

SUB-ACCOUNT TRANSFERS:

The POMS and Uniform Acts

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I. TRUSTEE: AUTHORITY TO TRANSFER

A. TRUST DOCUMENT.

SPECIFIC GRANT OF AUTHORITY IN MASTER TRUST AGREEMENT.

1. Master Trust Agreement – Many MTAs grant the express authority to transfer a sub-account to another pooled trust, another d(4) trust or another supplemental needs trust.

- a) Examine the language for authority to transfer:
 - a. Sole discretion – is there another person that needs to agree? (i.e. grantor/beneficiary/guardian)
 - b. Absolute discretion or Triggering event status – is it limited to a beneficiary’s move to another state, or if it falls below a certain amount?
 - c. Type of trust - to any d(4) trust or limited to d(4)(C)?
- b) Trust Protector/Director or Trustee – is the authority vested in a trust protector or director?

Drafting Highlight:

“My Trustee is granted the sole and absolute discretion to distribute, in part or in whole, the remaining principal and income to a trust created pursuant to the terms of 42 USC 1396p(d)(4), et seq.”

“....if the beneficiary moves from xyz state...”

“....after due consideration of the appropriateness of the receiving trust...”

“....only upon the dissolution of this trust....”

“....without the consent of the beneficiary....”

B. UNIFORM DECANTING ACT.

SECTION 13. TRUST FOR BENEFICIARY WITH DISABILITY. (Emphasis added)

(a) In this section:

(1) **“Beneficiary with a disability”** means a beneficiary of a first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated [incompetent].

(2) **“Governmental benefits”** means financial aid or services from a state, federal, or other public agency.

(3) **“Special-needs fiduciary”** means, with respect to a trust that has a beneficiary with a disability:

(A) **a trustee or other fiduciary**, other than a settlor, that has **discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries;**

(B) if no trustee or fiduciary has discretion under subparagraph (A), a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or

(C) if no trustee or fiduciary has discretion under subparagraphs (A) and (B), a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.

(4) **“Special-needs trust”** means a trust the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

(b) A special-needs fiduciary may exercise the decanting power under Section 11 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

(1) a second trust is a special-needs trust that benefits the beneficiary with a disability; and

(2) the special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

(c) In an exercise of the decanting power under this section, the following rules apply:

(1) Notwithstanding Section 11(c)(2)¹, the interest in **the second trust** of a beneficiary with a disability may:

(A) be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. Section 1396p(d)(4)(C);

or,

(B) contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. Section 1396p(d)(4)(A).

(2) Section 11(c)(3) does not apply to the interests of the beneficiary with a disability.

(3) Except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, must grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficiary's beneficial interests in the first trust.

SECTION 7. NOTICE; EXERCISE OF DECANTING POWER. (Emphasis added)

(a) In this section, a notice period begins on the day notice is given under subsection (c) and ends [59] days after the day notice is given.

(b) Except as otherwise provided in this [act], an authorized fiduciary may exercise the decanting power **without the consent of any person and without court approval.**

(c) Except as otherwise provided in subsection (f), an **authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than [60] days before the exercise to:**

(1) **each settlor of the first trust**, if living or then in existence;

(2) each **qualified beneficiary** of the first trust;

¹ Section 11(c)(2)a second trust may not:Include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust....

(3) each holder of a presently exercisable power of appointment over any part or all of the first trust;

(4) each person that currently has the right to remove or replace the authorized fiduciary;

(5) **each other fiduciary of the first trust;**

(6) **each fiduciary of the second trust;** and

(7) [the Attorney General], if Section 14(b) applies.

(d) An authorized fiduciary is not required to give notice under subsection (c) to a qualified beneficiary who is a minor and has no representative or] [An authorized fiduciary is not required to give notice under subsection (c)] to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

(e) A notice under subsection (c) must:

(1) specify the manner in which the authorized fiduciary intends to exercise the decanting power;

(2) specify the proposed effective date for exercise of the power;

(3) **include a copy of the first-trust instrument;** and

(4) **include a copy of all second-trust instruments.**

(f) The decanting power may be exercised before expiration of the notice period under subsection (a) **if all persons entitled to receive notice waive the period in a signed record.**

(g) The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file an application under Section 9 asserting that:

(1) an attempted exercise of the decanting power is ineffective because it did not comply with this [act] or was an abuse of discretion or breach of fiduciary duty; or

(2) Section 22 applies to the exercise of the decanting power.

