

## Your Beneficiary Up and Left: Liabilities and Responsibilities of the Trustee

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## What is a Pooled Trust?

Public Benefit Eligibility Rules Govern  
Creation, Funding and Distributions

- First-party exempt asset (by statute 42 USC 1396p(d)(4)(C))
  - Individual, Parent, Grandparent, Guardian or Court
  - Sole Beneficiary of Disabled Beneficiary
  - Managed by Non-profit
  - Medicaid Repayment
  - No age restriction but might be transfer of assets issue
- Third-party exempt asset
  - Created by third-party
  - Assets of third-party used to fund
  - Individual cannot revoke
  - Individual cannot direct the use for support and maintenance

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## State Law Controls Administration

- Trustee: authority to transfer
  - Ex. POMS allows early termination, but does state law give trustee authority?
- Beneficiary: authority to create/fund new account
  - Ex. POMS allows agent to create, a sub-account but does state law prohibit?
- Duties: trustee's duty to beneficiary
  - Ex. POMS allows SNT to SNT transfer, but does state law impose duty to investigate new SNT?

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## Senior General Counsel's Role at Wispact

- Review new trust applications
- Provide support for Beneficiary Specialists for complex distribution requests
- Provide support for attorneys who create sub-accounts
- Draft policy initiatives
- Review vendor contracts
- Serve as support for BOD meetings
- **Review Transfer Requests!**

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## Why Would a Beneficiary Leave?

- Required services not provided by PSNT
  - Case Management
  - Rep Payee
- Out of state move
- Soured Relationship
  - Move to another pooled trust within state
  - Move to another pooled trust that's national
  - Transfer to stand-alone trust
- Transfer to ABLE account

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## How Can and Should the Pooled Trust Help?

- How long to continue distributions?
  - Moving expenses
  - Application fee to new pooled trust
  - Attorney creating new sub-account in new state or drafting stand-alone
- Co-counsel with attorney in new state
- Lock the trust and kick them out the door?

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## Wispect's Policy

- Official policy is not to process distributions for beneficiaries out of state - have 90 days to move the trust
- Medicaid rules differ by state
- Beneficiary finds another pooled trust
- Beneficiary executes joinder with new non-profit
- Hired outside counsel compares joinders and drafts Non-Judicial Settlement Agreement
- Collect everyone's signatures
- Collect final fees
- Wire funds

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## Methods of Transfer

### **Non-Judicial Settlement Agreement**

- Can modify a trust any way that a Court could
- Can become costly
- Need to locate "all interested parties"
- Need to get signatures and documents returned to you
- Can drag out a long time
- Releases the trustee from liability when accountings are included and approved

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## Methods of Transfer

### **Court Order**

- Safest for Trustee
- Can potentially take a long time to get on the Court's schedule
- Costliest
- Releases the trustee from liability because Court approves accountings and discharges trustee

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## TRUSTEE: AUTHORITY TO TRANSFER

### Does the Master Trust Agreement include a Specific Grant of Authority to Transfer?

- Sole Discretion or Shared Authority? Must the Trustee get another's approval?
- Absolute Discretion or Triggering Event? Value of Account or State of Beneficiary Residence
- Limitations? (d(4) to d(4))
  - Should be or risks being counted resource
- Third-party? Trust Protector

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## TRUSTEE: AUTHORITY TO TRANSFER

### Uniform Decanting Act (UDA)

- Special needs fiduciary

**If....**

- Expanded distributive discretion

**May distribute...**

- Special needs trust benefiting beneficiary

**If...**

- Second trust furthers purposes of first trust.

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## TRUSTEE: AUTHORITY TO TRANSFER

### UDA Notice Requirements

**\*\*Does not require consent or court approval!**

**But....**

- Sixty days notice (may be waived)

**To...**

- Each living settlor
- Each qualified beneficiary
- Power of appointment
- Individual with authority to replace fiduciary
- Each fiduciary of first trust
- Each fiduciary of second trust

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## TRUSTEE: AUTHORITY TO TRANSFER

### UDA Notice Requirements

- Specify the manner of the exercise
- Specify effective date
- Include copy of first trust
- Include copy of second trust

**\*Exercise Reasonable Care\***

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## TRUSTEE: AUTHORITY TO TRANSFER

### Uniform Trust Code (UTC) Non-judicial Settlement Agreement

- **Matters:** Grant to a trustee of any necessary or desirable power (power to transfer)
- **Limitations:** Cannot violate a material purpose of the trust
- **Interested Persons:** All persons whose consent would be required to be approved by the court (same as UDC)
- **Possibilities:** Can be approved by the courts

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## TRUSTEE: AUTHORITY TO TRANSFER

### UTC - Court Intervention

- **Matters:** Any matter involving....an action to declare rights
- **Jurisdiction:** Principal place of administration
  - Trustee and beneficiary, by receiving distribution, submit to that state's jurisdiction
- **Venue:** County or city of principal place of administration

