sell the home. In a last-ditch effort for control, dad (through his attorney) files for a new guardian and a conservator. Only assets listed on the petition for conservator are the trust and the trust-owned home. Judge puts dad and his attorney on notice that if they proceed with the petition for conservator (since there are no assets to be overseen by the conservatorship) that the judge will entertain a motion for attorney fees for trustee and guardian.
  Dad and his attorney proceed and all motions were denied.
  Counsel for guardian petitions the court for attorney fees to respond to this erroneous petition and court grants it. Nearly $40,000 in attorney fees is assessed jointly and severally to the dad and his attorney **and payable to the trust**. Dad files

for bankruptcy. Attorney for dad begins all kinds of frivolous arguments, including that he was not served timely (he was).

- One of the assets of the estate is to be paid to the trust and the PR believes it is their asset
  Paul: Paul's father dies very suddenly in a terrible auto accident. Nearly all of the funds from his father's estate are payable to the 3rd Party SNT for the benefit of Paul. The main exception is "personal property" belonging to Paul's father. Paul's father's wife (not Paul's mother) is the PR of the estate. She determines a boat is "personal property" and transfers it to herself. Paul's mother (also guardian) believes the boat should go into the residuary of the trust, of which Paul's SNT is the beneficiary.
  In the course of settling the "boat debacle", it came to light that there were multiple questionable transactions related to the estate administration by the PR.

  The scenarios described above are drawn from the authors' real-world experiences. However, they represent only a few of the many circumstances in which assets intended for a trust may never reach it. For example, a conservator may fail to fund a trust as ordered, whether partially or entirely, or a will may designate a trustee who is never informed of the appointment. In situations such as these, trustees often have little or no way of knowing that assets or interests exist for which they are responsible.

Obligations of trustee and their counsel

What is the duty of a successor trustee or conservator to locate, secure assets? How far do they have to go? The scope of any court order may define that duty. Other times it may be according to state trust law or the uniform trust code.

Under the **Uniform Trust Code (UTC)**, a trustee's obligation to locate, marshal, and secure trust assets stems from several overlapping fiduciary duties outlined in **Article 8 (Duties and Powers of Trustee)**.

The primary statutory requirements and relevant citations for locating and securing assets include:

1. **The Duty to Collect Trust Property (UTC § 812)**

   This is the foundational section requiring a trustee to actively gather the trust's assets.

   - **The Rule:** A trustee must take "reasonable steps" to compel a former trustee or any other person to deliver the trust property to the trustee.

- **Application:** This mandates that the trustee search for, identify, and take physical or legal custody of all properties belonging to the trust at the inception of their administration.

2. The Duty to Control and Protect Trust Property (UTC § 809)

Once assets are located, the trustee has an immediate duty to secure them.

- **The Rule:** "A trustee shall take reasonable steps to take control of and protect the trust property."
- **Application:** "Securing" assets under this rule includes taking physical possession of tangible items, changing locks on real estate, moving funds to secure trust bank accounts, and purchasing adequate insurance to protect against loss or damage (**UTC § 816)**

3. Recordkeeping and Earmarking (UTC § 810)

Locating and securing assets requires proper legal separation and identification to prevent asset diversion.

- **The Rule:** A trustee must keep adequate records of the administration of the trust (**UTC § 810(1)**) and must keep trust property separate from the trustee's own property (**UTC § 810(2)**)
- **Application:** The trustee must ensure that titled assets (like bank accounts, real estate, and stocks) are properly re-titled in the name of the trust rather than held individually, a process known as "earmarking".

4. General Duty of Prudent Administration (UTC § 804)

The process of locating and securing assets must be executed competently.

- **The Rule:** A trustee must administer the trust as a prudent person would, exercising reasonable care, skill, and caution.
- **Application:** If a trustee fails to thoroughly search for missing assets or allows assets to waste away due to lack of security, they may be found in breach of this standard.

5. Accompanying Power to Collect Property (UTC § 816(1)(a))

To enable the trustee to fulfill these duties, the UTC grants the explicit statutory authority to do so.

- **The Rule:** A trustee has the specific power to "collect trust property and accept or reject additions to the trust property".

- **Application:** The trustee has the authority and responsibility to evaluate whether an addition should be accepted.

  Just because an asset **can** be assigned to the trust, does not mean it **should** be assigned to the trust.