(h) An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under subsection (c) if the authorized fiduciary acted with reasonable care to comply with subsection (c).

C. UNIFORM TRUST CODE:

SECTION 111. NONJUDICIAL SETTLEMENT AGREEMENTS. (Emphasis added)

(a) For purposes of this section, **“interested persons” means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.**

(b) Except as otherwise provided in subsection (c), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this [Code] or other applicable law.

(d) Matters that may be resolved by a nonjudicial settlement agreement include:

- (1) the interpretation or construction of the terms of the trust;
- (2) the approval of a trustee’s report or accounting;
- (3) direction to a trustee to refrain from performing a particular act **or the grant to a trustee of any necessary or desirable power;**
- (4) the resignation or appointment of a trustee and the determination of a trustee’s compensation;
- (5) transfer of a trust’s principal place of administration; and
- (6) liability of a trustee for an action relating to the trust.

(e) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in [Article] 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

D. UNIFORM TRUST CODE. *COURT INTERVENTION.*

SECTIONS 201 – 305. (Emphasis added)

SECTION 201. ROLE OF COURT IN ADMINISTRATION OF TRUST.

- (a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.
- (b) A trust is not subject to continuing judicial supervision unless ordered by the court.
- (c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

SECTION 202. JURISDICTION OVER TRUSTEE AND BENEFICIARY.

- (a) By accepting the trusteeship of a trust having its principal place of administration in this State or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.
- (b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.
- (c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

SECTION 203. SUBJECT-MATTER JURISDICTION.

- (a) The [designate] court has exclusive jurisdiction of proceedings in this State brought by a trustee or beneficiary concerning the administration of a trust.
- (b) The [designate] court has concurrent jurisdiction with other courts of this State of other proceedings involving a trust.

SECTION 204. VENUE.

- (a) Except as otherwise provided in subsection (b), venue for a judicial proceeding involving a trust is in the [county] of this State in which the trust's

principal place of administration is or will be located and, if the trust is created by will and the estate is not yet closed, in the [county] in which the decedent's estate is being administered.

(b) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in a [county] of this State in which a beneficiary resides, in a [county] in which any trust property is located, and if the trust is created by will, in the [county] in which the decedent's estate was or is being administered.

SECTION 301. REPRESENTATION: BASIC EFFECT.

(a) Notice to a person who may represent and bind another person under this [article] has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this [article] is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in Sections [411 and] 602, a person who under this [article] may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this [article] with respect to the termination or modification of a trust under Section 411(a).

SECTION 303. REPRESENTATION BY FIDUCIARIES AND PARENTS. To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) a [conservator] may represent and bind the estate that the [conservator] controls;

(2) a [guardian] may represent and bind the ward if a [conservator] of the ward's estate has not been appointed;

(3) an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

(4) a trustee may represent and bind the beneficiaries of the trust;

(5) a personal representative of a decedent's estate may represent and bind persons interested in the estate; and

(6) a parent may represent and bind the parent's minor or unborn child if a [conservator] or [guardian] for the child has not been appointed.

SECTION 305. APPOINTMENT OF REPRESENTATIVE.

(a) If the court determines that an interest is not represented under this [article], or that the otherwise available representation might be inadequate, the court may appoint a [representative] to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A [representative] may be appointed to represent several persons or interests.

(b) A [representative] may act on behalf of the individual represented with respect to any matter arising under this [Code], whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a [representative] may consider general benefit accruing to the living members of the individual's family.

