Surrogates Session: Special Needs Trusts, Guardians Ad Litem, Article 17-A

Honorable Peter J. Kelly
Queen's County Surrogate's Court, Jamaica, NY

Honorable Richard Kupferman
Saratoga County Surrogate's Court, Ballston Spa, NY

Honorable Acea M. Mosey
Erie County Surrogate's Court, Buffalo, NY

Honorable Brandon R. Sall
Westchester County Surrogate's Court, White Plains, NY

Moderators:
Edward V. Wilcenski, Esq.
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Ron M. Landsman, Esq.
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NYSBA ELDER AND SPECIAL NEEDS LAW SECTION
SUMMER MEETING 2019
SURROGATE'S COURT JUDGES' PANEL

Panelists: **Hon. Peter Kelly (Queens County)**
Hon. Richard Kupferman (Saratoga County)
Hon. Acea Mosey (Erie County)
Hon. Brandon Sall (Westchester County)

Moderators: **Edward V. Wilcenski, Esq. (Clifton Park, NY)**
Ron M. Landsman, Esq. (Rockville, MD)

Fact Pattern: Michael

Michael is 17 years old and has a moderate developmental disability. He lives with his parents. Both work, and both are active and involved advocates for their son.

He reads at roughly a sixth-grade level. His math skills are more rudimentary, and he has difficulty understanding money and making change in simple cash transactions. He has difficulty navigating social situations and is easily manipulated. Luckily, he is in a small and supportive public school where he is well known and supported by staff and students alike.

Michael has an IEP (Individualized Education Plan), and also receives services through the Office of People With Developmental Disabilities (OPWDD) Waiver.[1] The Waiver provides him with a Care Manager (formerly known as a Service

[1] The OPWDD Waiver is a Medicaid funded program. Michael is Medicaid eligible even though he is under 18 years of age with working parents, because one of the rules that is "waived" for people in Waiver programs like this one is the rule that a parent's income and resources are countable in determining financial eligibility for Medicaid. The Supplemental Security Income (SSI) program does not have a similar rule, and so Michael is not yet eligible for SSI. When he reaches 18 years of age, the SSI program will look at him as an independent adult, and so long as he does not own more than $2,000 in countable resources, he can apply for and begin receiving an SSI check at that time.

Coordinator) and some staff who take him out in the community to recreate and to practice life skills.

He drives, he volunteers at a local fire department where he helps wash the trucks and maintain the equipment. He has an unpaid internship – arranged by his school - at a local insurance office where he makes copies, shreds documents, and does basic scanning. He has a job coach most days.

Michael has no independent property of his own. His parents pay all his bills.

He will turn 18 in three months. His parents understand that they will need legal authority to advocate for him once he becomes an adult, and they are considering an application to become his court appointed guardians under Article 17A of the SCPA.

Question:

1. Michael's parents obtain the required physician's affirmation and psychologist's affidavit required by the statute, both of which confirm that he has a developmental disability which meets the statutory criteria under SCPA 1750-a. Would you require or take any additional steps to investigate the nature and scope of the disability?

If you believe that Michael's disability does not warrant the plenary relief under Article 17A, how would you proceed? Would you dismiss the petition, or convert the matter to an Article 81 *sua sponte*?

2. Do you ask for any type of reporting for a personal needs (only) guardian?

Assume that the petition is denied in favor of having Michael execute a Durable Power of Attorney and Health Care Proxy. A few years later you hear that Michael has executed new documents appointing a "girlfriend" who is clearly taking advantage of him financially. His parents return to court to ask you to reconsider their appointment.

3. His disability has not changed. Do you entertain the petition? To what extent do you support Michael's right to make ***bad*** decisions?

4. Do you have any thoughts or comments on Supported Decision Making? See https://www.includenyc.org/resources/tip-sheet/supported-decision-making-an-alternative-to-guardianship

The Court appoints a Guardian of the Person and Property for Michael under Article 17A.

Fast forward 5 years: Michael is now 22 years old, has graduated from high school with an IEP diploma, and has moved out into an independent apartment, where he has a roommate – also with a moderate developmental disability. The apartment is close to his parents' home, and his parents continue to provide some financial and other support. In addition, Michael receives Medicaid funded support from a local disability service provider.

Staff visit his apartment to help him review and pay bills, grocery shop and provide other residential supports. Staff turnover is high and assigned staff are often young and inexperienced, and so his parents end up spending more time than they would like in overseeing and managing this residential arrangement.

Michael is now receiving SSI as his only source of income.

Later that year, Michael's grandfather dies. The grandfather named Michael as direct beneficiary on a life insurance policy with a $500,000 death benefit. In order to preserve Michael's eligibility for Medicaid, the Guardian seeks approval to establish a first party supplemental needs trust and to fund the trust with the policy proceeds. The request is filed as a petition to withdraw funds from the guardianship account and transfer them to the trustee of a first party supplemental needs trust (SNT). A local bank is proposed as trustee.

5. Would the Court appoint a Guardian *ad litem* (GAL) to represent Michael in this proceeding, and if so, what criteria does the Court use in identifying GALs in cases involving SNTs?

The proposed SNT meets the four basic statutory criteria for first party SNTs under federal and state law[2]: Michael is under 65 years of age, he has a qualifying disability, the trust names his parents as settlors (and will be established pursuant to court order), and the trust provides the Medicaid program with a right of recovery upon Michael's death.

6. Would the Court require any notice of the proceeding to establish the SNT on the local Department of Social Services? If so, on what legal basis?

7. Would the Court treat DSS as a party entitled only to notice pursuant to SCPA 1753(2), or a party entitled to service of process under SCPA 1753(1)?

8. DSS demands changes to the trust document which are not required by statute or by NYS Regulations under 18 NYCRR 360-4.5. What weight, if any, does the Court give to DSS counsel in proceedings to establish an SNT?

9. Are there any additional criteria/provisions that the Court will require in a proposed SNT?

[2] 1396p(d)(4)(A); NY Social Services Law 366(2)(b)(2)(iii)

The trust is established and funded with the permission of the Court, and the trust contains the optional language in 7-1.12(e)(2)(i) which allows the trustee to make distributions from the SNT even if the distribution will impact benefits, so long as the distribution puts the beneficiary in a better position.

The SNT includes a provision requiring the Trustee to account on an annual basis. The accounting is due in January of each year, together with the annual report of the Guardian of the Property (which in this case will be a simple "zero balance" report, as all guardianship assets are now in the hands of the trustee).

The first annual accounting shows the following:

* The Trustee is paying private staff to provide additional in-home support for Michael. Michael might have staff available through the Waiver, but the family is frustrated by the high turnover, and prefer to use privately paid staff for many of these services, as they are more experienced and more reliable.

* The Trustee has been paying for cable, utilities, internet and similar expenses. The utility payments have the effect of reducing Michael's SSI by one third.

* The cable, utility and internet payments are not pro-rata. Rather, the trustee is paying the expenses in full, even though there are two people living in the apartment. Upon inquiry, the trustee tells the examiner that the other roommate has been associating with people who seem to be taking advantage of him and causing him to spend his own SSI income on their entertainment. The roommate has no guardian, no involved family, and staff from the agency that is supposed to be serving him are unhelpful, as they take the position that he can spend his money as he wishes.

10. In reviewing the annual accounting of the trustee, and what would trigger a request (by the examiner) that the matter be reviewed by the judge? In other words, what do your examiners look for when reviewing SNT accountings?

11. Assume that the Court had concerns about the administration of the trust based on the review of the examiner, and on its own initiative directed the trustee to file an interim accounting for the settlement of its accounts. In reviewing the accounting, what standard of review would be applied by the Court? Abuse of discretion? Best interest? Substituted judgment?

12. What weight would you give to Michael's opinion on the expenditures? What if he said he wanted to pay for his roommate's share, because the roommate was his best friend and he knew that he didn't have any money? Phrased differently, to what extent should courts support a trustee's decision to allow Michael to make **bad** decisions?

13. What is your reaction to a Trustee's use of trust to pay for services – such as private aides – when those same services might be funded through Medicaid? Stated more generally, how do you analyze whether a distribution qualifies as a "supplemental need", and has that analysis changed over time?

14. Trusteeship is different from guardianship, and there is a separate and well established body of law governing discretionary trusts. Once the court approves the use of a trust as the appropriate management arrangement, what is the relationship between the guardianship and the trusteeship?

Michael and his family have had enough of this freeloading roommate. His lease is up and there is enough money in the trust to purchase a modest townhouse in Michael's community. The current value of the trust is currently $450,000, and the townhome would cost $275,000 (just over 60% of the value of the trust).

15. Assume that there is no restriction on real estate purchases in the order approving the establishment of the trust or under the terms of the trust. Is this a purchase that the court would consider to be within the discretion of the trustee (meaning that the Trustee could purchase the property without prior court order)?

16. Are there any types of distributions that the court considers to be outside of the scope of the discretion of the trustee? If so, what is the legal basis for such a limitation?

The Trustee is counselled to get court approval for the real property purchase given the amount of the expense. The petition asks that title to the home be taken in the name of the guardians (and not the trustee), because Michael is well under the age where the Medicaid program would have a right of recovery against his estate, and he may one day marry and have children. Taking title outside the trust would allow the home to pass to his beneficiaries without Medicaid estate recovery if he were to die prior to reaching the age of 55 (and with a ten year retroactive limit after reaching 55).

DSS is served with process in the proceeding in light of its "remainder" interest, and files objections, arguing that title must remain in the name of the trust to protect the Department's interest.

17. Does the Trustee have an affirmative obligation to consider the Department's interest as it does an individual remainder beneficiary in other types of irrevocable trusts?

Fact Pattern: Settlement in Supreme Court

Michael's parents are appointed as Guardians under Article 17A. His grandfather is alive and well, and Michael doesn't receive a $500,000 inheritance. Instead, on his way to visit his grandfather one afternoon he gets rear ended by a Fed Ex delivery truck while at a traffic light and is severely injured. A lawsuit is filed in Supreme Court, and a significant settlement is reached.

The personal injury attorney files a proceeding under Article 12 of the CPLR seeking settlement of the lawsuit and asking the court to direct payment of the proceeds into a first party supplemental needs trust established for Michael's benefit. A bank is named as trustee. The court approves the request and the trust is established and funded. Once the settlement is paid, a stipulation of discontinuance is filed and the matter is closed.

18. What jurisdiction and/or involvement – if any – does the Surrogate's Court have over the SNT established in Supreme Court?

Would the Surrogate's Court entertain an application for relief by the trustee – e.g., a petition to pay caregiver compensation, purchase of a home, or settlement of the trustee's accounts?

19. Assume the trust is administered for a number of years, and the trustee is interested in having its accounts settled. Do the property guardians have the authority to sign an informal settlement?

If no guardian was appointed for Michael and an informal settlement agreement with releases was filed with his signature (or signed by his agent under power of attorney) pursuant to SCPA 2202, would you consider Michael bound by the agreement if he later petitions for relief against the fiduciary?

Written Materials Appended:

Landsman, Ron M., Esq., *When Worlds Collide: State Trust Law and Federal Welfare Programs*, NAELA Journal Volume 10, No. 1 (Spring 2014)

Wilcenski, Edward V., Esq. and Pleat, Tara Anne, Esq., *Administration of Special Needs Trusts: Development of an Improved Approach (Part I)* (NYS Bar Journal March 2019)

Matter of Capurso, 2019 NYLJ LEXIS 1003 (Surr. Ct. Westchester Co. 2019)

Matter of KeyBank N.A., 58 Misc. 3d 235 (Surr. Ct. Saratoga Co. 2017)

Matter of Tinsmon (Lasher), 61 Misc. 3d 218 (Surr. Ct. Albany Co. 2018)

Matter of Tinsmon (Lasher), 169 A.D.3d 1305 (Third Dept. 2019)

Matter of McMichael, 2017 NYLJ LEXIS 2245 (Surr. Ct. Queens Co. 2017)

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By Ron M. Landsman, Esq., CAP

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When Worlds Collide: State Trust Law and Federal Welfare Programs

By Ron M. Landsman, Esq., CAP

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I. Introduction

"Special needs trusts,"[1] which enable people with assets to qualify for Supplemental Security Income (SSI)[2] and Medicaid,[3] are the intersection of two different worlds: poverty programs and the tools of wealth management. Introducing trusts into the world of public benefits has resulted in deep confusion for public benefits administrators.

Trusts traditionally involve wealth and its management. SSI and Medicaid are public benefit programs for poor people. Even if adjusted for inflation, the asset limits for SSI eligibility[4] — the easiest door to Medicaid eligibility — or a year's SSI income[5] is of the same order of magnitude as just the fees for most private bank or trust firms.[6] The one valuable asset permitted — a personal residence — is eschewed as an asset in wealth management trusts.[7] SSI and Medicaid administrators and beneficiaries alike would have

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1 The term is not well defined but generally refers to trusts designed to allow their beneficiaries to enjoy their benefits while also qualifying for means-tested public benefit programs such as Supplemental Security Income (SSI) and Medicaid. *See* Stuart D. Zimring et al., Fundamentals of Special Needs Trusts § 1.02, 1-3 – 1-4 (Lexis Nexis 2013); *see also* Ron M. Landsman, Special Needs Trusts, in *A Practical Guide to Estate Planning*, ch. 14, 197–198 (Jay Soled, ed., ABA 2012). In its first published discussion implementing federal legislation approving trusts that coordinate with public benefits eligibility, the Centers for Medicare & Medicaid Services (CMS) stated that a trust under 42 U.S.C. § 1396p(d)(4)(A) (2013) was "often referred to as a special needs trust." State Medicaid Manual, "Transmittal 64," General and Categorical Eligibility Requirements, § 3259.7A, http://www.sharinglaw.net/elder/Transmittal64.htm (accessed June 6, 2013) [hereinafter Transmittal 64].

2 Created in 1972, SSI is the federal cash benefit program for low-income people who are aged (65 or older), blind, or disabled. Social Security Act, tit. XVI, § 1601, added Oct. 30, 1972, Pub. L. 92-603, tit. III, §301, 86 Stat. 1465; 42 U.S.C. §§ 1381-1383f.

3 Medicaid, created in 1965, is the joint federal-state program providing medical and remedial services to the elderly and disabled poor. It is roughly parallel to Medicare, an exclusively federal program providing medical services to the elderly and disabled who get employment-based benefits through Social Security. Social Security Act, tit. XIX, §1901, added July 30, 1965, Pub. L. 89-97, tit. I, § 121(a), 79 Stat. 343; 42 U.S.C. §§ 1396-1396w-5. Medicaid's great significance is in providing long-term remedial residential services, something not available from either Medicare or private health insurance.

4 Congress set a fixed asset limit of $1,500 for SSI eligibility in 1972 and raised it in increments of $1,000 from 1985 until it reached $2,000 in 1989. 42 U.S.C. § 1382(a)(1)(B), (3)(B). Had Congress increased that limit with the consumer price index from 1989 through April 2013, when the Consumer Price Index for All Urban Consumers (CPI-U) rose 92 percent, the SSI resource level of $2,000 would still be only $3,840. These calculations are based on data published at U.S. Dept. of Labor, Bureau of Labor Statistics, ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (accessed May 28, 2013).

5 The maximum "federal benefit rate" in 2014 is $721 per month. *See Soc. Sec. Adm., SSI Federal Payment Amounts for 2014*, http://www.ssa.gov/oact/cola/SSI.html (accessed Nov. 26, 2013).

6 For example, the Bank of America trust department fee for a personal trust account, characterized on the website as competitive, has a base fee of $1,000 plus 1 percent per year on the first $1,000,000, with a minimum annual charge of $2,000. Maximum SSI income for 2014 is $8,652. *See* First Bank & Trust, *Trust & Investments*, http://www.firstbt.com/trusts-investment (accessed Nov. 29, 2013).

7 > Fiduciaries generally accept these [(u)nique assets includ(ing) real estate] into trust accounts to accommodate a client's entire portfolio of assets. The most common example of this arrangement is a bank placing the family home or property into a trust. On rare occasions, a bank may *purchase* these types of assets but only if the bank has the appropriate expertise and only in accounts of significant size and sophistication. (Emphasis in original.)

Off. of the Comptroller of the Currency, *Comptroller's Handbook: Asset Management – Unique and Hard-to-Value Assets* 1 (Aug. 2012); *see also id.* at 13 (if a trust holds real property, the trustee "must

no reason to be familiar with trusts solely by involvement with SSI or Medicaid.