Furthermore, we need to explore What Happens if a Trustee Fails to Locate and Secure All Assets. Beneficiaries can file a civil lawsuit for **breach of fiduciary duty** and **negligence** against a trustee who fails to locate and secure trust assets.

When a trustee takes over a trust, they have a legal duty to identify, collect, and safeguard all trust property. Failing to do so harms the beneficiaries and exposes the trustee to legal claims.

Core Causes of Action:

- **Breach of Fiduciary Duty:** Trustees must manage trust property with the care, skill, and caution of a prudent person. Leaving assets uncollected, uninspected, or unsecured (such as leaving real estate abandoned or failing to track down missing financial accounts) violates this standard of care.
- **Breach of the Duty to Collect and Protect Assets:** A trustee has an affirmative obligation to take control of trust property promptly. If they fail to secure tangible property, financial accounts, or real estate—leading to loss, theft, or damage—they can be sued for the resulting economic harm.
- **Common Law Negligence:** If the trustee acts carelessly or fails to perform basic investigative steps to find assets that reasonably belonged to the trust, beneficiaries can claim ordinary or professional negligence.

Available Remedies and Court Actions:

If a trustee fails to secure assets, beneficiaries can petition the probate court for specific legal remedies:

- **Surcharge (Financial Damages):** The court can order the trustee to pay out of their own personal pocket to replace the value of any lost, uncollected, or mismanaged assets, plus lost interest or earnings.
- **Removal or Suspension:** Beneficiaries can ask the court to remove the negligent trustee and appoint a professional or successor trustee.
- **Compelling an Accounting and Inventory:** The court can order the trustee to produce a full forensic accounting of all assets they have managed or failed to locate.
- **Attorney's Fees:** Courts may order the negligent trustee to pay the beneficiaries' legal fees if their failure to act forced a court battle.

Finally, the obligation to pay funds to a trust, or the assignment of funds for the trust's benefit, constitutes a trust asset. Trustees have a fiduciary responsibility to account for,

monitor, and pursue the collection of all assets and income due to the trust. Attorneys representing trustees should advise their clients of these obligations and the potential consequences of failing to protect or recover trust assets, including possible liability for breach of fiduciary duty.

Practical Advice for Trust Administration

Trustees have a fiduciary duty to identify, monitor, and collect assets owed to the trust. A well-organized intake process is the first step in ensuring that all known assets and future payment obligations are identified and documented.

Once identified, payments due to the trust should be recorded in a reliable tracking system that captures the source, amount, due date, and payment status of each obligation. Regular reviews of expected payments help trustees quickly identify missed or delayed payments.

Assets owed to the trust should be accounted for through the trust's accounting records or a separate receivables tracking system. Maintaining accurate records demonstrates that the trustee is actively monitoring trust property.

When a payment is missed, trustees should promptly investigate and follow up with the payor. If the obligation is disputed, significant, or remains unpaid despite collection efforts, legal counsel should be consulted. Trustees should also consider whether statutory interest or other remedies may be available.

In deciding whether to pursue collection, trustees must balance the anticipated costs of recovery against the value of the asset while remaining mindful of their fiduciary duty to protect trust property. This is not a “one size fits all” model –Trustees should consider what response is *reasonable under the circumstances*. Consider factors such as the value of the trust, the likelihood of successful recovery, the strength of the trust’s legal claim, the identity and solvency of the person or entity holding the asset, the potential impact on the beneficiary, and if failure to act could constitute a breach of fiduciary duty. This is not necessarily a mathematical formula – rather, it is a documented decision-making process. The Trustee must identify the asset, consider the circumstances, and make an informed fiduciary decision.

An effective attorney relationship can be invaluable in these situations. Trustees benefit from working with attorneys who understand trust administration, can clearly evaluate the facts, establish a timeline of events, and assess both known assets and newly discovered obligations. A well-prepared inventory of relevant documents and information allows counsel to provide efficient and practical guidance.

Ultimately, effective trust administration requires more than identifying assets. The trustee needs to close the loop. The process should look something like this:

- Identify the asset →
- establish the trust's entitlement →
- determine where the asset/payment is →
- secure it →
- monitor it →
- reconcile it →
- investigate discrepancies →
- pursue appropriate remedies →
- document the resolution.

That process should continue throughout the administration. **The strongest administration is not the one in which nothing ever goes wrong.** It is the one in which, when something does go wrong, the trustee can show:

- We identified it.
- We investigated it.
- We evaluated the options.
- We took reasonable action.
- And we documented why.