II. BENEFICIARY: AUTHORITY TO CREATE AND FUND NEW SUB-ACCOUNT

A. POMS SI 01120.203.B.6.

b. Power of attorney

A power of attorney (POA) can establish legal authority to act with respect to the assets of an individual. A trust established under a POA for the disabled individual will result in a trust that we consider to be established through the actions of the disabled individual themselves because the POA establishes an agency relationship.

NOTE: A representative payee, in their capacity as representative payee, does not necessarily have the legal authority to establish a trust or transfer funds into a trust for the disabled individual. For information about a representative payee transferring benefits into a trust, see GN 00602.075.

c. Legal authority

The person or entity establishing the trust with the assets of the legally competent, disabled individual or transferring the assets of the individual to the trust must have legal authority to act with respect to the assets of the individual. Attempting

to establish a trust with the assets of another individual without proper legal authority to act with respect to the assets of that individual will generally result in an invalid trust under State law.

NOTE: Do not routinely question the validity of a trust under State law. However, if you have reason to question the validity of a trust under State law (e.g., because it is apparent the individual or entity that established the trust did not have legal authority to act with respect to the assets), please turn to your Regional Trust Lead (RTL), who may consult with the Office of Program Law (OPLaw) on the issue.

B. UNIFORM POWER OF ATTORNEY ACT.

SECTION 201. AUTHORITY THAT REQUIRES SPECIFIC GRANT; GRANT OF GENERAL AUTHORITY. (Emphasis added)

(a) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

- (1) create, amend, revoke, or terminate an inter vivos trust;
- (2) make a gift;
- (3) create or change rights of survivorship;
- (4) create or change a beneficiary designation;
- (5) delegate authority granted under the power of attorney;
- (6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;
- (7) exercise fiduciary powers that the principal has authority to delegate;
- (8) exercise authority over the content of electronic communications, as defined in 18 U.S.C. Section 2510(12)[, as amended,] sent or received by the principal[; or,
- (9) disclaim property, including a power of appointment.

(b) Notwithstanding a grant of authority to do an act described in subsection (a),

unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal, may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(c) Subject to subsections (a), (b), (d), and (e), if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in Sections 204 through 216.

(d) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to Section 217.

(e) Subject to subsections (a), (b), and (d), if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(f) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(g) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.

B. UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT.

SECTION 414. POWERS OF CONSERVATOR REQUIRING COURT APPROVAL.

(a) Except as otherwise ordered by the court, a conservator must give notice to persons entitled to notice under Section 403(d) and receive specific authorization by the court before the conservator may exercise with respect to the conservatorship the power to:

(1) make a gift, except a gift of de minimis value;

(2) sell, encumber an interest in, or surrender a lease to the primary dwelling of the individual subject to conservatorship;

(3) convey, release, or disclaim a contingent or expectant interest in

property, including marital property and any right of survivorship incident to joint tenancy or tenancy by the entireties;

(4) exercise or release a power of appointment;

(5) **create a revocable or irrevocable trust of property of the conservatorship estate**, whether or not the trust extends beyond the duration of the conservatorship, or revoke or amend a trust revocable by the individual subject to conservatorship;

(6) exercise a right to elect an option or change a beneficiary under an insurance policy or annuity or surrender the policy or annuity for its cash value;

(7) exercise a right to an elective share in the estate of a deceased spouse [or domestic partner] of the individual subject to conservatorship or renounce or disclaim a property interest;

(8) grant a creditor priority for payment over creditors of the same or higher class if the creditor is providing property or services used to meet the basic living and care needs of the individual subject to conservatorship and preferential treatment otherwise would be impermissible under Section 428(e); and

(9) make, modify, amend, or revoke the will of the individual subject to conservatorship in compliance with [the state's statute for executing a will.

(b) In approving a conservator's exercise of a power listed in subsection (a), the court shall consider primarily the decision the individual subject to conservatorship would make if able, to the extent the decision can be ascertained.

