

1

[illegible]

National Landscape


PSNT trustees provide vital specialized services to people in need

Institutional trust companies:

- Often lack public benefits expertise
 - May outsource to public benefits advisors (costly)
- SNTs require additional oversight, knowledge and time
- Trusts/conservatorships carry increased liability
- Raising minimum account sizes and fees
 - Annual minimum fees nationally: \$3,000 - \$20,000
 - Fees may be combined with outside investment advisor fees

BEST PRACTICE TIP

Advise families to review the entire fee structure in total.



2

National Landscape – Local Bank Consolidation 1996-2008

1990 - 1995

Travelers Group | Citicorp | European American Bank | BanaMex

2009

Citigroup

Washington Mutual | Great Western Financial | J.F. Ahmanson | Dime Bancorp
First Chicago | Banc One | First Commerce | JP Morgan | Chase Manhattan
Chemical Bank | Bear Stearns

JPMorganChase

US Trust | MBNA | Continental Bank | Bank of America | Security Pacific Bancorp
NationsBank | Fleet Financial Group | BancBoston Holdings | BayBanks
Summit Bancorp | USB Financial | Countrywide Financial | Merrill Lynch

BANK OF AMERICA


Wells Fargo | First Interstate Bancorp. | Norwest Holding Company
SouthTrust | Wachovia | Central Fidelity National Bank | CoreStates Financial
First Union | The Money Store

WELLS FARGO

3

PSNT vs. SNT

- Master Trust Document vs. Individual Trust Document
 - Stand Alone Trusts
 - Consider the drafter!
 - Variety of flavors
 - First- vs. Third-Party
 - Remainderpersons
 - Discretionary Distribution language
 - Reporting requirements
 - Trust Protector/Advisory Committee/Co-Trustee
 - Best Practice Tip: use of trust administration software/CRM to track these differences**
- Staffing of administration
 - Best Practice Tip: assign most experienced and knowledgeable staff to Stand Alone administration**
- Asset size
- Distribution volume
 - Stand Alone trusts administered by CFPD average 30% more distribution than their pooled counterparts



4

4



Unique Asset Management

Overall Considerations

- Beneficiary diminished capacity
- Public benefits
- Undue influence
- Promotion of beneficiary independence and empowerment
- Trustee liability
- Reporting (benefits agencies, courts, remainderpersons)
- Titling

5

5

Unique Asset Management

Beneficiary-Occupied Real Estate


- R3 § 90 - "efforts to achieve diversification [with trust owned real-estate]...will be complicated...especially [for] trustees of smaller trusts"
- Industry standard allocation = 15-20% of trust corpus
- "Hidden" costs such as real estate taxes, insurance, upkeep and maintenance, utilities, appraisals, inflation

BEST PRACTICE TIP
Trust longevity simulation before purchase

- Trustee duty to monitor home for beneficiary appropriateness, sole benefit, prudence, diversification
- Appraisals: necessary for proper reporting and public benefits
- Eviction

BEST PRACTICE TIPS

- Delegate management experienced property manager
- Consult with attorney who specializes in evictions/leases



Other Purchase Criteria

- Beneficiary ability to maintain property
- Location safety
- Accessibility costs
- Beneficiary support systems
- Beneficiary Will if property held outside of trust

6

6




Unique Asset Management

Farmland/Ranchland/Commercial Real Estate

- R3 § 90 – “it would not be prudent for a trustee to disregard the complexities, burdens and special risks associated...with such investments.”
- Complex titling, income payout structures, participation schedules and taxation
- Diversification
- Capital calls or funding requests
 - Sole benefit
 - Prudence
 - Trust longevity
 - Marketability
 - Liquidity for beneficiary needs
 - Applies to closely held business interests, LLCs, etc.

BEST PRACTICE TIP
 Delegate management to experienced and vetted outside manager. Retain counsel to review ownership/partnership agreements.

Mineral Interests, Water Rights, etc.