However, the federal agencies that administer SSI and Medicaid — the Social Security Administration (SSA) and the Centers for Medicare & Medicaid Services (CMS) — had no choice but to address how trusts would fit into SSI and Medicaid eligibility requirements given Congress's authorization of special needs trusts. The confusion arising from the merger of trust law with public benefits is sharply drawn in the agencies' attempts to define what it means for a trust to be for the sole benefit of the public benefits recipient. Public benefits administrators have focused on the distributions a trustee makes rather than the fiduciary standards that guide the trustee. The agencies have imposed detailed distribution rules that range from the picayune to the counterproductive and without regard, and sometimes contrary, to the best interests of the disabled beneficiary.[8]

This article critiques the agencies' treatment of sole benefit. It finds that the agencies, unfamiliar with trust law, overlooked state trust law as the source for understanding what it means for a trust to be for the sole benefit of a specific beneficiary. It is divided into five substantive parts:

- Part II reviews the history of Congress's treatment of trusts regarding public benefits through its decision to bring trusts inside public benefits programs;
- Part III details CMS's and SSA's interpretations of the new public benefits trusts, especially their definitions of "sole benefit" and "solely for the benefit of";
- Part IV analyzes sole benefit as a matter of state trust law, which Congress had chosen as the mechanism for implementing its policy;
- Part V reviews the reasons why CMS's and SSA's very different view of sole benefit would not be entitled to deference from the federal courts under the *Skidmore* doctrine; and
- Part VI outlines an approach CMS and SSA might take to achieve the goals they sought in monitoring the use of trusts.

II. Congress Brings Trusts Inside the Public Welfare System

Congress first legislated on trusts and Medicaid in 1986 to stop the use of trusts to avoid Medicaid's resource limits by elders needing long-term nursing home care. It then enacted the "Medicaid qualifying trust" (MQT) provision under which a trustee of a discretionary first-party trust would be deemed to exercise discretion to make any payments permitted under the terms of the trust.[9] All trust income and principal would be available

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have in-depth knowledge of prudent real property management, including market knowledge, accounting and legal expertise, diversification of holdings where possible, and careful oversight and monitoring of each asset. … If the real estate does not produce income for the trust, the bank fiduciary must determine whether retaining the property is in the best interests of the trust"). This is of course not the case for revocable *inter vivos* ("living") trusts used by the affluent but not wealthy to avoid probate, but the law of trusts has developed largely in the wealth management area.

8 For example, paying family members' travel expenses to visit the disabled beneficiary, *see infra* nn. 52–55 and accompanying text, and requiring distributions on an "actuarially sound" basis, see *infra* nn. 42- 43 and accompanying text.

9 Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9506(a), 100 Stat. 82 (1986), codified at 42 U.S.C. § 1396a(k), repealed, Omnibus Budget Reconciliation Act of 1993 (OBRA '93), Pub. L. No. 103-66, tit. XIII, § 13611(d)(1)(C), 107 Stat. 627 (1993).

if trustee discretion permitted payment for the benefit of the elder. The common view among Elder Law attorneys is that the statute was ineffective, although case law suggests otherwise.[10]

Nonetheless, after something of an onslaught of publicity about Medicaid planning,[11] Congress in 1993 enacted a new law, as part of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), to address the use of trusts in Medicaid planning, replacing the 1986 act.[12] Under the new rules, trust assets of the Medicaid-planning settlor or his or her spouse were deemed available if there were "any circumstances" under which payment could be made to or for the benefit of the settlor.[13] This rule applied without regard to the purpose for which the trust was established or any limitations in its terms.[14] At the same time, Congress exempted three specific trusts from the new trust rules: two to protect resources (and the income they generate) and one to solve an eligibility problem related to nontrust income.[15] Congress also, for the first time, encouraged Medicaid planning by exempting from its antitransfer rules gifts to a trust for any disabled person under age 65.[16]

The decision to exempt some trusts from the Medicaid trust rules and to actively encourage donors[17] to qualify for Medicaid by funding trusts for children or grandchildren with disabilities reflected a sea change by Congress. All along, Congress's goal had been to stamp out every vestige of Medicaid planning by individuals for themselves,[18] though

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10 There is only one case, out of dozens, finding nonavailability for someone seeking nursing home care. *Pollak v. Dept. of Health & Rehabilitative Servs.*, 79 So. 2d 786 (Fla. App. Dist. 4 1991); *cf. e.g. Barham by Barham v. Rubin*, 72 Haw. 308, 816 P.2d 965 (1991); *Cohen v. Commr. of Div. of Med. Assistance*, 423 Mass. 399, 668 N.E.2d 769 (1996). Others, however, allowed young adults disabled in accidents to protect personal injury recoveries. *E.g. Trust Co. of Okla. v. St. of Okla. ex rel. Dept. of Human Servs.*, 825 P.2d 1295 (Okla. 1991).

11 The extra-legislative activity that prompted enactment of the Medicaid provisions of OBRA '93 is reviewed in Mary F. Radford & Clarissa Bryan, *Irrevocability of Special Needs Trusts: The Tangled Web That is Woven When English Feudal Law is Imported into Modern Determinations of Medicaid Eligibility*, 8 NAELA J. 1, 6 (2012).

12 OBRA '93, *supra* n. 9 at § 13611; 107 Stat. at 622.

13 42 U.S.C. § 1396p(d)(3)(B)(i).

14 42 U.S.C. § 1396p(d)(2)(C)(i), (iii), (iv).

15 These are the so-called (d)(4) trusts, 42 U.S.C. § 1396p(d)(4)(A)–(C). The income trust, 42 U.S.C. § 1396p(d)(4)(B), does not raise "sole benefit" issues and therefore is not relevant here except to the extent its treatment by CMS throws light on CMS's understanding of trusts generally.

16 This is but one of the ways in which Congress provides advantageous treatment to individuals with disabilities in means-tested programs without means testing the individuals with disabilities. A person seeking Medicaid can transfer a home or other assets to a disabled child of any age without regard to the latter's wealth, 42 U.S.C. § 1396p(c)(2)(A), (B), and may make such a child the beneficiary, with priority over Medicaid, of an annuity used to "spend down" and qualify the parent for long-term care. 42 U.S.C. § 1396p(c)(1)(F)(ii).

17 The exclusion from the antitransfer rules included, *inter alia*, gifts to a trust for a donor's spouse, disabled child of any age, and any disabled person under age 65, 42 U.S.C. § 1396p(c)(2)(i)–(iv), thus allowing, for example, an elderly person to qualify for Medicaid long-term care benefits by funding a trust for a disabled child, niece or nephew, or grandchild.

18 Congress's other efforts included attempts to make transfers illegal and, when that did not work, to make giving Medicaid legal advice illegal; *see* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 217, 110 Stat. 2008 (1996), and Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4734, 111 Stat. 522 (1997), 42 U.S.C. § 1320-7b(a)(6), known popularly as "Granny Goes to Jail"

not for others.[19] What Congress did by exempting special needs trusts from the new rules and providing an exemption from the antitransfer rules for funding trusts for others with disabilities was the opposite of its previous treatment of such trusts. Individuals with disabilities were now expressly allowed to keep assets in trust while they obtained or maintained Medicaid benefits. This was new.[20]

These new rules exempted two kinds of resource trusts for people with disabilities,[21] those with a single beneficiary and those operated by nonprofits, known as pooled trusts, with many disabled beneficiaries, each with his or her own account.[22] The most significant requirement for both types of trusts is that upon the death of the beneficiary, Medicaid programs must be reimbursed for benefits they paid for the beneficiary — before the trustee could make any distributions to heirs or legatees.[23] In both types of trusts, a parent, grandparent, legal guardian, or court may establish the trust or trust account.[24] Aside from these elements, individual and pooled trusts have some differences provided by statute. Pooled trusts, but not individual trusts, also may be established by the beneficiaries themselves.[25] There is no age limit for pooled trusts, but individual trusts must be established

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and "Granny's Lawyer Goes to Jail," respectively. The former was never enforced; enforcement of the latter was enjoined on First and Fifth Amendment grounds in *N.Y. St. Bar Ass'n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998).

19 Congress had long accepted that third party trusts (trusts set up and funded with other people's assets) could be established to permit beneficiaries to enjoy the benefits of both the trust and SSI or Medicaid as was done in, *e.g., First Natl. Bank of Md. v. Dept. of Health and Mental Hygiene*, 284 Md. 720, 399 A.2d 891 (1979); *Lang v. Commonwealth Dept. of Public Welfare*, 528 A.2d 1335 (Pa. 1987); and *Zeoli v. Commr. of Soc. Servs.*, 179 Conn. 83 (1979). This was a policy of necessity and prudence: To deny families the opportunity to assist a family member with a disability would drive the assistance underground, hurting the beneficiary and not likely saving much in public funds. Disinheriting the child, leaving the estate to nondisabled siblings with nonbinding instructions regarding care for the disabled child, was by the late 1980s an option of last resort given its shortcomings, to be used only in very small estates or in jurisdictions with problematic laws or administrative practices. *See e.g.* Ralph Moore, *Estate Planning for Families of Persons with Developmental Disabilities* 98 (Md. St. Plan. Council on Developmental Disabilities l989).

20 The Spousal Impoverishment provisions set forth in 42 U.S.C. § 1396r-5 and enacted five years earlier had changed the resource rules for spouses of nursing home residents seeking Medicaid, but nursing home residents themselves still, ultimately, had to meet the same strict resource limits. Those changes were preceded by judicial attempts at relief. *See In re Rose Septagenarian*, 126 Misc.2d 699 (N.Y. 1984). This is similar to the judicial relief that preceded some of what Congress did in OBRA '93 (i.e., the new income trust, 42 U.S.C. § 1396p(d)(4)(B), which was modeled on the trust approved in *Miller v. Ybarra*, 746 F. Supp. 19 (D. Colo. 1990), and the parental trusts under 42 U.S.C. § 1396(d)(4)(A), which may in part be drawn from, *e.g., Trust Co. of Okla. v. St. ex rel. Dept. of Human Servs.*, 825 P.2d 1295 (Okla.1991).

21 Congress used the Social Security definition of disability throughout. *See* 42 U.S.C. § 1396p(c)(2)(A)(ii)(II), (B)(iii), (iv), and § 1396p(d)(4)(A), (C), all referring to 42 U.S.C. § 1382c(a)(3).

22 42 U.S.C. § 1396p(d)(4)(C)(ii). A pooled trust is best likened to a 401(k) account or mutual fund; deposits are pooled for investment that everyone shares *pro rata*, but each participant maintains his or her own account for contributions and withdrawals.

23 42 U.S.C. § 1396p(d)(4)(A), (C)(iv).

24 42 U.S.C. § 1396p(d)(4)(A), (C)(iii).

25 *Compare* 42 U.S.C. § 1396p(d)(4)(A) *with* 42 U.S.C. § 1396p(d)(4)(C)(iii).

before the beneficiary turns age 65,[26] and the nonprofit may retain funds rather than reimburse Medicaid.[27] Other differences reflect the different nature of pooled trusts. These must be operated by a nonprofit entity,[28] all participants must be disabled and each must have his or her own account.[29]

Regarding transfers of assets, Congress added to the existing exemptions[30] transfers "to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of" the individual's disabled child and "to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of" any disabled individual under age 65.[31] "Solely for the benefit of" was used three times, once to describe exempt pooled trusts[32] and twice, in parallel provisions, to describe the trusts to which exempt transfers could be made. The term sole benefit also appears, twice, both times regarding transfers to or for "the sole benefit of the individual's spouse."[33]

Congress extended the OBRA '93 trust rules to SSI in 1999; it reintroduced an anti-transfer rule for SSI, which had been dropped in 1993.[34] The SSI provisions are similar, but not identical, to the prior Medicaid provision.[35] Whether Congress intended different

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26 42 U.S.C. § 1396p(d)(4)(A); by contrast, there is no age limit in 42 U.S.C. § 1396p(d)(4)(C).

27 42 U.S.C. § 1396p(d)(4)(C)(iv).

28 42 U.S.C. § 1396p(d)(4)(C)(i).

29 42 U.S.C. § 1396p(d)(4)(C)(iii) requires that "[a]ccounts in the trust are established solely for the benefit of individuals who are disabled … ."

30 Transfers to a spouse or disabled child were previously permitted. The change is noted in 42 U.S.C.A. § 1396p(c)(2)(B) hist. nn., 1993 amends. (West 2012).

31 42 U.S.C. § 1396p(c)(2)(B)(iii), (iv).

32 *See* 42 U.S.C. § 1396p(d)(4)(C)(iii).

33 42 U.S.C. § 1396p(c)(2)(B)(i), (ii).

34 Foster Care Independence Act of 1999 (FCIA), Pub. L. No. 106-169, tit. II, § 206(a), 113 Stat. 2833 (1999), 42 U.S.C. § 1382b(e).

35 The parallel provisions are 42 U.S.C. § 1396p(d)(1)–(5) and § 1382b(e)(1)–(5), and the subparagraph numbers correspond except that the order of (4) and (5) are switched in the SSI statute. One difference throughout is that the SSI provision does not discuss income or the effect on income. The Medicaid provisions say:

(1) These provisions apply for determinations of eligibility and amount of benefits, an income-related notion; SSI concerns only determinations of resources.

(2)(A) A trust is deemed to be established by an individual if his or her resources fund it at all and if the trust itself was established other than by will by the individual, spouse, or a court or agency acting on his behalf or at his request. SSI dispenses with the list of who may create the trust, and it changes the relevance of the will. While Medicaid reaches trusts established "other than by will," SSI reaches trusts "if any assets [of the individual or spouse] … are transferred to the trust other than by will."

(2)(B) For a trust with assets of the individual and anyone else, the Medicaid trust rules apply to the portion of the trust attributable to the individual. SSI casts the notion in terms of assets transferred to the trust.

(2)(C) Same: rules apply without regard to purpose of trust, trustee discretion, restrictions on when or whether distributions may be made or what they may be used for.

(3)(A) Same: resources of revocable trust are available. Medicaid spells out that payments to the individual are income and payments to anyone else are transfers of assets.

(3)(B) For irrevocable trusts, if payments from assets may be made under "any circumstances," then such assets are available; payments for the individual are income, and for someone else are transfers. If no payments may be made, then funding was a transfer. SSI says only that if payment may be made, the asset is available.

treatment is not clear, but that is beyond the scope of this article other than with respect to sole benefit.[36]

III. CMS and SSI Implement the Trust Provisions

A. CMS: Transmittal 64

To implement the OBRA '93 trust provisions, CMS[37] amended its *State Medicaid Manual*,[38] writing or adding Sections 3257–3259 in Transmittal 64.[39] To a large extent, CMS only restated the statutory language. It also addressed the unique situation of 42 U.S.C. § 1396p(d)(4)(B) trusts, acknowledged the state law nature of trusts, and attempted to define sole benefit and "solely for the benefit of."

In Transmittal 64 CMS said that a trust is "for the sole benefit" of a person "if the trust benefits no one but that individual, whether at the time the trust is established or at any time in the future." Conversely, a trust or transfer is not for someone's sole benefit if it "provides for funds or property to pass to a beneficiary who is not" in one of the three categories to whom exempt transfers can be made.[40] However, a trust can still make a post-mortem disposition: "[T]he trust may provide for disbursal of funds to other beneficiaries, provided the trust does not permit such disbursals until the State's [reimbursement] claim

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(4) Medicaid has the three exempt trusts. The SSI provision, 1382b(e)(5), cross-references two of them. "This subsection shall not apply to a trust described in subparagraph (A) or (C) of section 1396p(d)(4) of this title."

(5) Application to be waived where there is undue hardship under standards determined by the Secretary; the SSI provision, 1382b(e)(4), directs the SSA Commissioner to apply the undue hardship waiver.

36 The more complicated issue is whether the Medicaid programs in SSI states — which are required to provide Medicaid to all SSI beneficiaries — are allowed to deny benefits to someone on SSI because the person's (d)(4) trust does not meet state requirements. Before the SSI trust amendments, both CMS and SSA took the view that these programs were allowed to do so. The one court to look at this issue closely came to the contrary view, in part because neither agency had addressed the question anew since the enactment of the SSI trust rules. *Lewis v. Alexander*, 276 F.R.D. 421, 440 (E.D. Pa. 2011), *aff'd on other grounds*, 685 F.3d 325 (3d Cir. 2012). One court held, and others assume, that the trust exemption rules are mandatory. *Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012), *aff'g* 276 F.R.D. 421, 438 (E.D. Pa. 2011), citing *Norwest Bank of N.D. v. Doth*, 159 F.3d 328, 330 (8th Cir. 1998); *Horowitz ex rel. Horowitz v. Apfel*, 143 F. Supp. 2d 240, 242 (E.D.N.Y. 2001), *aff'd on other grounds*, 29 Fed. Appx. 749 (2d Cir. 2002); *Sullivan v. Co. of Suffolk*, 1 F. Supp. 2d 186, 190 (E.D.N.Y. 1998), *aff'd on other grounds*, 174 F.3d 282 (2d Cir. 1999). One court is to the contrary, *Keith v. Rizzuto*, 212 F.3d 1190 (10th Cir. 2000); *see also Wong v. Doar*, 517 F.3d 247, 256–257 (2d Cir. 2009) (dicta).