(c) To determine under subsection (b) the decision the individual subject to conservatorship would make if able, the court shall consider the individual's prior or current directions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable by the conservator. The court also shall consider:

(1) the financial needs of the individual subject to conservatorship and individuals who are in fact dependent on the individual subject to conservatorship for support, and the interests of creditors of the individual;

(2) possible reduction of income, estate, inheritance, or other tax liabilities;

(3) eligibility for governmental assistance;

(4) the previous pattern of giving or level of support provided by the

individual;

(5) any existing estate plan or lack of estate plan of the individual;

(6) the life expectancy of the individual and the probability the conservatorship will terminate before the individual's death; and

(7) any other relevant factor.

(d) A conservator may not revoke or amend a power of attorney for finances executed by the individual subject to conservatorship. If a power of attorney for finances is in effect, a decision of the agent takes precedence over that of the conservator, unless the court orders otherwise.

III. DUTIES: TRUSTEE'S DUTY TO BENEFICIARY

A. POMS SI 01120.199.E.2.

Policy for early termination provisions:

2. Exception for transfers to a secondary trust upon early termination. An early termination provision in a section 1917(d)(4)(A) special needs trust or section 1917(d)(4)(C) pooled trust does not need to meet the above criteria if the provision allows solely for a transfer of the beneficiary's assets to a secondary section 1917(d)(4)(A) or section 1917(d)(4)(C) trust of which the same individual is the beneficiary.

The early termination provision must contain specific limiting language that precludes the early termination from resulting in disbursements other than to the secondary section 1917(d)(4)(A) or section 1917(d)(4)(C) trust or to pay for the administrative expenses listed in SI 01120.199E.3 in this section and in SI 01120.201F.4.

B. UNIFORM TRUST CODE.

SECTION 801. DUTY TO ADMINISTER TRUST. Upon acceptance of a trusteeship, the trustee shall administer the trust in **good faith, in accordance with its terms and purposes and the interests of the beneficiaries**, and in accordance with this [Code].

SECTION 804. PRUDENT ADMINISTRATION. A trustee shall administer the trust as **a prudent person would, by considering the purposes, terms, distributional**

requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

C. POMS SI 01120.225B. and D.

Pooled Trust Management Provisions

B. Background of pooled trusts management

To qualify for exception under the provisions of section 1917(d)(4)(C), a pooled trust must be managed by a non-profit association. By law, each trust beneficiary must have a separate account, but the non-profit manager can pool these funds with the funds of other members of this communal trust. 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.

D. Policy on use of for-profit entities

If a non-profit association employs the services of a for-profit entity, the non-profit association must maintain ultimate managerial control over the trust. The for-profit entity may handle certain trust functions on behalf of the non-profit association; however, the use of a for-profit entity must always be subordinate to the non-profit managers of a pooled trust under section 1917(d)(4)(C).

For example, the non-profit association must be responsible for:

- determining the amount of the trust corpus to invest;
- removing or replacing the trustee; and
- making the day-to-day decisions regarding the health and well-being of the pooled trust beneficiaries.

NOTE: This list is not intended to be exhaustive. These are a few examples of the type of authority that must vest in the non-profit association.

D. POMS SI 01120.200B. and D.

Introduction to trusts

B.16. Third-party trust

A third-party trust is a trust established with the assets of someone other than the trust beneficiary (or their spouse).

D.2. Trusts that are not resources

If an individual does **not** have the legal **authority to revoke or terminate** the

trust or to **direct the use of the trust assets for their own support and maintenance**, the trust principal is not the individual's resource for SSI purposes.

E. POMS SI 01130.740

Achieving a Better Life Experience (ABLE) Accounts

B.2. Contributions to ABLE account

- Contributions are payments of funds into an ABLE account
- Contributions must be in cash and may be made in the form of cash or a check, money order, credit card, electronic transfer, Gift of Independence card, or a similar method.
- Contributions may be made by any person. ("Person," as defined by the Internal Revenue Code (IRC), includes an individual, trust, estate, partnership, association, company, or corporation.)
- The total annual amount of contributions from all sources is limited to the amount of the per-donee gift-tax exclusion in effect for a given calendar year.

C.3. Exclude up to and including \$100,000 of balance

- Exclude up to and including \$100,000 of the balance of funds in an ABLE account from the resources of the designated beneficiary.