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## TRUSTEE: AUTHORITY TO TRANSFER

### UTC – Court Intervention

- **Notice:** All interested parties necessary to obtain complete personal jurisdiction to bind all parties
- **Representation:**
  - Conservator
  - Guardian
  - Agent (POA with authority)
  - Trustee (beneficiary trust)
  - Personal Representative (may represent persons interested in estate)
  - Parent (minor beneficiary or unborn beneficiary)
- Court may appoint guardian *ad litem*

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## BENEFICIARY: AUTHORITY TO CREATE AND FUND NEW SUB-ACCOUNT

### Powers of Attorney – POMS and Uniform Power of Attorney Act (UPAA)

- **POMS SI 01120.203B6.**
    - Agent CAN establish and fund sub-account IF...
    - Document grants the authority to create and fund trusts
  - **UPAA**
    - Document MUST SPECIFICALLY grant authority to
      - Create, amend, revoke or terminate an inter vivos trust
      - Make a gift
    - Document MUST SPECIFICALLY grant authority to
      - Make gifts to trust
      - Make gifts outside of current estate plan
      - Make gifts greater than estate tax exclusion
- OR Allow....
- Public benefits planning

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## BENEFICIARY: AUTHORITY TO CREATE AND FUND NEW SUB-ACCOUNT

### Guardians and Conservators – POMS and Uniform Guardianship, Conservatorship, and Other Protective Arrangement Act (UGCOPAA)

- **POMS**
    - Both stand alone and pooled can be established by guardian
  - **WHO FUNDS?**
  - **UGCOPAA** – Conservator does not have authority UNLESS
    - Court order
- OR.....
- Notice to interested parties
- AND....
- Specific authorization from court
- TO...
- Make a gift
  - Create an ..... irrevocable trust of property of the conservatorship
- Court SHALL consider the individual's
    - Eligibility for governmental assistance

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DUTIES: TRUSTEE'S DUTY TO BENEFICIARY

Early Termination

- POMSSI 01120.199E.2
  - Early termination allowed
    - Limited to d(4) trust
    - Limited to specific disbursements

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DUTIES: TRUSTEE'S DUTY TO BENEFICIARY

Duty of Trustee to Investigate?

- Uniform Trust Code (UTC)
  - Sec. 801: Duty to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiary
  - Sec. 804: Duty to administer as a prudent person would, by considering the purposes, terms and distributional requirements

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DUTIES: TRUSTEE'S DUTY TO BENEFICIARY

Duty of Trustee to Investigate?

- POMSSI 01120.225B and D.
  - Pooled trust must be MANAGED by a non-profit association
    - IF...
    - non-profit employs a for-profit entity
    - THEN...
    - non-profit must maintain ultimate managerial control
- POMSSI 01120.200
  - Third-party trusts
    - Assets of third-party
    - Individual does not have authority to
      - revoke or terminate
      - Direct the use of trust assets for support and maintenance
- Non-profit Retention Policy

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## DUTIES: TRUSTEE'S DUTY TO BENEFICIARY

### Contributions to ABLE Accounts to Close Trust

- POMSSI 01130,740
  - Trust can make contributions to ABLE account
  - Up to annual gift tax exclusion amount then in effect
  - Only first \$100,000 excluded for SSI determination

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## Comparison of Pooled Trusts' Retention Policies

- Wispact's retention language
  - Federal statute and language
  - Contribution Agreement language
- Other pooled trusts
  - Retain 20%
  - Retain 50%
  - Etc. (more examples)

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## Let's think: Who is going to be unhappy with this transfer?

- First-party trust
  - Remainder beneficiaries (would they get anything anyway?)
  - Estate recovery? - payback provisions correct - all states
- Third-party trust
  - Remainder beneficiaries
  - Creator is no longer alive?
    - May need to go to Court

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## What about transfers TO your pooled trust?

### Reverse Analysis

- From a stand-alone trust
  - Costly administration
  - Size of account
- Don't like current trustee
  - Family dynamics
  - Bank or corporate trustee not addressing beneficiary's needs
- From other pooled trust, just moved to new state
- From an ABLE account (beneficiary needs more oversight or support)
  - Tax implications

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## How Wispact Accepts Transfers

- Authority in the transferring trust docs
  - Language allowing trustee to fund another trust or make full distribution to pooled trust
- Decanting following the state statute
  - Wispact requires the Trustee's Certification that they have followed the statute (parties, timing)
- Non-Judicial Settlement Agreement - not used as much after adopting UDA
  - Parties - primary beneficiary, remainder beneficiaries, creator/grantor
- Court Order

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## But, what does Wispact see come in?

- A check with a letter saying "open an account"
- A check with application documents but no supporting documentation for the transfer of funds
- A copy of a Will or Trust setting up a stand-alone trust, but says nothing about Wispact or transfer authorities
- An application with no hint of where the funds are coming from, and then later on a check originating from some other trust

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# Questions?

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