- Extraordinarily specialized asset management
- Depleting resources, Uniform Fiduciary Income and and Principal Act allocations
- Tax & legal titling evaluation
- Prudence
- Complex division orders and sale propositions

REPORTING-BEST PRACTICE TIP
 Show interests on beneficiary statements

BEST PRACTICE TIP
 Delegate management to experienced, vetted outside manager

7

Unique Asset Management

Overall Aspects for Review Prior to Acceptance

☒ Effect on public benefits
 ☒ Ongoing funding requirements
 ☒ Tax considerations
 ☒ Annual valuations
 ☒ Safekeeping
 ☒ Asset allocation/diversification

☒ Trust Liability (e.g., environmental liability with Commercial Real Estate)
 ☒ Partnership/ownership structure
 ☒ Access to information
 ☒ Principal and income accounting
 ☒ Policy reviews (e.g., life insurance, death benefits)
 ☒ Ongoing monitoring
 ☒ Third-party vendor monitoring
(GCC Bulletin 2013-29 <https://www.gcc.gov/news-issuances/bulletins/2013/bulletin-2013-29.html>)


8

Due Diligence: Acceptance Considerations

Prior Fiduciary Review

- Review all statements
- Marshall all assets once appointed/accepted
 - Bank accounts
 - Investment accounts
 - IRAs/401(k)s/Pension Plans
 - Annuities
 - Social Security
 - Rents/accounts payable/promissory notes
 - Safe deposit box
 - Unclaimed property
 - Other trust payments
 - Business interests
 - ABLE Account
- Personal/tangible property?
 - Consider appraisals as necessary

In re Will of Crabtree, 449 Mass. 128, 865 N.E.2d 1119 (2007): successor breached their duty (after accepting appointment) to ensure prior trustee had properly accounted for the entirety of the trust estate.



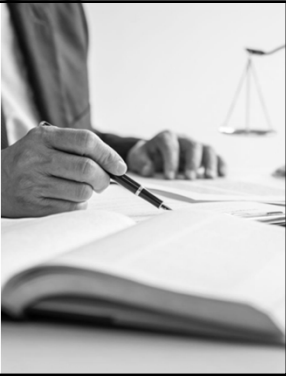
9

Due Diligence: Acceptance Considerations

Prior Fiduciary Review

- Tax Returns
 - Trust (1041) and Personal (1040)
 - IRS transcript
- Accountings/statements
- Marshalling mail
- Bill pay
 - Credit Cards
 - Utilities
 - Insurance (residential, commercial, auto, etc.)
 - Medical
 - Phone
 - Other creditors
- Residence search as applicable
- Real Property taxes, title, etc.
- Automobile(s)
 - Lien in favor of trust?
 - Insurance

NOTE: Fiduciaries generally have a duty to keep the beneficiaries of their account reasonably informed of the account and its administration.




10

10

Due Diligence: Acceptance Considerations

Beneficiary Social / Emotional Health

- Emotional wellness
- Community connections
- History with prior trustee (violent, frequent requests?)
- Meeting: in-person or virtual
- Family dynamics
 - Support system
 - Benefitting from trust?
 - Additional legal fees?
- Undue influence
 - Who is asking for the successor trustee?
 - Why? (denials/approvals from prior trustee?)
- Other fiduciaries
 - Guardian, conservator, agent under POA, etc.



BEST PRACTICE TIP
Create a list of demographic questions to use when evaluating appointment

11

11

Due Diligence: Acceptance Considerations

Attorney Review:

- Initial review of trust vehicle
- Amend/restate trust document
 - Public benefits
- Acts of prior trustee
- Immigration
- Guardianship/conservatorship
- Investment/annuity review
- Resignation/Acceptance
 - Receipt and Release
- Tax

Social Security/Medicaid:

- Enhanced scrutiny
- Review/approval of trust
 - Increases wait times
 - Potential for amendment/restatement
 - Sometimes no notice/approval given!
 - Benefits implications
- Distribution reporting requirements

12

12

Taxation Differences

PSNT Accounting Methodology

Omnibus Budget and Reconciliation Act 1993 (OBRA '93)

- "for purposes of investment management of the funds, the trust pools these accounts"

"Pool" x 3

- Legal (Master Trust Agreement/Joinder)
- Administration (pooling of cash/investments = economy of scale)
- Tax

Can you pool 1st and 3rd Party sub-accounts together?