37 The agency responsible for the Medicare and Medicaid programs at the time of Transmittal 64 was named the Health Care Financing Administration. Its name was changed in 2001 to the Centers for Medicare & Medicaid Services (CMS).

38 The *State Medicaid Manual* is a CMS publication that provides guidance to state Medicaid agencies. CMS, *State Medicaid Manual*, http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html (accessed Jan. 14, 2014). The name is something of a misnomer; it is not a model manual. Similar to the Program Operations Manual System (POMS), it is not the product of rulemaking but appears to reflect substantial agency effort to explain and help readers understand its programs.

39 *Transmittal 64, supra* n. 1.

40 *Id*. at § 3257(B)(6), para. 3.

is satisfied."[41] CMS added that, to be "for the sole benefit of" an individual, a trust "must provide for the spending of the funds involved for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual involved."[42] Presumably, this provision made sure that no one else would receive any benefit from the trust. But this restriction does not apply to trusts that include a payback to the state Medicaid agency,[43] i.e., if the state Medicaid agency is entitled to payback, sole benefit does not require the funds be dispersed to or for the benefit of the beneficiary during his or her anticipated life expectancy. If a parent or grandparent funding a trust for a disabled child or grandchild wants to enjoy the exclusions under (c)(2)(B)(iii) or (iv), respectively, in which payback is not otherwise required, he or she can satisfy sole benefit by adding payback in lieu of "actuarially sound" language.

B. SSI: Program Operations Manual System (POMS)

With Congress's extension of the Medicaid trust rules to SSI,[44] the SSI unit of SSA also had to address the meaning of sole benefit. Like CMS, SSA properly acknowledged that trusts are creatures of state law.[45] Unlike CMS, SSA had no reason to defer to the states since SSI is exclusively a federal program. Also unlike CMS, SSA was not implementing its own statute; the exceptions to its antitrust rules are by statutory cross-reference to the same trusts exempted under the Medicaid statute.[46] Again unlike CMS, SSA attempted to provide directions to staff about specific state trust law issues. Unlike CMS, SSA addressed not only sole benefit, which is in the federal statute, but also a range of state trust issues.

With respect to sole benefit, SSA was loyal to the principle of congressional intent, inferring different meanings where Congress used slightly different words, and distinguishing "for the benefit of" from "for the sole benefit of." In language redolent of Transmittal 64, SSA explained that a trust is established for the benefit of an individual

> if payments … from the … trust are paid to another person … so that the individual derives *some benefit* from the payment (emphasis added).[47]

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41 *Id*. at § 3257(B)(6), para. 4.

42 *Id*. at § 3257(B)(6), para. 3.

43 *Id*. at § 3257(B)(6), para. 4.

44 Congress logically enough did not extend to SSI the qualified income trust provision, 42 U.S.C. § 1396p(d)(4)(B), *see supra* n. 15 and accompanying text, which was only enacted to codify a court decision that solved a problem unique to Medicaid long-term care. Aside from that, SSI is only designed to provide a floor on income; it made no sense to allow individuals to qualify by artificially lowering their other income through a trust mechanism.

45 POMS SI 01120.199C ("Trusts are often complex legal arrangements involving State law and legal principles that require obtaining legal counsel"); *see also* POMS SI 01120.203B.1.f ("In the case of a legally competent, disabled adult, a parent … may establish a 'seed' trust using a nominal amount of his or her own money, or if State law allows, an empty or dry trust").

46 *See* 42 U.S.C. § 1382b(e)(5). But note, the SSI antitransfer provision restates the language of the Medicaid statute. *Cf*. 42 U.S.C. § 1382b(c)(1)(C)(ii)(III), (IV), with 42 U.S.C. § 1396p(c)(2)(B)(iii), (iv).

47 POMS SI 01120.201F.1.

A trust is for the sole benefit of an individual

> if the trust benefits *no one but that individual* … at any time for the remainder of the individual's life (emphasis added).[48]

After painstakingly making this distinction, SSA without explanation disregarded it and said that individual special needs trusts "for the benefit of" a disabled individual under (d)(4)(A) also must be for that person's sole benefit.[49] Sole benefit precluded a provision that would "provide benefits to other individuals or entities during the disabled individual's lifetime,"[50] but it then provided as an "[e]xception to the sole benefit rule for third party payments" any "[p]ayments to a third party that result in the receipt of goods or services by the trust beneficiary."[51]

In 2012, SSA added an example to POMS to show that reimbursing family members for travel expenses to visit the trust beneficiary was not for the sole benefit of the beneficiary.[52] SSA reconsidered in the face of vigorous protests from charities and special needs trust attorneys first by removing the example[53] but ultimately substituting rules[54] that limit payment for third party travel to two narrow exceptions.[55]

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48 POMS SI 01120.201F.2.

49 Under the special needs trust exception, the trust must be established for and used for the benefit of the disabled individual. SSA has interpreted this provision to require that the trust be for the sole benefit of the individual.
POMS SI 01120.203B.1.e.

50 *Id*.

51 POMS SI 01120.201F.2.b. Payment of administrative expenses was a further permissible exception to the sole benefit rule. POMS SI 01120.201F.2.c.

52 Example 1 — Trust provision that is not for the sole benefit of the trust beneficiary. An SSI recipient is awarded a court-ordered settlement that is placed in an irrevocable trust of which he is the beneficiary. The trust document includes a provision permitting the trustee to use trust funds to pay for the SSI recipient's family to fly from Idaho to visit him in Nebraska. The trust is not established for the sole benefit of the trust beneficiary, because it permits the trustee to use trust funds in a manner that will benefit the SSI recipient's family financially.
POMS SI 01120.201F.2, quoted in ElderLawAnswers, *POMS Changes Tighten Interpretation of 'Sole Benefit' Rule for (d)(4)(A) Trusts* (last modified Jan. 7, 2013) http://www.elderlawanswers.com/poms-changes-tighten-interpretation-of-sole-benefit-rule-for-d4a-trusts-9915 (accessed June 11, 2013).

53 ElderLawAnswers, *SSA Removes Controversial POMS Language, But Planners Remain in Limbo,* http://attorney.elderlawanswers.com/ssa-removes-controversial-poms-language-but-planners-remain-in-limbo-12067 (accessed June 11, 2013).

54 ElderLawAnswers, *SSA Revises POMS, Permits First-Party Trusts to Pay for Non-Beneficiary Travel in Some Cases,* http://attorney.elderlawanswers.com/ssa-revises-poms-permits-first-party-trusts-to-pay-for-non-beneficiary-travel-in-some-cases--12295 (accessed June 11, 2013).

55 Payment for third-party travel is permitted only if "necessary in order for the trust beneficiary to obtain medical treatment" or to "ensur[e] the safety and/or medical well-being of [an] individual" living in a nursing home, group home, or assisted living facility. POMS SI 01120.201F.2.b.

IV. The Proper Meaning of Sole Benefit Trust Comes From the State Law of Trusts

A. State Trust Law Provides a Clear, Comprehensive Meaning That Conforms to Congressional Intent

Congress chose to use trusts, creatures of state law, as the mechanism for coordinating private assets and means-tested public benefits[56] and granting special treatment for certain federal programs for beneficiaries of trusts and for the donors of such trusts. These trusts all have to be for the "sole benefit" of the trust beneficiary. There is no general federal law of trusts, nor is sole benefit a term of art in state trust law,[57] but familiar state trust law principles provide an interpretation that conforms precisely to Congress's intent in providing special treatment for beneficiaries of trusts established "solely for" their benefit, and the donors to such trusts.[58]

The notion of benefit or beneficial interest is fundamental in the law of trusts. Adding "sole" or "solely for" addresses another fundamental trustee duty, the duty to be impartial in managing the trust for the benefit of all beneficiaries. Together, these provide a definite and definitive meaning of what Congress sought to achieve in using trusts as part of the public benefits system: the needs and welfare of the person with a disability have absolute priority over those of any other beneficiary in all aspects of the trustee's management of the trust.

The beneficiary is one of the three essential elements of a trust.[59] Beneficiaries are the individuals, usually named in the trust document, to whom the trustee owes the duty

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56 *See Lewis,* 685 F.3d at 347. Congress has of course done the same in other situations in which one party manages property for the benefit of another, *e.g.* Employee Retirement Income Security Act (ERISA) Pub.L. No. 93-406, 88 Stat. 829 (1974), although some think the combination has not always been a happy one. *See* John H. Langbein, *The Supreme Court Flunks Trusts*, S. Ct. Rev. 207, 209–211, 211–212, 223–228 (1991).

57 The phrase appears but typically only as a more emphatic statement of the notion of benefit (*e.g.*, "failing to act for the sole benefit of the beneficiaries"), *Markert v. PNC Fin. Servs. Group, Inc.*, 828 F. Supp. 2d 765 (E.D. Pa. 2011); *In re Roman Catholic Archbishop of Portland in Or.*, 345 B.R. 686, 694 (Bankr. D. Or. 2006). It is different from "sole beneficiary" trusts, whose one beneficiary gets income and gets or controls principal, either during the beneficiary's lifetime or at his or her death. *See* Mark L. Ascher et al., *Scott and Ascher on Trusts* § 12.2.1 (5th ed., Aspen 2006).

58 As used by CMS and SSA, this phrase includes the trusts identified by both the resource and transfer exclusions, 42 U.S.C. §§ 1396p(d)(4)(A) and (c)(2)(B)(i)–(iv), respectively. The similar phrase in (d)(4)(C)(iii) ("Accounts … established solely for the benefit of individuals"), referring to pooled trusts, has a different purpose, to limit the use of (d)(4)(C) trusts accounts to disabled individuals, excluding the non-disabled.

59 *Restatement of the Law Third, Trusts* § 2. The others are the trustee and the property the trustee manages for the beneficiary's welfare. A trust is a fiduciary relationship involving property "subjecting the person who holds title to the property [the trustee] to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee." It may appear to exist for a time without a beneficiary, because the beneficiary may not be identified with specificity at first and possibly for a long time (*viz.*, the unborn children of a class of individuals, one of whom may be the proverbial fertile octogenarian) after a trust is created. "But [i]n a more comprehensive sense, even at the outset [every] trust has existing beneficiaries by implication of law: the reversionary beneficiaries whose interests may or may not eventually materialize … ." *Id.* These are the people with beneficial interests in the property of the trust.

of loyalty. "Who the beneficiaries of a trust are depends on the manifestations of the settlor's intent."[60] It is the individual(s) selected and named — whether by name, or class, or some other characteristic[61] — by the settlor as the one(s) he or she intends to benefit and to whom the trustee owes all of his or her duties.

A beneficiary gets the benefit of the trust through the trustee's use of trust assets for his or her benefit. The trustee may give the beneficiary cash, may purchase goods or real property (e.g., an automobile, home, or computer) for his or her use, or may pay others to provide services for the beneficiary. The fact that the trustee pays someone else to do something for the beneficiary does not make the service provider a beneficiary of the trust, and that payment is not a benefit of the trust. Even naming a specific person to provide services to the trust, trustee, or beneficiary does not mean the settlor intended to give that person a beneficial interest in the trust; therefore, getting paid for providing those services is not considered getting a benefit from the trust.[62] *A fortiori*, someone not named in the trust who is paid to provide services to the beneficiary is not, by the fact of payment alone, getting a benefit under the trust.[63]

A special needs trust always has at least two beneficiaries: the current life beneficiary with a disability and whoever enjoys the benefit of the property, if any remains, after the death of the life beneficiary.[64] The trustee is not to discriminate between them unless the settlor has directed the trustee to do so.[65] Treating the beneficiaries with due regard for their respective interests[66] requires nonfavoritism in procedure[67] and results.[68] Most of the cases on the duty of impartiality involve successive beneficiaries, in which one (or more) receives income for life and the other(s) later get the principal. The trustee's duty

60 Ascher et al., *supra* n. 57, at § 12.14, 781–782; *see also Restatement of the Law Third, Trusts, supra* n. 59, at § 49.

61 A somewhat whimsical illustration might be the charitable "trust" in "The Red-Headed League," a Sherlock Holmes story by Sir Arthur Conan Doyle. *See The Adventures of Sherlock Holmes, The Red-Headed League* (http://168.144.50.205/221bcollection/canon/redh.htm) (accessed Aug. 19, 2013).

62 The question often comes up in the context of directions to employ someone in management of the trust. Even if the trust uses mandatory rather than precatory language, the person named is not necessarily a beneficiary with any rights to enforce. The person might have been named "in the belief that such employment would promote both trust administration and the interests of the beneficiaries," which leaves the employee as only that, not a beneficiary. Ascher et al., *supra* n. 57, at § 12.13, 769; *see generally id*. at 776–781.

63 *Cf. Hobbs ex rel. Hobbs v. Zenderman*, 579 F.3d 1171 (10th Cir. 2009).

64 If no one is named, property remaining would go to the probate estate of the life tenant and thus, absent a will, to his or her heirs at law.

65 Langbein, *supra* n. 56, at 987–988.

66 *See* U.T.C. §§ 803, 105(a), (b) (2010); *Restatement of the Law Second, Trusts* § 183, comment a.

67 *McNeil v. Bennett*, 792 A.2d 190 (Del. Ch. 2001), *aff'd in part and rev'd in part*, 798 A.2d 503 (Del. 2002) (communicating with the beneficiaries and letting them know of their rights and interests), discussed in Ascher et al., *supra* n. 57, at § 17.15, 1261.

68 *See e.g. In re Estate of Whitman*, 266 N.W. 28 (Iowa 1936) (where two beneficiaries are entitled to income, the trustee abuses his discretion when he permits one to live in trust property rent free); *Penny v. Wilson*, 20 Cal. Rptr. 3d 212 (Cal. App. 2004) (distributing property without taking into account appreciation and thus future tax liability); both cases are discussed in Ascher et al., *supra* n. 57, at § 17.15, 1259–1260.

is to "preserve a fair balance between them."[69] Where there are inherent differences in what each beneficiary is entitled to, as with income to one and remaining principal to the other, the trustee cannot treat them exactly the same, but the duty imposes on the trustee an obligation to consider the interest and needs of each in all of the decisions to be made.[70] To say a trust is for the sole benefit of one individual or is established "solely for [his or her] benefit" means that the duty of impartiality has been suspended and that, between the life beneficiary and any remaindermen, the trustee is to consider only the interests and needs of the sole benefit beneficiary and is to give no weight to the interests or needs of the remaindermen.

Trustees may have broad discretion in meeting the duty of impartiality, but that hardly negates there is such a duty; eliminating the duty by making a trust for the sole benefit of one beneficiary reflects a real and substantial shift in the trustee's obligations and in the resulting management and use of trust assets.[71] The trustee should not, as would otherwise be the case, consider an investment strategy designed to ensure growth of principal so that there will be something to pass on to the remainderman, nor may the trustee stint on distributions to meet needs not met by other sources or resources to ensure that there is a remainder to be distributed. The remainderman is a beneficiary,[72] one to whom the trustee may owe *some* duties. All of the beneficiaries have some interests in common — that the trustee be prudent, competent, loyal, and conscientious — and any of the beneficiaries may enforce those duties. The sole benefit requirement addresses only impartiality, not the other obligations a trustee has to all the beneficiaries.

This understanding of sole benefit squares perfectly with Congress's intent in providing for individuals with disabilities who themselves seek to enjoy the benefit of earned, inherited, or otherwise acquired assets while using SSI and Medicaid. The same is true for those who qualify for Medicaid while committing their resources to the benefit of another person with a disability, as the antitransfer exceptions permit. Congress's purpose was to make certain that the person with a disability received the beneficial enjoyment of the assets, and that is achieved by sole benefit, properly understood as a modification of the duty of impartiality.

B. Sole Benefit, Although It Derives Its Meaning from State Law, Is an Independent Federal Requirement that Preempts Contrary State Law

If state law provides a useful, functional definition of sole benefit that promotes federal policy, the next inquiry is how, if at all, that definition attaches to the federal statutory term. Federal law controls, but Congress did not oust state law entirely — rather the contrary, it adopted state law as the means for achieving its ends.

The Third Circuit in *Lewis v. Alexander* treated the interplay as a matter of preemption. The court analyzed which provisions of state law were pre-empted by the federal

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69 Ascher et al., *supra* n. 57, at § 20.1, 1463.

70 *Id*. at § 20.1, 1466–1469.

71 *See e.g*. U.T.C. § 803, cmt., first unnumbered para.

