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***Unique Asset Management***

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## **I. Introduction**

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

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

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

## **II. Fiduciary Duties**

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

### **Duties of Loyalty/Impartiality and Conflicts of Interest:**

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

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

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

### **Duty of Care/Prudence**

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

### **Duty of Full Disclosure/Reporting**

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

## **III. Uniform Prudent Investor Act**

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

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

## Modern Portfolio Theory

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

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

## Prudence

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

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

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

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

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

## **Diversification**

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

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

## **Duty of Loyalty and Impartiality**

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

## **Asset Allocation**

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

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

## **IV. Unique Asset Complications**

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

### **Liquidity**

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

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

### **Undue Influence**

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

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

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

## **General Liability**

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

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

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

## **Prudence**

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

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

## **Valuation**

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

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

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

## **Outside Management**

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

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

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

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

## **Trust Longevity**

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

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

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

## **V. Types of Unique Assets**

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

## **Beneficiary-Occupied Real Estate**

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

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

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

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

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

## Vehicle Liens

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

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

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

## **Mineral Interests**

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

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

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

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

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

## **Farm/Ranch Land and Commercial Real Estate**

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

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

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

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

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

## **Promissory Notes**

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

Wispect's UAPs for Promissory Notes state:

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

## Closely Held Interest

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

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

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

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

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

## Life Insurance

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

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

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

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

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

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

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

## **Annuities**

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

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

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

Wispect's UAPs on Annuities require that:

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

## **Individual Retirement Accounts (IRAs)**

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

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

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

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

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

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

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

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

## VI. Delegation

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

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

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

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

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

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

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

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

## **VII. Taxation**

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

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

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

## **VIII. Conclusion**

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

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

## **Appendix A**

### **Wispect Special Needs Trusts Unique Asset Policies and Procedures**

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

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

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

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

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

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

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

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

True Link Financial, Investment Manager

***With a copy to***

Wispact, Inc.'s Executive Director, Kevin Hayde

And

Capital First Trust Company

## **I. Marketable Securities:**

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

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

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

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

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

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

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

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

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

## **B. PROMISSORY NOTES**

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

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

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

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

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

### **III. Real Estate:**

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

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

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

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

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

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

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

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

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

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

#### **IV. Life Insurance Policies:**

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

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

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

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

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

### **Fixed Annuities:**

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

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

### **V. Variable Annuities:**

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

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

## **VI. Personal Property:**

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

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

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

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

## **VII. Beneficial Interest in Inherited Individual Retirement Accounts:**

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

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

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

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

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