POMS SI 01120.25 - "by law, each beneficiary must have a separate account, but the non-profit can pool these funds with the funds of other members of this communal trust"

- Strict reading = only pool trusts created/authorized under 42 U.S.C. § 1396(d)(4)(c)
- However, not specifically prohibited
- Pooling separately may avoid tax complications

Omnibus Budget and Reconciliation Act 1993 (OBRA '93)

13

13

Taxation Differences

PSNT Accounting Methodology

Unitization

Beneficiary sub-account value adjusted daily for:

- Joinder date/amount
- Sub-account transactions (distributions, receipts, etc.)
- Income items (dividends, interest)
- Capital gains (realized)
- Market value

Similar to mutual fund accounting and other general accounting principles

- PSNT is **not** a mutual fund or investment offering
 - Investment management is typically delegated to RIA under UPIA § 9
 - Restatement (Third) of Trusts Prudent Investor Rule § 77
 - POMS SI 01120.25 - "in some instances, the non-profit manager(s) may employ the services of a for-profit entity to manage some of the financial activities of the trust"

14

14

Taxation Differences

Taxation - First Party SNT / (d)(4)(a) Trust

Grantor Trust

- Grantor = Beneficiary
- Beneficiary retains right to beneficial enjoyment of trust property, even if distributed purely by trustee's discretion

L.R.C. § 673(a)

L.R.C. § 671 - 678

L.R.C. § 677

L.R.C. § 675

"reversionary interest in either the corpus or the income therefrom if the value of such interest exceeds 5 percent of the value of such portion."

"grantor shall be treated as the owner of any portion of a trust...whose income...may be distributed to the grantor..."

"grantor or any person (may) purchase, exchange, or otherwise deal with or dispose of the corpus or the income..."

15

15

Taxation Differences

Grantor Trust

- Trust's taxable events flow out to the beneficiary
- Advantage - taxed at beneficiary's personal tax rate (if any)

2024 Simplified Federal **Personal** Income Tax Rates*

Tax Rate	Single	Married, Filing Jointly
10%	\$0 - \$11,600	\$0 - \$23,200
12%	\$11,601 - \$47,150	\$23,201 - \$94,300
22%	\$47,151 - \$100,525	\$94,301 - \$201,050

2024 Simplified Federal **Trust** Income Tax Rates**

Trust Taxable Income	Trust Tax Rate
\$3,100 or less	10%
\$3,101 - \$11,150	\$310 + 24% of excess over \$3,100
\$11,151 - \$15,200	\$2,242 + 35% of excess over \$11,151
\$15,201+	\$3,659.50 + 37% of excess over \$15,201

*Source: IRS Form 990
**Source: IRS Form 991

Taxation Differences

Tax Filing

26 CFR §1.671-4(b)(2)(iii)(B)(i)

- Trustee must inform IRS that the Grantor is liable for income tax
- Trustee must provide Grantor information regarding trust income and expenses for the tax year
 - "Simplified" information may be sufficient under 26 CFR §1.671-4(b)(2)(iii)(B)(ii)
 - Should include "the information necessary to take the items into account in computing the grantor's income."
 - Issuance of Form 1099 to beneficiaries will not meet these requirements
 - Additional timing issues (1099s must be issued by Feb 1 of following tax year - many custodians subsequently adjust 1099s after Feb 1)
 - Grantor Tax Letter (CTL)
 - CTLs may include potentially deductible items for beneficiary (e.g., medical expenses, trustee fees, etc.)
 - Note: beneficiary should consult with their own tax professional for deductibility

17

Taxation Differences

Taxation - Third Party SNT

Complex Trust or Qualified Disability Trust (QDT)


- Grantor = Someone other than the beneficiary
- Grantor cannot retain any interest (residual or otherwise)

I.R.C. §§ 601 - 663

Only one of the following need apply to be qualified for complex trust status:

- Trust may accumulate income
- Trust may distribute corpus
- Trust may make distributions to charity

I.R.C. § 661	I.R.C. § 662	I.R.C. § 663
Complex trust deductions	Inclusion of amounts of income of beneficiaries	Other special rules



Taxation Differences

Taxation - Third Party SNT

Distributable Net Income

- Trust Accounting Income (TAI): deductions for amount that is required to be distributed
- Distributable Net Income (DNI): limits distribution deduction and tax-exempt income
 - May limit amount of taxable income that can flow out to beneficiaries
 - Measures greatest amount deductible due to beneficiary distributions
 - Characterizes income distributed for distribution deduction
 - Any taxable income undistributed to or for the benefit of the beneficiary may remain "trapped" in the trust and taxed at the trust level.