72 The Uniform Trust Code has dispensed with the distinction between beneficiary and remainderman, treating them all, as they are, as beneficiaries of the trust. U.T.C. § 103 (treating as the same those with "present or future beneficial interest[s]").

statute. This is not the only, or perhaps even the best, way to analyze the conflict between state and federal law,[73] but it provides a framework for analyzing sole benefit. Here, as it has in many areas, Congress has provided a benefit within the context of state law. There is no general federal common law[74] and no general federal law of property, trusts, or estate law.[75] State law controls absent a specific federal statute, policy, or interest that requires otherwise.[76] The Supreme Court noted recently, "In most fields of activity … this Court has refused to find federal preemption of state law in the absence of either a clear statutory prescription, or a direct conflict between federal and state law."[77] Where Congress operates through state law, "the basic assumption [is] that Congress did not intend to displace state law."[78] Application of preemption resulting in a state law being unenforceable is limited to specific points of conflict.

In *Lewis v. Alexander*, this question of how much state law was abrogated was central to resolving Pennsylvania's attempt to regulate — a cynic might say strangle — pooled special needs trusts. The Third Circuit's answer can be summarized as "not very much."

> [T]here is no reason to believe [Congress] abrogated States' general laws of trusts or their inherent powers under those laws. … [W]e reject the conclusion that application of these traditional powers is contrary to the will of Congress. After all, Congress did not pass a federal body of trust law, estate law, or property law when enacting Medicaid. It relied and continues to rely on state laws governing such issues.[79]

To the extent Congress specified what was permitted as a condition to Medicaid eligibility, the state was not free to add additional requirements.[80] Reviewing the five specific provisions challenged by plaintiffs in the Third Circuit,[81] the court found that the state could not limit pooled trust retention[82] to less to 50 percent,[83] special needs trust expenditures to needs related to the individual's disability,[84] participation in pooled trusts to those who could not meet their needs without the trust,[85] or pooled trust participation to

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73 The plaintiffs prevailed before the district court and argued on appeal that the question was whether the comparability requirement under 42 U.S.C. § 1396a(a)(17) precluded the more restrictive state statute, but the Third Circuit declined to take that approach. *Lewis*, 685 F.3d at 347–348, n. 21.

74 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

75 *Lewis*, 685 F.3d at 347.

76 *U.S. v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 93 S. Ct. 2389 (1973).

77 *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504, 108 S. Ct. 2510, 2514 (1988) (citations omitted). The exceptions are those areas involving "uniquely federal interests," such as military operations.

78 *Md. v. La.*, 451 U.S. 725, 746 (1981).

79 *Lewis,* 685 F.3rd at 347.

80 *Id.,* citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 131 L. Ed. 2d 881 (1995).

81 Plaintiffs did not appeal the district court decision dismissing their challenge to a sixth provision of the state statute that "all distributions from the trust must be for the sole benefit of the beneficiary." *See Lewis*, 685 F.3d at 338, n. 9.

82 42 U.S.C. § 13p6p(d)(4)(C)(iv) (Medicaid payback required only "[t]o the extent that amounts remaining in the beneficiary's account upon [his or her] death … are not retained by the trust …").

83 *Lewis,* 685 F.3d at 348–350.

84 *Id.* at 350.

85 *Id.* at 350–351.

those under age 65.[86] Congress addressed each of these and made no allowance for states to limit or modify what it, Congress, would allow.

Like the four provisions struck down, the sole benefit requirement was plainly delineated by Congress and is not one that the states can modify. It is an independent element of what Congress requires for those who want to use federally funded Medicaid benefits: Preemption precludes the states from adding more to the requirement. As a practical, functional matter, it means that the remainder beneficiaries have no standing to challenge disbursements for the life beneficiary as in derogation of their rights as remaindermen, and that the life beneficiary can require the trustee to disregard the remaindermen's interests. The trustee can and should favor the beneficiary with a disability. The court in *Lewis* did not have occasion to address the meaning of sole benefit since the state had only added to its own statute a sole benefit provision similar to that in the federal statute, and the meaning of neither was at issue.[87]

The court upheld the fifth provision challenged, subjecting pooled special needs trusts to petitions for termination by the attorney general. It said that the state may subject special needs trusts, like all trusts, to court jurisdiction. The threat of termination is just one of the arsenal of general trust law provisions "for protecting the trust and the interests of its beneficiaries."[88] Congress's decision to draw on state trust law as the mechanism for implementing its Medicaid policy carries a certain tension, the court noted. If Congress has defined sole benefit trusts, the court asked, what about the other duties imposed on trustees?

> There is necessarily some tension between this conclusion [that state trust law and the states' powers under it are not abrogated] and the bar on states adding requirements. For example, even application of the trustee's traditional duty of loyalty — to administer the trust solely in the interests of the beneficiaries[89] — could be considered an extra requirement.[90]

The court later said:

> Pennsylvania's general trust law contains numerous provisions for protecting the trust and the interests of its beneficiaries. For example, Pennsylvania law imposes duties of loyalty, impartiality, prudent administration, and prudent investment.[91]

Sole benefit, understood as a modification of the duty of impartiality, would, under the Third Circuit's preemption analysis, conflict with the duty of impartiality. Because the duty of impartiality is only a default rule, however, it presents a preemption conflict only in the limited sense of precluding an option trust settlors might otherwise prefer but are denied if they want to enjoy using both resources and Medicaid or SSI.

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86 *Id*. at 351–352.
87 *Id*. at 338, n. 9.
88 *Id*. at 352–353.
89 20 Pa. Consol. Stat. Ann. § 7772(a) (West).
90 *Lewis,* 685 F.3d at 347.
91 *Id*. at 352.

The difference between the federal agencies' understanding of "for the sole benefit of" and that suggested by state law is vast. The question for a court asked to enforce the federal agencies' interpretation is whether it should defer to the agencies or, instead, review the statute, legislative history, and other authorities to come to its own independent conclusion. The following section addresses the standards for undertaking that task.

V. On the Sliding Scale of Deference to Agency Determinations, Neither CMS nor SSA has Earned the Right to Substantial Deference for Its Definition of Sole Benefit

A. Absent Careful Use of Rulemaking Authority, Deference is a Function of an Agency's Competence in the Specific Area

Judicial deference to action of an agency under a statute it administers ranges "from great respect at one end … to near indifference at the other."[92] At one end is almost total deference to agency exercise of legislative rulemaking authority given by Congress within the agency's jurisdiction.[93] It is just such authority that the Supreme Court typically has relied on in cases involving CMS and Medicaid[94] and SSA and SSI.[95] A court should defer to an agency that has engaged in legislative rulemaking under its statute if "the agency's answer is based on a permissible construction of the statute."[96] The agency's answer does not have to be compelling, or the only permissible reading, or even the one the court finds most reasonable, as long as it reflects "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute."[97] Such regulations are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to

92 *U.S. v. Mead Corp.*, 533 U.S. 218, 228, 121 S. Ct. 2164, 2172 (2001).

93 *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

94 *Wis. Dept. of Soc. Servs. v. Blumer*, 534 U.S. 473, 496, 122 S. Ct. 962, 976, 115 L. Ed. 2d 935 (2002) ("We have long noted Congress's delegation of extremely broad regulatory authority to the Secretary in the Medicaid area"); *Thomas Jefferson U. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 2387, 129 L. Ed. 2d 405 (1994) (this broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program [Medicaid]," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns"); *Atkins v. Rivera*, 477 U.S. 154, 162, 106 S. Ct. 2456, 2461, 91 L. Ed. 2d 131 (1986) (where the Secretary's regulation of the Medicaid statute is supported by the plain language of the statute, it is entitled to more than mere deference or weight but is entitled to legislative effect and is controlling unless it is arbitrary, capricious, or manifestly contrary to the statute); *Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 101 S. Ct. 2633, 2640, 69 L. Ed. 2d 460 (1981) ("Congress explicitly delegated to the Secretary broad authority to promulgate regulations defining eligibility requirements for Medicaid").

95 *Barnhart v. Thomas*, 540 U.S. 20, 29–30, 124 S. Ct. 376, 382 (2003); *Sullivan v. Everhart*, 494 U.S. 83, 88–89, 110 S. Ct. 960, 964 (1990); *cf. Sullivan v. Zebley*, 493 U.S. 521, 110 S. Ct. 885 (1990); *Bowen v. Yuckert*, 482 U.S. 137, 145, 107 S. Ct. 2287, 2293 (1987) ("Where, as here, the statute expressly entrusts the Secretary with the responsibility for implementing a provision by regulation, our review is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious") (citations omitted).

96 *Chevron*, 467 U.S. at 843.

97 *Id.* at 844–845; the quote is from *U.S. v. Shimer*, 367 U.S. 374, 382, 6 L. Ed. 2d 908 (1961).

the statute."[98] This degree of deference is warranted where the agency enjoyed, and exercised, specific rulemaking authority.[99]

Here, CMS does not enjoy and thus could not exercise the kind of specific rulemaking authority it has in determining what constitutes income or resources. The Court in *Blumer* put substantial reliance on CMS's authority under 42 U.S.C. § 1396a(a)(17), in which Congress required state plans to utilize:

> reasonable standards … which … provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient … .

The mandate for the transfer and trust rules to be in state plans, in the next subsection, provides in its entirety that state plans shall:

> comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts; …

42 U.S.C. § 1396p itself has nine specific grants of rulemaking authority to the secretary,[100] but none concern what constitutes a trust "for the sole benefit" of a person or established "solely for [his or her] benefit."[101] The agency can define income and resources, and as CMS has noted,[102] all of the normal rules may apply to income or assets going into or out of a trust, and as to that the agencies may well have rulemaking authority, but there is no similar clear and specific grant of such authority respecting trusts.

SSA would appear to stand on no better footing. Whatever rulemaking authority SSA has, it has no authority to make rules respecting the Medicaid program. When Congress added Medicaid-like trust rules into the SSI statute in 1999, it enacted those rules directly into Title XVI,[103] but the special needs trust exclusions were only by cross-reference to the Medicaid statute.[104] The secretary's general rulemaking authority may be relevant,[105] but it is not at all clear it extends to what the Medicaid statute means. In any

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98 *Chevron*, 467 U.S. at 844.

99 *U.S. v. Mead*, 533 U.S. at 227.

100 *Viz.*, respecting reports from issuers of long-term care insurance within the "partnership plan," 42 U.S.C. § 1396p(b)(1)(C)(iii)(VI); for waiver based on undue hardship from estate recovery, *id*. at § 1396p(b)(3)(A); for imposition of transfer penalties, *id*. at § 1396p(c)(2)(D); for paying nursing facilities to hold a bed while the individual's transfer waiver application is pending, *id*. at § 1396p(c)(2), last unnumbered para.; for applications for waivers of the trust counting rules, *id*. at § 1396p(d)(5); for what constitutes intent to obtain fair market value, return of transferred assets, or whether transfer was for another purpose, *id*. at § 1396p(c)(2)(C); for apportioning transfer penalties when both spouses require long-term care, id. at § 1396p(c)(4); for when to include annuities as trusts, *id*. at § 1396p(d)(6); and for determining what "similar financial instruments" to subject to annuity disclosure rules, *id*. at § 1396p(e)(1).

101 42 U.S.C. § 1396a(a)(18).

102 *Transmittal 64, supra* n. 1, at § 3259.7B.

103 42 U.S.C. § 1382b(e)(1)–(4). The language is not identical, but appears to reflect clarity and simplicity rather any change of policy, 42 U.S.C. § 1396p(d)(1)–(5), 1382b(e)(1)–(5).

104 *See* 42 U.S.C. § 1382b(e)(5).

105 *See City of Arlington, Tex. v. Fed. Commun. Commn.*, ___ U.S. ___, 133 S. Ct. 1863, 2013 WL 2149789 (2013) at *10, citing *Mead* as denying *Chevron* deference to an agency with rulemaking authority for

event, the secretary has not utilized it. Like CMS, SSA says the usual asset and income rules apply to what goes in or comes out of a trust, but again, that is a distinct question.[106]

Absent agency exercise of rule-making authority, judicial deference depends on the quality of the action taken by the agency, as set out in *Skidmore*:

> The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position. … The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, lacking power to control.[107]

This directive can be broken into perhaps five distinct areas of inquiry:

1. *Care and thoroughness*. Whether the agency action reflects consideration of all the factors that contribute to the meaning and the consequences of different choices.

2. *Consistency*. Whether the agency had come to similar decisions on similar facts, and different decisions on distinguishable facts.

3. *Formality*. Whether the agency procedure, even if short of full rulemaking, reflects a procedure that guarantees careful consideration.

4. *Relative expertness*. Whether the subject of the decision, even if within the agency's nominal jurisdiction, is one to which the agency brings greater expertise than courts or others.

5. *Validity of reasoning and persuasiveness*. The ultimate basis for deference is the power of the reasoning.

B. Application of the Skidmore *Factors Suggests Deference Is Not Appropriate*

Three of the five factors warrant extended consideration.

1. Formality

This is the first of the three areas in which a *Skidmore* factor suggests that a court should not defer to CMS or SSA. Neither agency has utilized its rulemaking authority. Transmittal 64 and POMS both reflect a lower degree of formality than notice-and-comment rulemaking. POMS has been cited by the Supreme Court to support its statutory interpretations[108] and is frequently cited by the federal appellate courts, but mostly it ap-

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action that was not rulemaking.

106 POMS cautions that payments still have to be reviewed under the regular SSI counting rules; *viz*., payments of cash and the purchase of nonexempt items or in-kind goods and services for food and shelter also would be considered income to the beneficiary. POMS SI 01120.201I.1.a, b; *see also id*. d–f.

107 *U.S. v. Mead*, 533 U.S. at 228, quoting Justice Jackson in *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

108 *E.g. Wash. St. Dept. of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 385, 123 S. Ct. 1017, 1026 (2003) ("While these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift for the sake of reading 'other legal process' in abstract breadth,"

pears to confirm the courts' conclusions based on other sources rather than to persuade the contrary to other authorities.[109]

2. Relative Expertise in State and Federal Law

Here, too, a *Skidmore* factor suggests, now much more strongly, that a court should not defer to either agency. Federal welfare officials have no professional expertise in state trust law. State courts have declined to defer to their state Medicaid agencies when they go outside of their specific area of competence to deal with substantive state law of property or other matters.[110] The forays of SSA, in particular, into trust law reveal such serious miscomprehension that a court should be chary of deferring to its views. In using state trust law to achieve its policy, Congress has introduced a notion foreign to state trust law, something not understood by the agencies exactly because of their lack of expertise, so that even the federal nature of the issue does not translate into agency expertise.

a. State Trust Law

SSA uses words and phrases from trust law but ascribes its own, different meaning to them. If this only concerned nomenclature, it might be a minor problem solved by keeping clear the different meanings and their uses.[111] But it goes beyond that: SSA attributes meaning to trust terms used in the federal statute that results in misconstruing Congress' intent and frustrating Congress' purpose.

i. Benefit and Beneficial Interest

SSA's most serious deviation from accepted trust law is the meaning it gives to "benefit" from a trust. SSA says that the beneficiary must derive *some* benefit under its

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citing *Skidmore,* 323 U.S. at 139–140).

109 *See e.g. Lopes v. Dept. of Soc. Servs.*, 696 F.3d 180 (2d Cir. 2012) ("The language of the relevant regulations, as clarified in the POMS and in HHS's amicus brief, convinces us that the income stream from Lopes' annuity is properly considered income, not a resource, because the annuity is non-assignable"); *Beeler v. Astrue*, 651 F.3d 954, 961–962 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012). POMS tends to be relied on more for matters of procedure, *e.g. Gossett v. Colvin*, 527 Fed. Appx. 533 (7th Cir. 2013) (remand required where agency failed to follow procedure set out in POMS); *Sullivan v. Colvin*, 519 Fed. Appx. 985 (10th Cir. 2013) (citing POMS for proposition that a specific form is only a worksheet, not the residual functional capacity assessment *per se*), but even that is not absolute, *Carillo-Yeras v. Astrue*, 671 F.3d 731 (9th Cir. 2011) (POMS "does not impose judicially enforceable duties on either this court or the ALJ").

110 *See e.g., L.M. v. New Jersey Division of Medical Assistance,* 140 N.J. 480, 659 A.2d 450 (1995) (no deference to state Medicaid agency on meaning or operation of a qualified domestic relations order, a matter of state domestic relations law).