2024 Simplified Federal Trust Income Tax Rates*

Trust Taxable Income	Trust Tax Rate
\$3,100 or less	10%
\$3,101 - \$11,150	\$310 + 24% of excess over \$3,100
\$11,151 - \$15,200	\$2,242 + 35% of excess over \$11,151
\$15,201+	\$3,659.50 + 37% of excess over \$15,201

*Source: IRS Form 1041

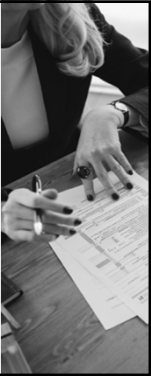
In general, re: Distributable Net Income (DNI):

(Taxable Income)

(Net Capital Gains)

(Tax-Exempt Income Reduced By Expenses)

DNI



19

Taxation Differences

Taxation - Qualified Disability Trust

Qualified Disability Trust (QDT)


\$5,050 (2024) additional exemption which would reduce the tax burden of taxable events "trapped" in the trust

Qualification requirements

- 42 U.S.C. § 1396p(c)(2)(B)(iv)
 - Trust is irrevocable
 - Sole benefit of the beneficiary with a disability
 - Beneficiary is under the age of 65
 - Beneficiary is disabled as **determined by SSI/SSDI**

Issues: beneficiary works or parental deeming rules

- Trust must have simple or complex trust status (I.R.C. § 652 or 662)
 - Note: this requirement therefore excludes First Party (Grantor) Trusts



20

Taxation Differences

Taxation - Qualified Disability Trust


Qualified Disability Trust (QDT)

Pros

- Additional exemption of \$5,050 to offset any "trapped" income

Consider filing trusts as a QDT when:

- Trust does not distribute all income to or for the benefit of a beneficiary
 - Beneficiary may have 1st Party trust that is spending down first
 - Beneficiary has few discretionary distribution needs
 - Relatives of beneficiary are using the SNT sub-account for inter vivos planning
- Trust account has few deductions
- QDT exemption tax savings far exceeds cost of trust tax return preparation



BEST PRACTICE TIP

Consider review of existing Third Party PSNT sub-accounts that may benefit from QDT exemption

21


21

7

Trust Document Review

Attorney Review:

- Can the trustee serve? ("bank or trust company...")
- Unique provisions
 - Trust distributions
 - Discretionary language
 - Remainderpersons
 - Investment restrictions
 - Prohibitions
- Payment of attorney fees?
 - BEST PRACTICE TIP:** include in set-up fee
 - Flat fee (e.g., not hourly)
- BEST PRACTICE TIP:** have multiple attorneys to do reviews
 - Conflict of interest considerations

 **BEST PRACTICE TIP: CHECKLIST**

- Trust document is completed and signed
- Trust document allows single trustee to serve
- Verify process for current trustee to resign (successor trustee only)
- Verify PSNT can serve
- Process for PSNT to accept appointment
- Delivery of Resignation and Acceptance of Office requirements
- Release and receipt process
- Applicable standard of trustee liability
- Accountings/statements/report recipients
- Unusual trust distribution limits or provisions
- Review of trust investments and holdings, including Unique Assets (successor trustee only)
- Drafting issues, etc.
- Trustee compensation review
- Recommendations

22

Trust Document Review

Situs:

Legal Situs


- State or jurisdiction that has primary control over a trust's legal matters
- "This trust is governed, construed, and administered by the laws of [state]"
- States such as Nevada, South Dakota, Delaware, Alaska and Wyoming have favorable trust laws
 - Some trust documents or courts will allow for a change in situs
- Trustee powers
 - "the Trustee may exercise those powers set forth in the [state] Fiduciaries' Powers Act"
 - Best Practice Tip:** review applicable state's Fiduciaries' Powers Act

Administrative Situs

- Principal place of administration
- Trust registration, state or county requirements, reporting requirements, etc.

Tax Situs

- May be determined by legal situs, administrative situs, beneficiary residence or trustee residence
- May affect investments (municipal bonds), UFIPA, DNI, filing requirements, etc.
- Example: trust beneficiary resides in New York, trust legal situs of Pennsylvania, trustee administrative situs in California
 - 3 tax returns may be required:



23

Trust Document Review

Discretionary Distribution Language

- Vague discretionary distribution language
- Changing trust laws
- Changing public benefits regulations
- State vs. Federal statute
- Contradictory case law
- Settlor intent
- Remainderperson consideration
- Hyper-litigious environment

HEMS: "health, education, maintenance and support"

Resources:

- Restatement (Second) of Trusts (1959) - "**Restatement (Second)**"
- Restatement (Third) of Trusts (2003) - "**Restatement (Third)**"
- Uniform Trust Code (2003) - "**UTC**"
- Case law



24

Trust Document Review

Discretionary Distribution Language

"Support & Maintenance"

- Some courts have interpreted "support" and "maintenance" as virtually synonymous
 - "Distributions necessary to maintain the beneficiary in the beneficiary's accustomed manner of living"
- Restatement (Third) § 50*, "regular mortgage payments, property taxes, suitable health insurance or care, existing programs of life and property insurance, and continuation of accustomed patterns of vacation and charitable and family giving".
- Restatement (Third) § 50* includes support of or suitable education for beneficiary's children and payment of household expenses

Other definitions:

- "Customary lifestyle or station in life" - *Hartford-Connecticut Trust Co. v. Eaton*, 36 F.2d 710 (2d. Cir. 1929)
- Property taxes and premiums for fire and liability insurance for house - *Orange First Nat. Bank v. Press*, 2 N.J. Super. 486, 64 A.2d 475 (Ch. 1948)
- Needs and necessities reasonably necessary to meet personal needs of the beneficiary in accustomed standard of living at time of death of the settlor - *Amseskeag Trust Co. v. Wentworth*, 99 N.H. 346, 111 A.2d 198 (1955)

"Health"

- Restatement (Third) § 50*, comment d(2): "Distributions may increase for inflation and subsequent increases in needs resulting from situations such as deteriorating health or added burdens from the needs of another."
- SNT: *ignorantia juris non excusat*
- Typically approved "health" distributions:
 - Health insurance premiums
 - Co-payments
 - OTC medication
 - LTC insurance premiums
 - Medical supplies
 - Dental

Remainderperson Consideration

- Restatement (Third) § 50*, comment d(2): "...an increase in distributions may be appropriate in light of the productivity of the trust and if otherwise the remainder beneficiaries would benefit over the current beneficiary to an extent not intended by the settlor..."


25

Trust Document Review

Discretionary Distribution Language

"Comfort & Happiness"

- "Comfort" is "broader than necessity" - *Estate of Curtis*, 253 Wis. 119, 33 N.W.2d 193 (1948)
- "Comfort" is "a state of tranquil or moderate enjoyment resulting from the satisfaction of bodily wants and freedom from care or anxiety" and "a feeling or state of well-being, satisfaction, or content" - *Equitable Trust Co. v. Montgomery*, 28 Del.Ch. 389, 44 A.2d 420 (1945)
- Restatement (Third) § 50*, comment d(3): "The terms 'benefit' and 'welfare' imply something beyond a support standard. Although 'benefit,' 'welfare,' and 'happiness' may imply something beyond support, they are less objective standards of support and may inhibit the ability of a beneficiary to compel a distribution. 'Happiness' implies that the trustee's discretion should be exercised generously."
- Restatement (Third) § 50*, comment d(3): "happiness may protect the trustee from challenge by remainder beneficiaries for almost any reasonably affordable distribution" and the trustee "can still resist a request from a beneficiary because the distribution is in the trustee's discretion."

 **BEST PRACTICE TIP**
Drafters: consider defining "comfort" or "happiness" or include a settlor letter of intent.

"Education"

- Restatement (Second) § 28*, comment e: "when the trustee has discretion to pay so much of the income or principal for the education or support of the beneficiary, the beneficiary cannot compel the trustee to pay to him or to apply for his benefit more than the trustee in the exercise of a sound discretion deems necessary for his education or support."
- Restatement (Third) § 50*, comment d(3): "education generally includes the payment of living expenses as well as fees and other costs of attending an institution of higher education, or the beneficiary's pursuit of a program of trade or technical training, as may be reasonably suitable to the individual and to the trust funds available for that purpose."
- Distributions for high school as preparation "to defray the reasonable expense of a college education" allowable - *Security Trust Co. v. Smith*, 284 Ky. 611, 145 S.W.2d 512 (1940)
- Distributions for the lifelong "proper education of [the beneficiary]" allowable - *n re Wolfe's Estate*, 164 Misc. 504, 299 N.Y.S. 99 (Sur. Ct. 1937)

26

Trust Document Review

Trust Advisory Committee

- Promotes settlor intent and beneficiary involvement
- May weigh in on discretionary distributions
- May be tasked with development of distribution plan
- Supporters may act as part of Committee
 - BEST PRACTICE TIP:** identify any conflicts of interest (e.g., remainderperson, housemate, etc.)

From Wealth Counsel:
"The Trust Advisory Committee shall consist of a minimum of 3 members, but no more than 5 members to be determined by the chairperson(s) then serving. If any member of the Trust Advisory Committee is unwilling or unable, for any reason, to act or continue to act as a committee member, the chairperson(s) then serving may decide whether or not to fill the vacancy. However, there shall be at least three (3) members serving at all times. If there are fewer than 3 members serving and the chairperson(s) then serving are unable or unwilling to appoint a successor committee member, the Trustee may appoint the successors."

27

Trust Document Review

Trust Protector

- Promotes settlor intent and beneficiary involvement
- May remove trustee
- May amend trust document for changes in law, public benefits, etc.
- May weigh in on discretionary distributions
- **BEST PRACTICE TIP:** identify any conflicts of interest (e.g., remainderperson, housemate, etc.)

From Bradley J. Frigon, JD, LL.M (tax), CELA, CAP:
"The Trust Protector may amend any provision of this Agreement, as it applies to any Trust for which the Trust Protector is serving, pursuant to [subsequent restrictions]. Notwithstanding the foregoing, the Trust Protector may not amend this Agreement in any manner that would make Trust corpus or income available to the Beneficiary for Medicaid eligibility. Further, the Trust Protector may not limit or alter the rights of the Beneficiary in any Trust assets held by the Trust before the amendment, nor may the Trust Protector remove or add any individual or entity as a beneficiary of any Trust asset."

28

28

Trust Document Review

Who's On First?

Conflict will inevitably arise when a trustee and an outside fiduciary disagree.

- *Trustee:* assets titled in the trust
- *Guardian:* protected person's living situation, health care decisions, well-being
- *Conservator:* assets not titled in trust
- *Agent under Power of Attorney:* assets not titled in trust if no conservator
- *Co-Trustee*
 - **BEST PRACTICE TIP:** Delineate rights/duties of co-trustee before accepting appointment



29

29

Investments

Delegated Investment Management

UPIA § 9

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

BEST PRACTICE TIP
PSNT Board of Directors should perform a thorough review of investment advisor before delegation.

Review criteria in advisor selection process

- ☐ Past or pending legal issues
- ☐ Investment Policy Statement ("IPS")
- ☐ Fee schedule
- ☐ Investment management agreement
- ☐ Staff experience
- ☐ SEC/state registration
- ☐ Conflict of interest
- ☐ Historical performance
- ☐ Soft-dollar arrangements
- ☐ Proprietary investment products
- ☐ Insurance coverage
- ☐ Data security
- ☐ SNT-specific knowledge
- ☐ OCC Bulletin 2013-29: "Third-Party Relationships: Risk Management Guidance"

30


30

Investments

Delegated Investment Management

UPIA § 9(a)(3)

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

**BEST PRACTICE TIP**

PSNT Board of Directors should perform an annual review of delegated investment advisor.

Ongoing Review Criteria

- ☐ SEC or state annual qualifications/registration
- ☐ Adverse regulatory or legal actions
- ☐ Firm control person review
- ☐ Disaster Recovery Program
- ☐ ADV Parts 1, 2 & 3
- ☐ ADV/FINRA brochures
- ☐ Compliance with IPS

31

Investments

Directed Investment Management


- Uniform Directed Trust Act – 2017
- "Trust protector", "trust advisor", "trust director"
- Directed trustee's authority to act in re: investments is reduced, therefore the trustee's liability is potentially reduced
- Trustee must monitor actions for gross negligence, willful misconduct or imprudence
- Uniform Trust Code § 808 – directed trustee provisions do not bifurcate investment function as trustee will always be liable if advisor's actions constitute a breach of trust

Rollins v. Branch Banking & Trust Co. of Va., 2011 WL 34037931 (Va. Cir. Ct. April 30, 2011)

- Trustee directed to hold individual security
- Individual security was large portion of portfolio (overconcentration)
- Security value declined significantly, suit brought claiming failure to diversify

Court found:

- Trustee not liable for failure to diversify because of directed language
- Trustee was liable for breach of trust by failing to warn beneficiaries of impending security decline

**BEST PRACTICE TIP**

PSNT Board of Directors should perform an annual review of directed investment advisor.