111 SSA defines "grantor" as the one whose assets fund a trust and who "establishes the trust with funds or property," POMS SI 01120.200B.2, and defines "grantor trust" as one in which the grantor is the "sole beneficiary," explaining that "State law on grantor trusts varies." But there is no state law of "grantor trusts," which is a term of art in federal income tax law, referring to trusts that are disregarded for income tax purposes so that all income is attributed to the person deemed the grantor. See 26 U.S.C. §§ 671–678. Where states' laws refer to grantor trusts, it means the federal tax law notion of grantor trust. E.g. Ala. Stat. Ann. § 40-18-25(j); Fla. Stat. Ann. § 201.02(b)(5). There is a notion of sole beneficiary trusts, however, and to the extent SSA limits its use of "grantor trust" to such trusts, it might introduce some confusion, but not results at odds with Congress' intent.

definition of "for the benefit of" and defines "solely for the benefit of" to mean that no one else can receive *any* benefit from the trust. It then provides an exception to this definition by allowing payments to a third party for goods or services for the benefit of the beneficiary.[112] State trust law, by contrast, defines benefit in functional terms: it is the beneficial enjoyment of trust assets or income, for which one is not required to perform a service or deliver a good. The beneficiary is the one to whom the trustee owes its duties in the use of trust assets and income.

SSA's definitions only make sense if what SSA means is that *any* payment by a trustee is a benefit of the trust to the person who receives the payment. This looks like nothing so much as SSA's old "name on the instrument" rule.[113] From that perspective, a trustee's $20 payment to a cabdriver to take the beneficiary to a doctor's office for an exam gives the cabdriver a trust benefit. Such a payment is saved from violating "sole benefit" by the POMS exception allowing payments to third parties for the purchase of goods or services for the beneficiary. A definition that accommodates the central purpose of the thing it defines only as an exception to its general rule does not have a well-grounded general rule.

Like the Ptolemaic system,[114] SSA's definitions are a jerry-built approximation of the real thing and must in time lead to inaccurate, not to say bizarre, results. This happened for example in a state Medicaid agency's attempt to deal with a trustee's payment of compensation to a mother to remain home to care for her seriously disabled son.[115] Following SSA's theory, payments to the mother were treated as giving her a benefit of the trust, in violation of the sole benefit rule, and since she was doing what mothers (or at least parents) are expected to do, it was not shoehorned into the permissible exception. A traditional analysis under state trust law of sole benefit, as a guide to trustees, might permit payments to parents, but it would do so only when to do so were in the best interests of the beneficiary.[116]

ii. Revocability

SSA has applied state trust law inconsistently and often incorrectly in determining when trusts are irrevocable. It asserts as a "general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is revocable regardless of language in the trust to the contrary," and a trust that does not name specific individuals as beneficiaries is always revocable.[117] The modern rule, found in *Restatement of the Law (Third), Trusts,* is to the con-

112 *See* POMS SI 01120.201F.2.c, discussed above in text accompanying notes 51, 62 and 63.

113 *See* the discussion of this informal rule in *Purser v. Rahm,* 104 Wash. 2d 159, 170, 702 P.2d 1196, 1202 (1985), and the authorities cited there.

114 Ptolemy (c. A.D. 90-168) improved the accuracy of the geocentric theory's explanation of the movement of celestial bodies by positing that they moved in circles centered on other circles centered on yet other circles centered on the earth.

115 *Hobbs v. Zenderman, supra*, n. 63.

116 Application of sole benefit to payments to parents is discussed in more detail below.

117 POMS SI 01120.200D.3, first unnumbered para. The idea that a trust naming heirs, rather than specific individuals, is always revocable as a matter of law is drawn from the Doctrine of Worthier Title and the Rule in Shelley's Case, two post-feudal era rules designed to thwart attempts to avoid feudal duties. *See* Radford & Bryan, *supra* n. 11, at 14. These rules treated dispositions to the heirs of the settlor or another person as transfers to the ancestor, thus subjecting the transfer to taxes or duties that the settlor hoped to

trary: A trust is not for a sole beneficiary when the settlor "names heirs, next of kin, or similar groups to receive the remaining assets [after the beneficiary's] death"; therefore, the trust is not revocable per se. But SSA requires state-by-state analysis and finds that the rule survives absent an express judicial decision to the contrary, often overlooking statutory reversal, resulting in "unrelenting and incorrect application of the [Doctrine of Worthier Title]."[118]

This error, combined with its failure to appreciate the significance of third-party creators, can lead to anomalous results that violate long-standing state law. Parents who sought to avoid SSA's finding of revocability by having the trust name themselves as contingent beneficiaries could run afoul of the deeply established rule that no one can make a will for another person. Such a plan of distribution could easily deviate from state intestacy law depending on who survived, if anyone remarried and had later-born children, and the state's anti-lapse statute.

iii. Establishment

"Establish" is not a term of art in the law of trusts. Historically, a trust came into existence when the owner of property conveyed the beneficial interest to another. The question often requiring resolution was when, if ever, those duties arose, *viz.*, whether the conveyance itself defined the duties, whether a mere declaration by the settlor/trustee could cause enforceable duties to come into existence, or whether later acquired property could be subject to duties previously declared. A person could not establish a trust of someone else's property — that is, convey a beneficial interest to another — any more than he or she could sell it to another and convey good title. Because the trust arose from the transfer of one's own property, the person who transferred the property was the settlor who "established" the trust, and perforce that was the person who determined the terms of the trust. Similarly, because a trust involves obligations respecting property, a trust could not come into existence until a trustee was in possession of property.

In authorizing parents and grandparents to "establish" a trust, respectively, of their child's or grandchild's assets, Congress introduced a new notion into trust law – authorizing a person to establish a trust for management of *another's* property.

SSA has tried to find the meaning of "establishment" in state trust law without recognizing that Congress has created an authority that has no basis there since Congress had introduced a practice not found in state trust law. Where a person establishes a trust with his or her own assets, he or she is the grantor, as SSA says; the trust comes into existence when the trustee receives property subject to the obligations imposed by the grantor and spelled out in a trust document. SSA, focusing on what trust law accepted as a result of its premises, treats the person whose assets fund the trust as the grantor, and treats the trust as established only when assets are delivered to the trustee. And since it was the act of funding the trust that brought it into existence, the disabled beneficiary whose assets fund a special needs is the grantor, SSA reasons, so the trust does not meet all of the requirements of Section 1396p(d)(4)(A).

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avoid. Both rules have long since been repealed by statute and are largely repudiated in the United States, seen at most as rules of construction (*i.e.*, an inference unless the settlor clearly indicated a contrary intent) rather than rules of law. *See id.* at 15–16.

118 *See* Radford and Bryan, *supra* n. 11, at 29.

This misapplies state trust law. State trust law focuses on funding by the owner because that is the only person who can establish the rules of the trust governing his or her property. In the situation created by Congress, where parents are to establish a trust to hold their child's assets, the obligation that arises when the trust is funded is not determined by the funding but by the trust document executed earlier by the parents as settlors and accepted by the trustee. In most states, the terms of the document control.[119] Thus, it *is* the parents who create the trust document who are the settlors, not the child whose assets later fund the trust.

SSA gets out of this conundrum by another jerry-built solution: looking for authority in state law for the creation of a trust without property, what it calls a "dry" or "empty" trust, by which it means an unfunded *inter vivos* trust.[120] Absent express authorization of "dry" trusts, SSA treats the parent-created trust as inadequate under 42 U.S.C. § 1396p(d)(4)(A).[121] SSA has found that some states do and some states do not, citing and relying on indistinguishable state court decisions that all require a trustee have title to property.[122]

These misunderstandings of state trust law are not minor deviations from an otherwise sound approach. They concern essential features of trusts — creation, beneficial interests, and revocability. Having gotten them so wrong, SSA frankly cannot be trusted to construct a system that remains true to what Congress intended in adopting trusts to promote public benefit programs. Moreover, the fundamental incomprehension of what a trust is carries over to the problem of finding meaning in a trust for the sole benefit of a person as a matter of federal law.

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119 In determining the terms of the trust, the first resort is, of course, to the governing instrument. … [T]he terms of the governing instrument ordinarily are the terms of the trust. … [T]he governing instrument, if unambiguous, is ordinarily determinative. In such a case, extrinsic evidence is inadmissible to vary or add to the terms of the instrument … .

Ascher et al., *supra* n. 57, at § 2.2.4, 42–43.

120 See POMS SI 01120.203B.1.f. This is another misuse of existing terms from state trust law. In trust law, a dry trust is one in which the trustee has no affirmative duties, e.g. Provident Life & Accident Ins. Co. v. Little, 88 F. Supp. 2d 604, 607–608 (S.D.W. Va. 2000), and Atkins v. Marks, 288 S.W.3d 356, 367 (Tenn. Ct. App. 2008); an empty trust is one whose assets have been distributed, e.g. Giannini v. First Nat. Bank of Des Plaines, 136 Ill. App. 3d 971, 975 n. 3, 483 N.E.2d 924, 929 (Ill. App. 1st Dist. 1985).

121 See POMS PS 01825.046 (S.D.), summarizing the decision affirmed in Draper v. Colvin, ___ F. Supp. ___ (D.S.D., July 10, 2013), 2013 WL 3477272, appeal pending, No. 13-2757 (8th Cir.).

122 *Cf*. POMS PS 01825.046 (S.D.), stating that South Dakota does not authorize dry trusts, citing and relying on Higgins v. Higgins, 71 S.D. 17, 20 N.W.2d 523 (1945), for the proposition that "to be a valid trust, the provisions 'must be reasonably certain as to the property …'") with *e.g*. POMS PS 01825.042 (Pa.), which states that Maryland does authorize such trusts, citing and relying on From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 167, 803 A.2d 528, 557–558 (2002), although the court states the opposite: "A trust [only] exists where the legal title to property is held by one or more persons …"). See also Duggan v. Keto, 554 A.2d 1126, 1133 (D.C. 1989) (a trust must have "a trustee, who holds the trust property"); Buchanan v. Brentwood Fed. Sav. & Loan Ass'n, 457 Pa. 135, 144, 320 A.2d 117 (1974) (transferee of property with duties to "deal with the property for the benefit of another person"; "one of them as trustee holds property for the benefit of the other"), also cited and relied on in POMS PS 01825.042 to find that those jurisdictions allowed so-called dry trusts.

b. Sole Benefit as a Feature of Federal Law

Even if the meaning of "sole benefit" is a question of federal law, the federal agencies can still claim no special expertise. Special needs trusts are a recent exception in the public benefits arena, and understanding sole benefit does not draw on any existing agency experience. The meaning of sole benefit does not involve a close reading of a highly complex statute with hundreds of moving parts, each of which affects dozens of others. Both agencies have the authority and the competence to address what kind of state property entities are available as resources or income and, for example, what kind of entities constitute income and what kind constitute resources, how they are counted or excluded, how they interplay with one another, and deeming from one to another; these are the kinds of statutory questions that CMS and SSA are uniquely qualified to answer. Both agencies correctly claim to continue to have primary authority to define and address the status of income and resources as they go into or come out of trusts,[123] but that is a different matter from interpreting the law of trusts or addressing how trusts should operate, which is what sole benefit properly concerns.

Nor does interpretation involve a close reading of specific legislative history and Congress-agency interchange to interpret an otherwise opaque statute.[124] CMS first addressed the issue in the wake of Congress's enactment of OBRA '93, and it has hardly visited the issue since. Special needs trusts were introduced into SSI with no history of agency action or reaction. The strongest argument in favor of the CMS/SSA definition is that Congress carried over much of the Medicaid statue to SSI after CMS had promulgated its informal State Medicaid Manual provision.

3. Validity of Reasoning and Persuasiveness

To address the validity of the agencies' reasoning requires, first, considering what question they were trying to answer. Congress's primary goal, inferred from the statutory structure, was to ensure that the person with a disability received the benefit of the resources set aside in trust. Much of what has been said above reflects the failure of CMS and SSA to understand how this operates in the context of a trust relationship. Three additional points merit discussion.

First, the definitions of sole benefit and "solely for the benefit of" add little to the statutory terms. They are the regulatory equivalent of saying the same thing, only louder.[125] Where the statute says "solely for the benefit of," both CMS and SSA say "the trust benefits no one but that individual … ."[126] It is difficult to see what the definition adds; it provides no operational direction, no indication of what the trust document should say that the statute does not already address, and no guidance to trustees on what they can or cannot do.

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123 POMS SI 01120.200E; *Transmittal 64, supra* n. 1, at § 3259.7C ("funds entering and leaving [so-called Miller trusts] are not necessarily exempt from treatment under the rules of the appropriate cash assistance program"). *See supra* nn. 102 and 106.

124 *Cf. Md. Dept. of Health & Mental Hygiene v. Ctrs. for Medicare & Medicaid Servs.*, 542 F.3d 424 (4th Cir. 2008).

125 *Cf. Gonzales v. Ore.*, 546 U.S. 243, 256–257, 126 S. Ct. 904, 915 (2006) (dismissing an "interpretive" rule that "does little more than restate the terms of the statute itself").

126 POMS SI 01120.201F.2; *Transmittal 64, supra* n. 1, at § 3257.6.

Second, CMS provided the one real elaboration on the basic definition of sole benefit, its dog-in-the-manger[127] requirement for actuarially sound distributions.[128] This addition is neither well reasoned nor persuasive. In requiring minimum required distribution–type distributions, CMS is telling trustees to make distributions even when doing so is not required to pay for any goods or services the beneficiary needs or wants. This can, if it has any effect at all, only result in reducing trust resources prematurely and unnecessarily, wasting resources and potentially leaving the beneficiary with inadequate resources later in life.[129]

CMS's offer of payback as an alternative to actuarially soundness suggests that one

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127 The proverbial dog in the manger cannot use the hay that is there while keeping away the ox that could, so the hay is wasted. *Aesop's Fables* 163 (Laura Gibbs trans., Oxford World Classics 2002).

128 CMS may have meant something such as the "minimum required distribution" rules that require distributions from tax qualified retirement plans at a rate designed to exhaust the accounts during the taxpayer's actuarial lifetime. But in fact "actuarial soundness," as actuaries use the term, is a rule of caution limiting how much a plan can pay out and still be able to meet its future obligations. While it is almost always used in the context of a plan involving multiple beneficiaries, *e.g. Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), in an individual case it may mean reducing a monthly benefit to ensure that the benefit will continue during the person's entire lifetime, the opposite of what CMS likely intended.

CMS's use of the term "actuarially sound" with respect to annuities is similarly unsophisticated. It published an SSA table of life expectancies based on age and stated that "[i]f the individual is not reasonably expected to live longer than the guaranteed period of the annuity," he or she "will not receive fair market value" and the annuity is "not actuarially sound." *Transmittal 64, supra* n. 1, at § 3258.9B, para. 4.

First, this reflects a misunderstanding of the significance of an actuarial table, which shows only average life expectancy; it is not a prediction of how long any one person will live. Second, the rule does not recognize the risk element in an annuity and thus fails to treat as a transfer the purchase of a life-plus-years-certain annuity no matter what the term-certain period is.

The additional cost of the term-certain provision is the price to be paid to cover the risk that payments must be made beyond the person's actual lifetime. Thus it allows for the benefit of someone other than the annuitant. For example, if a 70-year-old man with a life expectancy (under the Medicaid table) of 12.81 years can purchase an annuity paying $3,000 per month for life for $475,000, and a life-plus-10-years-certain annuity paying that much per month costs $550,000, the cost of the term-certain benefit, which only benefits others, is $75,000 — the additional cost to purchase the right to payment (up to 10 years) beyond the annuitant's actual lifetime. That $75,000 should be treated as a transfer to the named beneficiaries, but isn't.

Congress has adopted CMS's approach in using the idea of "actuarially sound" based on SSA tables in approving the use of certain annuities in Medicaid planning, 42 U.S.C. § 1396p(c)(1)(G)(ii)(II). That may render the use of actuarial soundness immune to judicial review with respect to annuities, but the issue with respect to special needs trusts is quite different.

129 In *Lloyd v. Campbell* 120 Ohio App. 441, 196 N.E.2d 786 (Ohio App. 1964), the court rejected the beneficiary's claim that she was entitled to all current income where the trust did not specifically authorize the trustee to convert undistributed income to principal, under the trustee's duty to consider her future welfare if not in derogation of present needs.

> Most certainly, it may be logically and persuasively argued that the beneficiary's welfare and benefit is being nobly served if the trustee elects to treat excess income as principal and invests it as such, thereby increasing the fund subject to the trust and the amount that will be received by the beneficiary when she reaches age 25, and likewise increasing the amount she will receive at age 32 when the trust is terminated and final distribution of the remaining half of the principal is made to her. Of course, if the beneficiary's present benefit and welfare is neglected in order to increase the trust principal, this would be an abuse of discretion on the part of the trustee.

Id. at 449, 196 N.E.2d at 791–792.

of its reasons for requiring actuarial soundness was to protect beneficiaries from trustees who are also remainder beneficiaries. Payback would reduce if not eliminate an interested trustee's incentive to preserve funds. Perhaps unsophisticated family member trustees are swayed by payback that forecloses effective self-interest, but imposing the requirement on disinterested professional trustees suggests SSA does not fully understand or appreciate what trustees do.