32

Investments

Asset Allocation:


- Portfolio's construction over different asset classes to balance risk and reward
- Prudent diversification
- Coordinates the beneficiary's:
 - Goals/Optimal Outcomes
 - Financial Plan/Budget
 - Beneficiary's budget is key determinant
 - Large purchases, LCP, time horizon
 - Risk Tolerance
 - Investment Horizon
 - Life expectancy

Diversification:

- UPIA §5 - "a trustee shall diversify the investments of the trust"

Diversifying Holdings:

- On average yields higher long-term returns while mitigating risk
- Smooths out unsystematic risk (risk specific to the security or the industry)
- Across capitalization (large cap, mid cap, small cap)
- ETF/mutual funds
- By geography (domestic vs. international)
- Jicarilla Apache Nation v United States, 112 Fed. Cl. 274 (2013)

**BEST PRACTICE TIP**

Consult with an investment advisor as needed.


33

11

Investments/Taxes

Capital Gains

- Embedded/Legacy capital gains are typical in successor trusteeships
- In-kind transfers - possible but necessary?
- Analysis:
 - Asset allocation
 - Diversification
 - Prudence
 - Beneficiary needs
 - Tax review
 - TAI vs DNI
 - Beneficiary tax levels

 **BEST PRACTICE TIP**

Consult with a tax professional as needed.

2024 Simplified Federal Personal Income Tax Rates*

Tax Rate	Single	Married, Filing Jointly
10%	\$0 - \$11,600	\$0 - \$23,200
12%	\$11,601 - \$47,150	\$23,201 - \$94,300
22%	\$47,151 - \$100,525	\$94,301 - \$201,050

2024 Long-Term Capital Gains Tax

Tax Rate	Beneficiary's Income	Beneficiary + Spouse's Income
10%	\$0 - \$47,025	\$0 - \$94,050
15%	\$47,026 - \$518,900	\$94,051 - \$583,750
20%	\$518,901+	\$583,751+

*Source: IRS Form 1040

34

Successor Trustee Liability

Primary Principle of trust and fiduciary law:


- Successor trustees cannot generally be held liable for the acts, omissions, or failures to act of the prior trustee
 - Typically included in trust document language as well

However, a successor trustee may be liable:

- If the successor trustee "[a] knows or should know of a situation constituting a breach of trust committed by [their] predecessor and improperly permits it to continue; or (b) neglects to take proper steps to compel the predecessor to deliver the trust property to [them]; or (c) neglects to take proper steps to redress a breach of trustee committed by the predecessor."
(Restatement (Second)) § 223
 - Affirmative duty to proactively remedy errors of prior trustee & suit for any breach?

CA Prob Code § 1564t:

"The liability for acts or omissions of a resigning trustee...is not released or affected in any manner by the trustee's resignation."

 **BEST PRACTICE TIP**

If breach is suspected, review all options before accepting appointment.

In Matter of Donald E. Bradford Trust, 524 So.2d 1213 (La. Ct. of App. 1989): successor held liable for not pursuing prior trustee for breach

35


Successor Trustee Liability

General statute of limitations against a fiduciary for breach = one year after beneficiary receives report that discloses the potential claim for breach. However, if no report was provided, statute is generally longer.

UTC § 705 (2000):
Prior trustee continues to be liable for acts or omissions committed during their tenure

Statute of Limitations for Breach of Trust

- **O'Connor v. Redstone (896 N.E.2d 595 (Mass. 2008):** successor trustee's knowledge of prior trustee's breach (not beneficiary's knowledge) was sufficient to begin statute of limitations.

 **BEST PRACTICE TIP**

Pay attention to state-specific statute of limitations.

36

12

Successor Trustee Liability


Prior Trustee

- Accountings/reports
 - Investment/checking account statements
 - Reporting to SSA/Medicaid/Courts
- Carefully review layperson trustee actions
- ISM distributions
- Supplanting vs. supplementing
- Sole benefit
- Fee structure

Fernandez v. K-M Industries Holding Co., Inc., 585 F. Supp. 2d 1177 (N.D. Cal. 2008): successor could be held liable for breach for failing to proactively remedy original breach by predecessor

BEST PRACTICE TIPS

- Review all transactions by prior fiduciary.
- Require a final accounting with the understanding that a judicial review may be necessary.