Third, the agencies' definition of sole benefit fails to address trustee duties. A trust that does not relieve the trustee of his or her obligations to remainder beneficiaries under the duty of impartiality can only result in underserving the beneficiary with a disability. Without an express waiver in the trust document, a trustee must take into account both the lifetime and remainder beneficiaries' interests. The conscientious trustee might well decline to spend trust funds when it threatens the remainder beneficiaries' ultimate share. Both CMS and SSA, unsophisticated as they are in their understanding of trusts, are silent on this crucial aspect of trust administration. In their discussion of sole benefit, they have failed to understand the nub of the problem (i.e., the need to relieve a trustee of a duty of impartiality between the life and remainder beneficiaries) and instead focused their efforts on a proxy, requiring distributions for the life beneficiary.

The elements for discarding *Skidmore* deference are present. These issues are outside the normal agency purview, the agencies' analyses have pervasive errors with respect to the state trust law they attempt to analyze, and their own definitions fail to fully serve Congress's purpose and are not supported by solid reasoning.

VI. A Practical and Effective Approach to Special Needs Trust Regulation That Utilizes Trustees as Partners

The task for CMS and SSA is to use their authority to develop standards and guidelines that utilize, rather than thwart, competent, responsible, properly trained trustees as their partners in making special needs trusts an effective tool in serving the needs of people with disabilities. If this were done properly, capable trustees would be the allies of the federal and state agencies in the efficient use of limited private resources. Beneficiaries would live better, more rewarding lives to the extent that resources can make a difference, at lower cost to Medicaid, with a greater possibility of more funds recovered through payback.

As a threshold matter, the agencies would appear to have somewhat different authority but common areas of concern. Even before getting to the substance of supervision of special needs trusts and trustees, CMS and SSA should resolve between themselves whether, as the court held in *Lewis*, there is a single, nationwide rule for special needs trusts rooted in federal law except to the extent it relies on state law operation. Related, it would be a rare but impressive moment if the two sister agencies could coordinate or even combine their efforts to develop a single, uniform approach for special needs trusts.

As part of that process, the agencies ought to come to recognize the limit of their ability to manage special needs trusts. Even aside from their many errors, the agencies went fundamentally astray in focusing on benefit as a measure of each transaction rather than as a guide to trustee conduct. By focusing on who received payment, a familiar cash benefits idea, they came up with a rule that is both too narrow and too broad.

Consider whether a trustee should pay a parent to provide necessary daily care for a severely disabled child, as in *Hobbs v. Zenderman*.[130] Who benefits when a trust pays a mother a little more than minimum wage to stay home and care for her seriously disabled 7-year-old son? Under the CMS/SSA standard, as applied by a state Medicaid agency, this benefitted the mother. This was the result even though the independent corporate trustee with probate court approval concluded that paying the mother was preferable to paying substantially more while the mother worked outside the home for less.[131] The trustee was denied the opportunity to exercise its discretion and purchase the care for the child the least expensive way possible. Plainly, the definition can be too narrow when it asks, "Who gets paid for caring for a disabled 7-year-old?" and does not permit payment on facts such as these.

But by the same token, it is too broad when it asks only, "Who gets paid for caring for a disabled 7-year-old?" Who benefits when a trust pays for certified nursing aides for 24-hour care for the seriously disabled 7-year-old oldest daughter of a family of five, with a stay-at-home mother and a highly compensated father? The CMS/SSA standard would see this as the child's "sole benefit," even though the parents and the other two children plainly benefit as well. The parents are relieved of a huge burden, while the younger children might feel like they get their mother back. The trustee might well conclude that the disabled child's funds should be preserved while the family provides some of the care. A definition that always permits such payments is plainly too broad.

The proper question is not, "Who was paid to do the necessary work?" but "Is this the most cost-efficient way to take care of the child's needs, taking all of the facts and circumstances into account?" This is how state trust law typically handles these issues, under the best interests of the beneficiary standard. A trustee might answer the question differently depending on the situation of the family. Is the mother home with a housekeeper because the family does not need her income and she elected to be an at-home mother? Does the trust have sufficient assets and scheduled income from a structure to pay for full-time aides now and still have sufficient funds to meet needs potentially 80 years in the future? These are decisions best left to a trustee to make on a case-by-case basis.

SSA's recent effort to address using special needs trusts funds for travel to allow beneficiaries to visit with relatives, discussed above,[132] illustrates the limit on what an agency can do through general rules. Consider the following scenario. The Washington, D.C., parents of a severely autistic child, living in a specialized Florida facility, would like to visit him, and the facility's staff agrees that maintaining family ties is extremely beneficial for the boy. The options are to pay the cost for a round trip for one of the parents to visit the boy in Florida, perhaps including other travel costs such as car rental, hotel, and meals, or to pay the cost for two round trips for the boy and an aide to go to Washing-

130 *Hobbs*, 579 F.3d at 1171.

131 The fact that the plan was proposed by an independent corporate trustee and approved by the local probate court are among the undisputed facts that the court in *Hobbs* believed unnecessary to include in its decision justifying the result. *See In the Matter of the Steffan Hobbs Special Needs Trust*, San Juan County (N.M.), 11th Judicial Cir., Case No. CV-2003-136-6, Order Authorizing Expenditure of Funds (June 11, 2003) (http://www.naela.org/NAELADocs/PDF/NAELA%20Journal/Hobbs%206-11-2003%20order_001.pdf).

132 *See supra* nn. 52–55 and accompanying text.

ton, along with wages and other expenses for the aide.

For the trustee, the issue is the child's best interests, including both current and future needs. Assuming the cost of the parents visiting is less, the trustee can consider whether trust funds are necessary. If the family is relatively affluent and could or would go even without a trust contribution to the costs, the trustee could reasonably decline to pay the costs, based in part on the need to preserve assets for the child's long-term needs. If the family could not afford such a trip without financial support from the trust, the trustee must weigh the long-term benefits of providing family contact against the child's future needs. But the standard would not be the formalistic "Who used the service?" but the real and practical one of "What is best for the child?"

Trustees of special needs trusts are subject to state trust laws that provide numerous protections for the beneficiary and for compliance with the terms of the trust. State probate court judges and state legislatures have established well-developed protections for beneficiaries of trusts, including accountings, removal, surcharge, penalties, fines, and in some circumstances even penal sanctions. This is where the supervision of trusts should be managed, not with public benefits eligibility workers with little or no experience in how trusts are managed or with sweeping policies in federal policy manuals that cannot take into account all of the facts of individual situations.

Sole benefit refers to the standard that guides the trustee, not to specific transactions. That is the level at which CMS and SSA can and should operate. Aside from clearing up the errors arising from failing to recognize the centrality of the role of the trustee[133] and the proper use of state trust law,[134] the agencies should address trustee standards and duties, perhaps where the problems are the most complicated. Few problems are more vexing than providing a home and caregiving for a disabled child whose family is poor and cannot afford appropriate accommodations and care. These and other complicated problems would benefit from a process in which the agencies get the benefit of trustees' experience in the real world of special needs trusts.

133 For example, its analysis of (d)(4)(B) trusts, which finds that income that funds the trust is for the benefit of the beneficiary only when spent. If the trustee has an affirmative duty to use the funds for the beneficiary, under a best interests standard, funding the trust is for his or her benefit no matter when the money is spent.

134 For example, blanket imposition of the Rule in Shelley's Case and the Doctrine of Worthier Title.

Administration of Special Needs Trusts: Development of an Improved Approach (Part I)

By Edward V. Wilcenski, Esq. and Tara Anne Pleat, Esq.[1]

Introduction:

We think it fair to say that most Elder Law and Special Needs Planning attorneys have developed a level of comfort with third party special needs trust practice. Many of the rules and concepts which apply to other trusts and which are used in a traditional estate planning practice carry over quite nicely.

The same cannot be said for the practice involving first party trusts. Indeed, the very nature of first party trust practice defies efforts to create a uniform set of practice standards for drafting and administration.[2] By definition these trusts are funded with the property of individuals with disabilities (as opposed to parents or other benefactors), leading to practice variations based on:

* disability, which can be cognitive, physical, or some combination of them;

* the nature of the property interest, which can be the proceeds of a personal injury settlement, marital property, inherited or gifted assets, accumulated earnings, and federal and state benefits;

* procedural context, which can be governed by the rules of the guardianship court if the trust is being funded in connection with a guardianship proceeding, the civil practice statute if the trust is being funded as part of a court approved litigation settlement, or the rules of the family court if the trust is being incorporated into a divorce proceeding; and

* program rules for public benefits, including Supplemental Security Income, Medicaid and Section 8 among many others.

First Party Trust Administration: Uncertainty and Indecision

New York enacted a third party supplemental (special) needs trust (SNT) statute, Section 7-1.12 of New York's Estates Powers & Trusts Law ("EPTL 7-1.12") in 1993. That same year Congress carved out an exception for first party trusts in the federal Medicaid program's transfer of asset penalty provisions,[3] and in 1994 our State legislature amended EPTL 7-1.12 to be used as the drafting template for both types of special needs trusts.[4] The result is something of a hybrid: a trust borne of federal Medicaid law governing asset transfers, framed within a state trust statute which codified the holding of a watershed state court decision on third party trusts.[5]

In New York, some courts – especially in the early years after the enactment of OBRA '93 – attempted to create drafting and administration standards for first party trusts.[6]

These early decisions are inherently fact- and forum-specific. They have led to as much confusion as clarity and offer little precedential value as trial court decisions. At best, they establish little pockets of common law applicable in similar proceedings involving cases with nearly identical facts.

A survey of New York case law[7] involving first party trusts shows that:

* statutory and regulatory guidance is limited;

* In the absence of guidance, courts give excessive deference to public welfare officials and program administrators; and

* the law continues to wrestle with the concept of disability, retaining vestiges of the outdated idea that all disabilities are alike and that every individual with a disability, regardless of the nature of the disability or the existence of informal supports, requires micromanagement and rigid oversight.

This lack of clarity has had a practical impact on the availability of qualified trustees. In our experience, many capable banks and trust companies – and especially the smaller regional institutions – are second guessing their commitment to the special needs trust market.

As special needs planning attorneys we certainly feel their pain. Perhaps the most challenging aspect of first party trust practice is the lack of credible guidance in the area of administration, leaving the trustee unsure of the criteria being used to measure its conduct. Some courts are inclined to micromanage expenditures, others are not. Some rely heavily on the public benefit program representatives' opinions, others do not. Some courts have the personnel to review regular accountings of trust activity, others do not.

This uncertainty is compounded by a blurred line of demarcation between what types of activities should be considered part of the trustee's fiduciary responsibility, and which activities can and should be delegated to outside counsel, private case managers and others.

For their part, given the inconsistent decisional law in this area, court examiners and judges often substitute their judgment for that of the trustee, and default to a generalized and uncircumscribed 'best interest' standard to pick and choose which expenditures are deemed appropriate and which should be disapproved and subject to surcharge. This leaves trustees hesitant to make distributions for fear of being second guessed by someone with little or no firsthand knowledge of the beneficiary's day-to-day circumstances, and fearful of seeking professional assistance out of a concern that those expenditures will be challenged in the future.

Banks and trust companies bear some responsibility for the current state of affairs. Many entered the special needs trust market without much thought to how SNTs differ from other discretionary trusts, and they applied the same administrative and oversight practices to SNTs they used for other trusts.

As a result, in cases where beneficiaries are incapable of self-advocacy and lack any family or informal supports, SNTs often sit dormant. This was the situation in a well-publicized New York case where a professional fiduciary was chastised for failing to take affirmative steps to remain informed about the needs of its autistic beneficiary.[8] In other cases, the trustees fail to do their due diligence in investigating the availability of government benefits, instead relying exclusively on requests made by family members and guardians. This occurred in a case which received significant attention here in New York,[9] the result being a substantial surcharge against the fiduciary.

These two well-publicized decisions do not present the professional trustee in a particularly favorable light, justifiably so given the facts of the cases. But they have reinforced the perception that this area of administration is fraught with risk, and as a result many banks and trust companies are reluctant to administer SNTs.

The practical implications are significant and far reaching. The disability community needs credible, capable and competent professional trustees to administer special needs trusts, first party and third party alike. Parents and family caregivers are aging, and when they pass on, siblings and other family members may be unwilling or unable to fill their shoes. Disability service providers will continue to face cuts in Medicaid and other sources of government funding. It is a simple matter of demographics and public finance: the safety net is not what it once was, and private dollars will be needed to fill in the gaps to ensure that individuals with disabilities do not suffer as a result.

While most attorneys practicing in this area are familiar with the concept of an SNT being a discretionary trust, little has been written on how a trustee's exercise of discretion should be measured in the context of a formal accounting of trust activity. We concentrate on first party trusts in this article because of the greater risk associated with the Medicaid program's right of repayment, but the discussion of an appropriate standard of review for discretionary distributions would apply to both first party and third party trusts.

This article, the first of two, focuses on the appropriate standard of review for discretionary decisions made by trustees of SNTs. The next will provide suggestions on how a trustee might satisfy that standard by striking a balance between two credible objectives: (1) the need for court oversight of a trustee who is managing money for a beneficiary who cannot advocate for herself, and (2) deference to the trustee's right to make discretionary decisions which it reasonably believes to be consistent with its fiduciary responsibilities.

General Obligations of the Trustee of a Supplemental Needs Trust

SNTs are discretionary trusts, but they require trustees in the exercise of discretion to consider the availability of government benefits before deciding to pay privately for a good or service. In New York, our statute allows for the distribution of "net income and/or principal of [the] trust as the trustee shall deem advisable, in his or her *sole and absolute discretion*."[10]

When it was enacted in 1993, New York's statute was intended to codify the holding of Matter of Escher,[11] the first case in New York to support the right of a discretionary trustee to refuse to pay for something that might be available from a publicly funded source (or, in that case, to repay the State for benefits provided in the past). The trustee's ability to exercise discretion was central to the holding in the case, later upheld by the highest court in our State.

New York's statute goes one step further. It allows a drafting attorney to provide the trustee with discretion to make a distribution *even if the distribution causes a reduction in benefits,* so long as the beneficiary will be better off as a result.[12] In exercising this grant of discretion, a trustee must:

1. consider *current* financial eligibility rules, understanding that government benefit eligibility is not static and will continually evolve due to changes in family composition, family financial condition, and beneficiary capabilities and preferences;

2. consider services and supports that are available to the beneficiary as a result of the beneficiary's participation in one or more government funded programs; and

3. ascertain whether services and supports available at the time of a proposed distribution are sufficient to meet the beneficiary's needs and preferences, or whether additional or alternative goods and services should be purchased privately with trust assets. If the latter, the trustee must be able to document the basis for the use of private funds.

But once a trustee has done its due diligence and made the distribution, what standard does a court use to review the trustee's decision to determine whether the distribution should be upheld in a proceeding for settlement of the trustee's accounts? We think the lack of a uniformly accepted answer to this question is the source of much conflict and consternation within the fiduciary community.

Federal law does not provide a standard of review

The Statute

The federal Medicaid statute 42 USC §1396p(d)(4)(A), provides the underlying foundation for first party trusts. It has four basic requirements: the trust must be established by a parent, grandparent, guardian, a court or by the individual with a disability, the beneficiary must meet the disability criteria under the Social Security Act, the beneficiary must be under the age of sixty-five (65) years at the time the trust is funded with the beneficiary's assets, and the trust must provide that upon the beneficiary's death, State Medicaid programs be repaid for medical assistance provided during the course of the beneficiary's life.

If a first party trust complies with these four criteria, the trust will receive the associated protections under federal Medicaid and Supplemental Security Income (SSI) law: trust

assets will be disregarded in determining resource eligibility while the income counting rules of these two programs will determine how a distribution will impact benefit eligibility and amount.

With one important exception, the federal statute leaves fiduciary standards to be determined under the law of the state where the trust was established.[13] The federal transfer of asset provisions exempt transfers to first party trusts under both 42 USC §§1396 d(4)(A) and d(4)(C) which are established for the "sole benefit" of an individual with a disability. The term has been interpreted to impose a limitation on distributions, often leading to absurd results.[14] We agree with NAELA Fellow Ron M. Landsman, whose thoughtful analysis leads to the better interpretation of that term: a deviation from the traditional fiduciary obligation to treat all beneficiaries equally, both income beneficiaries and remainder beneficiaries.[15]

The Regulations

No federal regulations were ever issued in connection with the first party trust provisions of the federal statute.

The Administrative Guidelines

The Health Care Financing Administration ("HCFA", now the Centers for Medicare and Medicaid Services or "CMS") modified the State Medicaid Manual shortly after the enactment of OBRA '93 in order to provide guidance to the States in implementing the changes to federal Medicaid law.[16] As it relates to first party trusts, this federal guidance – commonly referred to as "Transmittal 64" – deals primarily with the impact of funding first party trusts on Medicaid eligibility.

The SSI program's Program Operation Manual System (POMS) contains quite a bit of guidance on how the establishment, funding and administration of trusts might impact eligibility for the SSI program. [17]

There is no discussion of a fiduciary standard of review under either set of rules.

New York courts have largely ignored the standard suggested in our statute

A reader might assume that SNT administration in New York is well settled in light of the fact that our statute says – clearly and unequivocally – that an SNT trustee has "sole and absolute discretion" to make distribution decisions. The reader would assume that trustee conduct is measured in accordance with long standing New York law governing discretionary trusts.[18] The reader would be mistaken.

New York cases involving first party trusts include personal injury settlements, guardianship proceedings and family court proceedings. Because of the inherently fact

specific nature of the cases, they do not provide a reliable and broadly applicable precedent for the drafting and administration of first party trusts.

While there are cases, including from our highest court, which explicitly acknowledge the discretionary nature of SNTs,[19] we are not aware of any decisions which considered a contested distribution from an SNT, acknowledged the trustee's discretion to make a distribution decision, and upheld the distribution notwithstanding the fact that the court might have made a different decision.[20] This level of deference to the trustee of a discretionary trust – qualified by the trustee's responsibility to ensure that its decision is both supportable on the law and facts and is duly documented – is a familiar concept to the seasoned fiduciary.[21] It underlies the professional fiduciary's willingness to accept an appointment with the understanding that every decision may at some point be called into question.

Many attorneys who represent trustees of SNTs feel as if their clients do not receive the same level of deference, leaving them like fish in a barrel to be speared by the many parties who have standing to second guess: court examiners, judges, public welfare agency attorneys, and disgruntled beneficiaries who may have behavioral and cognitive deficits that make collaborative administration difficult. The fiduciaries' concerns are legitimate.

Identifying a standard of review

Most attorneys who represent fiduciaries know that the traditional standard of review for a discretionary trust is the "abuse of discretion" standard. Yet once government benefits and disability are added to the mix, conviction wavers and the analysis becomes diluted.

There seem to be two assessment methodologies used by most practitioners, courts and commentators when analyzing distributions from SNTs. One focuses on benefit eligibility, the other uses a broad and uncircumscribed "best interest" analysis. Both assessments are relevant, but neither should be used as a substitute for the "abuse of discretion" standard when reviewing the accounts of the trustee of an SNT.

Benefit eligibility is only one factor to consider when making distributions

The language of a "typical" SNT requires consideration of the availability of publicly funded benefits before a distribution is made, with the understanding that the impact of a distribution will vary from program to program.[22] Benefit program rules are applied at the time of the distribution, and are based on the beneficiary's *current* eligibility status. So, for example, the payment of rent by a trustee will impact otherwise similarly situated beneficiaries depending on program eligibility: Medicaid, which in New York allows a trustee to make in-kind payments from an SNT, including for food and shelter, without a reduction in benefits,[23] Supplemental Security Income (SSI), the rules of which typically reduce the benefits of an SSI recipient if a trust pays for food and shelter,[24] and Supplemental Nutrition Assistance Program ("SNAP"), formerly Food Stamps, which (in

New York) may treat payments to a beneficiary's household that are permissible for Medicaid purposes as countable income for SNAP purposes, thus reducing the monthly SNAP subsidy.[25]

It is not uncommon for a distribution to have an adverse impact on one benefit and no impact or limited impact on another. If a trustee decides to pay a beneficiary's rent, there may be a limited impact on the beneficiary's SSI payment, no impact on Medicaid eligibility, but a substantial reduction in the SNAP subsidy. If the trustee's decision to pay rent is reviewed (after the fact as part of an accounting proceeding) based on its impact on government benefits, which benefit program should serve as the baseline in determining the permissibility of the distribution by the trustee?

The answer is "none of them." Program rules do not restrict or permit a distribution; rather, the rules inform the trustee and beneficiary alike whether the contemplated distribution will have an impact on benefits. The trustee must decide whether a distribution – and the resulting impact on benefits – puts the beneficiary in a better place.

The trustee's failure to consider this distinction results in over-reliance on the often *ad hoc* and arbitrary decisions of government benefit agencies, excessive deference to public welfare agency attorneys in court proceedings involving SNTs, and an obsessive focus on informal and non-binding speculation by agency staff who opine on how an issue might be addressed in a future rule or decided in a future controversy. From our perspective, the result is that the tail ends up wagging the dog.[26]

Perhaps the best example of "excessive deference" can be found in In re McMullen,[27] a trial court case involving the review of a first party trust as part of a proceeding to settle a personal injury lawsuit. Initially, the decision includes a good explanation of the court's responsibility to ensure that a proposed trust document meets the statutory criteria for first party trusts such that the beneficiary's eligibility for Medicaid would be protected.

However, in trying to reconcile a disagreement between the petitioner and the attorney for the local Medicaid agency on the terms of the proposed trust, the court announced a "prophylactic" remedy that would be applied prospectively in all proceedings brought before that Court.[28] The 'remedy' was to require a petitioner to secure written approval for the terms of a first party trust from the local Medicaid agency before the court would entertain the petition. In other words, the court would require the petitioning party to concede to the demands of the Medicaid program representative - in advance and without the right to be heard - just for the matter to be accepted for consideration.

It is unlikely that such a position would be upheld on appeal (none was taken in the case), and one can understand why a court with little statutory guidance and without competent advocacy by special needs trust counsel would try to fashion a remedy to streamline future proceedings. But the case is badly decided.

Another recent New York decision, Matter of Tinsmon[29], illustrates how public welfare agency attorneys try to use program rules to control and limit fiduciary conduct. In Tinsmon, individual co-trustees of a first party trust sought court approval to use trust funds to purchase a one-half interest in the primary residence of the beneficiary, an SSI recipient. The beneficiary already owned the other one-half interest outright. The trust did not require prior court approval, but the co-trustees were also the parents and court appointed guardians. More important, the one-half interest was owned by one of the co-trustees who had helped the beneficiary finance the purchase prior to the injury.

The co-trustees asked the court to approve the 'buy out' of the co-trustee's interest and, in effect, a distribution of the interest to the beneficiary, outright and free of trust, with the result being that the beneficiary would own the entire residence. The beneficiary was a young mother, and by leaving the home in her name her interest would pass to her children without estate recovery for expenses incurred prior to age 55.[30]

The local Medicaid agency was served with process because of the Medicaid program's right of recovery at death and – predictably - objected. The agency argued, among other things, that the transaction was prohibited under the POMS.

There is no such prohibition under the POMS. The POMS clearly contemplate that a trustee may use trust assets to purchase an item which would be exempt in determining SSI eligibility if owned by the beneficiary outright,[31] a point made clear by the Guardian *ad litem* who represented the beneficiary in the transaction. The Guardian *ad litem* recommended that the transaction proceed as proposed, and the Court ultimately approved.[32]

But what if there was an adverse impact on SSI? So long as the trustee determined that the beneficiary would be left in a better position notwithstanding, the terms of the trust and the language of New York's statute give the trustee the discretion to proceed nonetheless. Benefit eligibility is just one factor to consider in the exercise of discretion; it does not independently permit or preclude a discretionary distribution.

"Best Interest" is another factor to consider, and should not be used as a substitute for the traditional standard of review

Courts considering the disposition of litigation settlements and guardianship property will render decisions based on what they determine to be in the "best interest" of the unemancipated minor or person with a disability. Predictably, decisional law in this area tends to be very fact specific, and commonly recites the courts' responsibility to protect those who are unable to speak for themselves.[33]

A best interest assessment is properly undertaken when a trust arrangement is being recommended to a court. Whether the use of a trust (versus some other custodial arrangement) is appropriate, whether the proposed trustee is acceptable, and whether the terms of the proposed trust are consistent with the objectives and concerns of the

court should all be viewed through the "best interest" lens at the time the arrangement is being proposed.

The most frequently cited example of this practice in New York is in the Matter of Morales, where a court-appointed guardian sought to transfer litigation proceeds to a first party trust to protect benefit eligibility. Explaining that "the duties and responsibilities of the trustee to the incapacitated person are akin to those of a guardian," the court went on to require modifications to the language of the proposed document which it "deem[ed] necessary to protect the interests of the disabled person."[34] The judge then provided – right in the language of the decision - a sample trust document to be used as a "guide to the bar" for drafting first party trusts.

The "Morales Trust" document provided by the court includes provisions not required as a matter of statutory law and which many practitioners believe to be overly restrictive. The decision should be understood to provide guidance only in cases involving the establishment of SNTs in guardianship proceedings. But many New York courts continue to follow it when funding an SNT is proposed.

In the context of the *establishment and funding of an SNT*, the parties understand the rules of the game. The court must decide *whether* the SNT should be established, *who* should serve as trustee, and *how* the trust should be drafted to address the court's specific concerns in that particular case. Counsel have their opportunity to argue against modifications they believe exceed the statutory mandate or which are not necessary given the facts of that case, and ultimately the court will render its decision based on what it believes to be in the best interests of the individual before it.

But the question presented here is a different one: once an SNT has been established and funded in accordance with a court's best interest determination (or even in those cases where the SNT is established independently and without court involvement), what is the standard of review to be applied by a court when reviewing distributions made by the trustee? Little decisional law exists in New York, but one well publicized case[35] illustrates the approach taken by most courts in our experience.

In Matter of Liranzo the corporate trustee of a first party trust funded with litigation proceeds sought to settle its account and terminate the trust. The trust was initially funded with just over $420,000. Six years later, the trust had approximately $3,200 remaining. The accounting showed that most of the money was used to pay for private caregivers and taxi service for the beneficiary.

The decision begins with the judge's conclusion that the trustee breached a number of commonly understood, generalized rules of fiduciary conduct (the "duty of undivided loyalty," the obligation to administer the trust in the "sole interests of the beneficiary," and the need to "act reasonably and in good faith"). But the decision goes on to recite concepts that are less precise (criticism of distributions that "could have either been avoided or were unreasonable," the failure to "provide support for the plaintiff for as long

as possible," and "authorizing each and every discretionary disbursement requested by the infant plaintiff's mother"[36]).

In addressing the private caregiver payments, the judge criticized the trustee for accepting the mother's claim, supported by a private social worker, that the beneficiary was better off with private caregivers as opposed to Medicaid funded aides. This was not sufficient for the judge, who wrote that "the trust agreement requires that a good faith effort be made by the trustee to inquire about providers of home healthcare whose costs are covered under Medicaid."

The court also penalized the trustee for spending more than $50,000 on private taxi services based on the mother's representation that driving in a taxi was a form of therapy for the beneficiary. In the words of the judge, the trustee "should have further investigated before allowing the disbursements. This "taxi therapy" does not appear to be a responsible use of Trust fund monies consistent with prolonging the life of the Trust."[37]

A trustee might be able to work with the court's analysis of caregiver expenses, as the decision suggests that an investigation of Medicaid funded alternatives might have saved those distributions from surcharge. But testimony did show that the mother and a social worker were consulted prior to making the discretionary decision to pay privately for that care. Is that not a "good faith effort"? Was the issue the lack of independent inquiry by the trustee or a matter of inadequate documentation?

The court's analysis of the taxi expenses is more troubling. The statement that the expense "does not appear to be a responsible use of trust funds" is vague. Taxi therapy *did* appear to be responsible in the mother's eyes and in the eyes of the social worker. If the expense was hippotherapy would that have made a difference? And who better to make that assessment than the primary caregiver and a professional advocate?

Had the court articulated a clear standard of review to be applied to each trust expense, the decision would be more helpful. Instead, the judge substituted her judgment for that of the trustee as to what types of expenditures were in the best interest of the beneficiary, relying primarily on generalized statements of fiduciary responsibility to support her decision.

In the end the court refused to approve the private caregiver and taxi expenses (and a few others as well), resulting in a surcharge of over $170,000. Admittedly, when a trust with well over $400,000 is almost fully depleted in six years it does not bode well for the trustee. But egregious facts should not relieve the court of its responsibility to frame its surcharge and write its decision in a manner that leaves the parties with a clear understanding of the criteria being used to measure conduct.

What trustees need is a workable methodology for analyzing distributions – be they modest or significant, mundane or out-of-the-ordinary - once an SNT is up and running.

The first step in developing such a methodology is an agreement on the correct standard of review.

Abuse of discretion is the correct and the only workable standard of review to be applied when assessing distributions from special needs trusts.

The abuse of discretion standard is the traditional standard applied to the conduct of all discretionary trustees under New York law,[38] and is also consistent with a recent line of New York cases which take the position that SNTs should be treated no differently than other irrevocable trusts established under state law.[39]

The abuse of discretion standard is the only standard which can comfortably incorporate the legitimate objectives of the benefit eligibility assessment and the best interest assessment. Under the abuse of discretion standard, the trustee must consider the impact on eligibility and services (the benefit eligibility assessment) and the resulting benefit to the beneficiary (the best interest assessment) when making a distribution decision. Once these two factors have been reviewed, considered and documented and the distribution has been made, a reviewing court should defer to the trustee and approve the distribution unless the trustee abused its discretion by acting in bad faith or beyond the bounds of reasonable judgment.[40]

The abuse of discretion standard does not provide a 'pass' to the trustee of an SNT any more than it provides a pass to trustees of other types of discretionary trusts. All of the traditional obligations of fiduciary conduct would still apply: the need to invest prudently, the need to account in detail, the prohibition against self-dealing, etc.. But the abuse of discretion standard will protect the trustee who has complied with the traditional obligations of fiduciary conduct, and who can demonstrate that it has done its due diligence in considering a beneficiary's benefit eligibility and best interest when making a distribution decision.

Adoption of the abuse of discretion standard would help address many of the concerns of banks and other professional fiduciaries about assuming trusteeship of first party (and even third party) special needs trusts, and it would encourage more capable and credible institutions to offer their services to individuals with disabilities and their families. If clients prefer to use family members or other individuals as trustees, counsel can advise that their conduct will be measured in a fair and understandable way.

Next Issue: An Improved Approach

Once we accept the abuse of discretion standard as the correct standard of review for SNTs, the next step is to develop some practice standards and protocols to recommend to our trustee clients. In our next article we will offer some thoughts and suggestions on this topic.

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[1] The authors wish to express their thanks to NAELA Fellow Ron M. Landsman for his willingness to offer insight and comment on the ideas expressed in this article. His piece in the Spring 2014 issue of the

NAELA Journal, cited in footnote 15, remains one of the most important writings in the area of special needs planning in many years.

[2] This article is based primarily on law and practice in New York State. While we have tried to focus on general concepts which we believe to be incorporated into the law and practice of other states, we are also aware that many states have substantially modified these concepts by regulation and administrative rule. Thus we offer the standard lawyers' disclaimer: we think our positions are pretty solid here in New York, but you're on your own when you cross state lines.

[3] 42 USC §1396p(d)(4)(A), enacted as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (1993) ("OBRA '93").

[4] EPTL 7-1.12(a)(5(v).

[5] In re Escher, 94 Misc 2d 952 (Sur. Ct. Bronx Co. 1978), aff'd 75 AD2d 531 (1st Dept. 1980), aff'd 52 NY2d 1006 (1981).

[6] See, for example, In re Morales, N.Y.L.J., July 28, 1995, at 25 (Sup. Ct. Kings County 1995).

[7] Former New York State Bar Association Elder Law Section Chair David Goldfarb's chapter on supplemental needs trust practice in *Warren's Heaton on Surrogate's Court Practice,* 12-211.12 (Lexis 2018) includes a subchapter entitled "Court-Added Criteria for Supplemental Needs Trusts." The subchapter includes a summary of cases from a variety of New York State courts where judges required modifications to the trust document beyond what is required in our State statute, and which imposed administrative responsibilities on trustees beyond what is required in our state regulations. While the summary is interesting and informative, no credible reading of the cases would leave a practitioner with the impression that there is any uniformity of practice and procedure in in New York State.

[8] Matter of the Accounting of J.P. Morgan Chase Bank, N.A, and H.J.P. as co-Trustees of the Mark C.H. Discretionary Trust of 1995 v. Marie H., 956 N.Y.S.2d 856 (Sur. Ct. N.Y. Co. 2012).

[9] Liranzo v. LI Jewish Education/Research, 28863/1996, New York Law Journal 1202609859342 (Sup. Ct. Kings Co. 2013).

[10] EPTL 7-1.12(e)(1)(1).

[11] *Supra* n. 5.

[12] EPTL 7-1.12(e)(2)(i)(5).