37

Successor Trustee Liability

Distributions

- Past distributions should be reviewed to determine needed changes
 - Entitlement compliance issues
 - Overspending
 - Family being paid directly for care
 - Others receiving benefits from the trust
- Prepare for challenging conversations
 - Educate the beneficiary of the successor trustee's distribution policies and procedures
 - Have an honest conversation about why previous types of disbursements may no longer be permitted
 - Ensure that the beneficiary is provided information verbally and in writing to ensure comprehension
- **Restatement (Third) § 36: Resigning trustee continues to have residual obligations to the trust beneficiary**

Duty to Report (generally)

Accountings for last fiscal year (or covered period) must contain:

- Statement of receipts and disbursements of principal and income
- Statement of assets and liabilities
- Trustee's compensation
- Agents hired and their relationship to trustee (if any)
- Statement that the recipient may petition court
- Statement that breach claims against the trustee may not be made after the expiration of 1 year

38

Denial Considerations

It is okay to decline appointment!

- PSNTs do not need to be the dumping ground of unwanted trusts/beneficiaries
 - May put the organization in danger (physically or financially)
 - Be cautious of non-standard trust language as managing multiple trust documents can become overwhelming and create liability
 - Does the PSNT have the staff to consistently refer to each trust document to ensure compliance?
 - Does the PSNT have the staff or acumen to perform what that trust is requiring?
- Consider decanting of low asset trusts from stand alone to pooled trust
 - Note: potential Medicaid issues (remainderperson) if d4a to d4c

BEST PRACTICE TIP

Ask some basic questions:

- Why does the present trustee not want to serve?
- How much money is in the trust?
- How much is the trust presently distributing?
- Have taxes been properly filed?
- Was the trust ever contested?
- Is there a letter of intent for the funds?
- What is the beneficiary's disability?
- How difficult is the beneficiary?
- Does the beneficiary want a new trustee?

39

STETSON
UNIVERSITY

2024 National Conference on Special Needs Planning and Special Needs Trusts

Thank You!

Administering Stand Alone Trusts:
Differences and Similarities to the Pooled Trust and the Many Considerations in Between

Megan Brand
Executive Director
Colorado Fund for People with
Disabilities
mbrand@cpfdtrust.org
www.cfpdtrust.org

Bradley J. Frigon
JD LL.M., CELA, CAP
Law Offices of Bradley J. Frigon, LLC
bfrigon@bjflaw.com
www.bjflaw.com

Peter J. Wall
Director of Fiduciary Services
True Link Financial Advisors, LLC
peter.wall@truelinkfinancial.com
www.truelinkfinancial.com

True Link Financial Advisors, LLC is an SEC-registered investment adviser and wholly owned subsidiary of True Link Financial Inc. Whereas True Link Financial Advisors, LLC provides the investment advisory services, True Link Financial Inc. provides the pooled trust and recordkeeping software, and the trust administration software and recordkeeping portal software ("True Link Platform"). The companies shall be referred to herein collectively as "True Link". When providing investment management services to special needs trust clients, the client is for True Link, not the individual advisors.

40

Disclosures

True Link's Investment Management Services are provided through True Link Financial Advisors, LLC, (the "Adviser") an investment adviser registered with the U.S. Securities and Exchange Commission ("SEC") and wholly-owned subsidiary of True Link Financial, Inc. ("True Link Financial") and, together with the Adviser, "True Link". Registration with the SEC authorities as a Registered Investment Adviser does not imply a certain level of skill or training nor does it constitute an endorsement of the advisory firm by the SEC. True Link Financial, Inc. provides the trust administration software and record-keeping platform as well as the True Link Visa Prepaid Card.

All content available within this presentation is general in nature, not directed or tailored to any particular person, and is for informational purposes only. Nothing contained herein should be deemed legal, tax or investment advice or a recommendation to purchase or sell any specific security. All scenarios contained herein are "made up" situations for purposes of education only, is not individualized, and is not intended to serve as a basis for your legal, investment or tax-planning decisions. **Specifically True Link does NOT provide legal or tax advice. Individuals are urged to consult with their own tax or legal advisors before entering into any advisory contract. Individual investor's results will vary. Investing involves risk, and you may incur a profit or loss regardless of the strategy selected.**

Peter Wall is not a licensed attorney or tax professional. The information contained herein is confidential and is not to be shared, distributed, or otherwise used, for any other purpose or by any other person without the written permission of Peter Wall and True Link.

The information contained herein reflects the opinions and projections of Peter Wall, not True Link, as of the date hereof, which are subject to change without notice at any time.

41

41

14