[13] Lewis v. Alexander, 685 F.3d 325 (3d Cir. 2012), cert. denied 133 S. Ct. 933 (2013), involved the interplay between state trust law and federal Medicaid law. In Lewis, the State of Pennsylvania by legislation imposed limits on pooled special needs trusts not contained in the federal Medicaid statute, including a limit on the trustees' discretion to make various distributions. In striking down all of the State's restrictions other than oversight by the State Attorney General, the Court agreed that the state could supervise special needs trusts, but only in the same manner it supervises all trusts under general state trust law.

[14] In re: Estate of Skinner, N.C.App.Ct. No. COA15-284(June 21, 2016), *reversed*, 804 S.E.2d 449 (N.C. S. Ct. 2017). The Court of Appeals found that the lower court's reading of the term "sole benefit" as a rigid distribution standard would lead to the "absurd" result of a beneficiary (for whose benefit a home was purchased by the trustee) living in "bizarre isolation." The Supreme Court reversed the decision of the Court of Appeals because it used the incorrect standard of appellate review.

[15] See Landsman, Ron M., Esq., *When Worlds Collide: State Trust Law and Federal Welfare Programs*, NAELA Journal Volume 10, No. 1 (Spring 2014) for a comprehensive and persuasive piece on this topic. Interestingly, the North Carolina Court of Appeals in Skinner, *supra* n. 14., similarly interpreted the term "sole benefit" as a deviation from the traditional standard of loyalty owed to all beneficiaries.

[16] State Medicaid Manual, "Transmittal 64," General and Categorical Eligibility Requirements, available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html (last visited September 12, 2018) (see, specifically, section 3259.7).

[17] *See* recent revisions to the Social Security Administration's Program Operations Manual System ("POMS") SI 01120.200 – 203, effective April 30, 2018.

[18] See Restatement [Third] of Trusts § 50(1)(b); see, also, In re: Estate of T. Harry Glick, 2005 N.Y. Misc. LEXIS 7336 (Sur. Ct. Kings Co. 2005) at page 9, citing Matter of Gilbert, 156 Misc. 2d 379 (Sur. Ct. New York Co. 1992); Trust of Frederick Brockway Gleason, Jr., 1999/4582 A, NYLJ 1202629074611, at 1 (Sur. Ct. New York Co. 2013).

[19] Matter of Abraham XX, 11 N.Y.3d 429 (2008) at 434.

[20] We are unaware of cases undertaking this analysis, with one important exception: the payment of attorney fees. These payments will always be subject to review (at least in New York), regardless of the grant of discretion and regardless of the consent of all interested parties to the amount paid. *See* Matter of Felice, 1 Misc. 3d 909(A) (Sup. Ct. Suffolk Co. 2004), which specifically addressed a trustee's argument that the supplemental needs trust document deferred to the trustee on attorney fees, and Stortecky v. Mazzone, 85 N.Y.2d 518 (1995), which confirmed the right of a probate court to review fees paid by a fiduciary even if all parties to an accounting have agreed and consented.

[21] See Restatement [Third] of Trusts § 50(1)(b); see, also, In re: Estate of T. Harry Glick, *supra* n. 18 at page 9, citing Matter of Gilbert, *supra* n. 18, and Leigh v. Estate of Leigh, 55 Misc.2d 294 (Sup. Ct. New York Co. 1967).

[22] EPTL 7-1.12(a)(5)(ii).

[23] 18 NYCRR 360-4.3(e).

[24] POMS SI 01120.200E.1.b.

[25] *Temporary Assistance (TA) and Food Stamps (FS) Policy: The Treatment of Supplemental Needs Trusts and Reverse Annuity Mortgage (RAM) Loans,* New York State Office of Temporary and Disability Assistance, 01 INF- 8 (March 8, 2001).

[26] Consider the April 2018 release of the revisions to the POMS on SNTs, *supra* n. 17. We would all agree that the changes were favorable and provided much needed clarity. But they only involve one agency's interpretation of how a distribution or investment by a trustee might impact the benefits the agency provides. They do not create distribution and administration standards that are applicable across all SNTs, and yet our impression is that many special needs planning attorneys treat them this way. The result is a misplaced and outsized emphasis on that agency's often inconsistent and arbitrary application of its own rules.

[27] Matter of McMullen, 166 Misc.2d 117 (Sup. Ct. Suffolk Co. 1995).

[28] *Id.* at 121.

[29] Matter of Tinsmon (Lasher), 79 NYS 3d 854 (Sur. Ct. Albany Co. 2018).

[30] 42 USC §1396p(b)(1)(B).

[31] POMS SI 01120.201(I)(1)(c).

[32] The Department has filed an appeal and oral argument is scheduled for January of 2019.

[33] N.Y. Surrogate's Court Procedure Act (SCPA) 1713 ("reasonable, proper and just under the circumstances"); Dinnigan v. ABC Corp., 35 Misc. 3d 1216(A) (Sup. Ct. New York Co. 2012); Matter of Teitelbaum, 11 Misc.3d 1067(A) (Sur. Ct. Rockland Co. 2006).

[34] In re Morales, 1995 N.Y. Misc. LEXIS 726, 214 N.Y.L.J. 19 (N.Y. Sup. Ct. July 28, 1995).

[35] Liranzo, *supra* n. 9.

[36] *Id*. at p. 4.

[37] *Id.* at p. 7.

[38] *Supra* n. 18. In fact, the trustee's discretion as granted under the terms of a will drafted decades ago was a critical part of the court's analysis in the seminal case on special (supplemental) needs trusts in New York, In re Escher *supra* n. 5.

[39] Matter of Kaidirmouglou, NYLJ November 5, 2004 at page 28 (Sur. Ct. Suffolk Co. 2004); Matter of KeyBank, 58 Misc.3d 235 (Sur. Ct. Saratoga Co. 2017); Matter of Feuerstein, 147 A.D.3d 688 (First Dept. 2017). New York attorneys are well advised to remember that even a wholesale adoption of the 'abuse of discretion' standard in evaluating distributions from all supplemental needs trusts will not shield attorney fees from later scrutiny. Matter of Felice, *supra* n. 20.

[40] Trust of Frederick Brockway Gleason, Jr., 1999/4582 A, NYLJ 1202629074611, at *1 (Sur. Ct. New York Co. 2013).

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Capurso

Surrogate's Court of New York, Westchester County

March 26, 2019, Decided; April 2, 2019, Published

2009-2351/A

Reporter
2019 NYLJ LEXIS 1003 *

Capurso

(In the Matter of Capurso, NYLJ, Apr. 2, 2019 at 35)

Core Terms

guardianship, best interest, decree, disability, decisions, hygiene, least restrictive, group home, decision-making, independently, individual's, terminated, guardian, appointed, restored, revoked, Rights, manage, travel, alternatives, Affirmation, petitioned, letters, courts, proxy, intellectually, psychological, psychosocial, constitutes, deprivation

Judges: [*1] Judge: Surrogate ***Brandon Sall***

Opinion

In a ***guardianship*** proceeding brought pursuant to Article 17-A of the Surrogate's Court Procedure Act, petitioner petitioned for the dissolution of his ***guardianship***. In 2010, petitioner's parents were made petitioner's 17-A guardians after it was determined that he suffered from mild intellectual and developmental disabilities. In 2017, petitioner moved to a group home and then started to work at a restaurant to which he was able to travel independently. Petitioner now argued that the ***guardianship*** should be terminated because it was no longer in his best interest. He has ample support to help him in decision-making, and it is not the least restrictive means to achieve the goal of protecting him. The court granted the petition, finding that ***guardianship*** is no longer warranted since petitioner has gained greater independence since moving to the group home, as he has been able to sustain employment, manage a bank account, maintain a social life, take care of his hygiene, and engage with a decision-making network that constitutes a less restrictive alternative to 17-A ***guardianship***.

Full Case Digest Text

The papers relied on are as follows:

1. Citation returnable on December 5, 2018;

2. Petition filed on September **[*2]** 24, 2018;

3. Affidavits of service filed on October 16, 2018 and November 21, 2018;

4. Affirmation of Michael W. Gadomski, Esq. dated September 21, 2018, with exhibits annexed; and

5. Affirmation of Lisa Herman, Esq. filed on December 18, 2018;

DECISION & ORDER

In this ***guardianship*** proceeding brought pursuant to Article 17-A of the SCPA, Stephen Capurso ("Stephen"), along with his counsel, Disability Rights New York ("Disability Rights"), petitions this court for the dissolution of his ***guardianship***, the revocation of the letters of ***guardianship*** decreed to his parents Patricia Capurso ("Patricia") and Thomas Capurso ("Thomas"), and the restoration of his full legal capacity. For the reasons set forth below, the relief requested in the petition is granted. The facts relevant to this petition are as follows:

On October 13, 2009, Patricia and Thomas filed a petition seeking a decree awarding them 17-A ***guardianship*** of the person and property of Stephen. At that time, the court had before it, in support of the application, the affidavit of Benna Dinhofer, Psy.D. and the affirmation of Claudia Sickinger, M.D., both of which basically stated, among other things, that Stephen suffered from mild intellectual and developmental **[*3]** disabilities. On May 17, 2010, Patricia and Thomas were made Stephen's 17-A guardians of the person and

property.

On April 17, 2017, Stephen, who is now 34 years old, moved to the Park Circle Individualized Alternative ("Park Circle"), a group home in White Plains, NY. At some time thereafter, Stephen trained at the Culinary Tech Center, and he started work at the Birch Collective Restaurant in White Plains, NY, travelling to work independently.

On September 24, 2018, Stephen and his counsel filed this petition, stating that the ***guardianship*** should be terminated because it was no longer in Stephen's best interest to maintain it; he has ample support from his family and community to assist him in decision-making; and it is not the least restrictive means to achieve the goal of protecting him. In support of his petition, Stephen attached his psychological assessment dated July 12, 2018, his Individualized Service Plan dated October 16, 2017 and his psychosocial evaluation dated August 1, 2018.

The psychological assessment, conducted by Benna Strober, Psy.D., one of the doctors who had submitted an affidavit in support of the initial ***guardianship***, stated that Stephen is "becoming more independent **[*4]** in all areas" including personal hygiene, cooking, shopping, maintaining employment, and going on outings with housemates without supervision. He can also make personal decisions regarding his well-being and lives in a supportive environment in a group home that has promoted his independence and increased his desire to participate in decisions that affect his life.

Dr. Strober concluded that: "Stephen's parents [should] be removed as his legal guardians and granted a healthcare proxy and a power of attorney to continue to assist Stephen with his medical and financial decisions."

The psychosocial evaluation concluded that Stephen would benefit from reversing his parents' legal ***guardianship***.

Patricia and Thomas support the relief requested in the petition.

The court appointed Mental Hygiene Legal Service ("MHLS") to represent Stephen's interest (see *SCPA 1754[1]*). The MHLS attorney investigated the circumstances surrounding the application, and she recommends that the relief sought in the petition be granted. In fact, it is the position of MHLS that Stephen has made huge improvements in his ability to function independently and that it is a positive idea to put in place less restrictive alternatives **[*5]** for Stephen than ***guardianship***.

SCPA Article 17-A ***guardianship*** is plenary, resulting in a total deprivation of an individual's liberty (see *SCPA 1750*, *1750-a*, *1750-b*; see also *Matter of Michael J.N., 2017 N.Y. Misc. LEXIS 5104 [Sur. Ct., Erie County December 27, 2017]*; *Matter of Caitlin, 2017 NYLJ LEXIS 1043 [Sur. Ct., Kings County April 24, 2017])*.[1]

The standard for whether a decree of ***guardianship*** should issue in the first instance for an intellectually and a developmentally disabled person is set forth respectively in *SCPA 1750* and *1750-a*. In accordance with the statutory provisions, a determination must be made by the court that the individual has an "impaired ability to understand and appreciate the nature and consequences of decisions which result in such person being incapable of managing himself...and/or his...affairs by reason of intellectual disability [and/or developmental disability] and that such condition is permanent in nature or likely to continue indefinitely."

SCPA 1759 states that a person for whom a 17-A ***guardianship*** has been established may petition the court to have the ***guardianship*** dissolved. To have ***guardianship*** letters revoked, a 17-A ward, such as Stephen, bears the burden of establishing that the ***guardianship*** is not in his best interest, with the determination of what is in his best interest committed to the court's discretion (see *SCPA 1751*; *SCPA 1750-a*; see also *Matter of Michael J.N., 2017 N.Y. Misc. LEXIS 5104*).

In determining whether the termination of a **[*6]** ***guardianship*** is in the best interest of the individual, courts have considered whether it is the least restrictive means to preserve and protect the rights of the person (see *Matter of Michael J.N., 2017 N.Y. Misc. LEXIS 5104*).

There are only a few reported cases in which a decree of 17-A ***guardianship*** has been revoked and an individual restored to his full rights under the law. For example, *in Matter of Dameris L. (38 Misc. 3d 570 [Sur. Ct., N.Y. County 2012])*, the husband/co-guardian of a 17-A ward petitioned the court to revoke the ***guardianship*** letters issued to him and to the ward's

[1] ***Guardianships*** decreed in accordance with SCPA 17-A are unlike those granted under Article 81 of the Mental Hygiene Law because the latter can be tailored to suit the individual needs of the person.

mother. Because the record before it reflected that Dameris L. was able to make her own decisions (albeit sometimes with the assistance of family and community support), the court terminated the ***guardianship*** and restored her legal rights.

In doing so, Surrogate Glen wrote that "New York courts have embraced the principle of least restrictive alternatives" and that the

legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same, time permits them to exercise the independence and self-determination of which they are capable (citations omitted).

The court also noted that the **[*7]** "legal remedy of ***guardianship*** should be the last resort for addressing an individual's needs because it deprives the person of so much power and control over his or her life" [citations omitted].

In *Matter of Michael J.N. (2017 NY Misc LEXIS 5104)*, the Surrogate's Court (Howe, S.) found that vacatur of the decree of ***guardianship*** and revocation of the letters issued to Michael's parents were in Michael's best interest. In vacating the decree, the court relied on the record before it, which demonstrated that Michael's adaptive skills, as supported by his placement in a group home, enabled him to make health care decisions and to perform his daily living tasks without a guardian. The court noted that an individual's best interest must include an assessment of his functional capacity and what he can or cannot do in managing daily affairs (see also *Matter of Gulielmo (2006 NYLJ LEXIS 5332 [Sur. Ct., Suffolk County Nov. 13, 2006]* [17-A ***guardianship*** dissolved where the record demonstrated that the individual currently was capable of conducting all activities of daily living]).

Cases where courts have refused to appoint a 17-A guardian in the first instance also are instructive on this issue. In *Matter of Caitlin (2017 NYLJ LEXIS 1043)*, the court, in denying the petition for SCPA 17-A ***guardianship***, stated that, where less restrictive alternatives were available, such **[*8]** as a durable power of attorney, a health care proxy, and community support services, it was not in Caitlin's best interest to have a guardian appointed for her and to have her "decision-making authority supplanted, regardless of good intentions and a desire by [her] family to protect [her]." In *Matter of Hytham (52 Misc. 3d 1211[A] [Sur. Ct., Kings County April 14, 2016])*, a petition for ***guardianship*** was dismissed where the individual, although intellectually in the borderline delayed range, was able to independently handle, among other things, money, purchases, grooming and cooking.

Similarly, *in Matter of Michelle M. (52 Misc3d 1211[A] [Sur. Ct., Kings County 2016])*, the court denied the relief of a decree of ***guardianship*** where the individual lived in a supported apartment, had appropriate services and had the capacity to make her own decisions. In *Matter of D.D. (50 Misc. 3d 666 [Sur. Ct., Kings County 2015])*, the court found that where less restrictive legal tools were available, appointing a 17-A guardian for a 29 year old with an intellectual disability was not in his best interests because he was high functioning, well-integrated socially, able to care for his hygiene, work and travel, and capable of making his own decisions, although sometimes done with assistance (see also *Matter of Eli T., 62 Misc. 3d 638 [Sur. Ct., Kings County 2018]* [same]; *Matter of A.E., 2015 NYLJ LEXIS 4377 [Sur. Ct., Kings County Aug. 17, 2015]* [same]; *Matter of Luis, 2014 NYLJ LEXIS 6814 [Sur. Ct., Kings County April 4, 2014]* [same]).

The record before this court demonstrates that Stephen has gained greater independence **[*9]** since moving to Park Circle, as he has been able to obtain and sustain employment, manage a bank account, maintain a social life, travel independently, take care of his hygiene, and engage with a supported decision-making network. Therefore, since Stephen has a system of supported decision making in place that constitutes a less restrictive alternative to 17-A ***guardianship***, the ***guardianship*** is no longer warranted.

Based on the above, the petition is granted, and the decree dated May 17, 2010, is vacated; the SCPA Article 17-A ***guardianship*** of Stephen is terminated; the letters of ***guardianship*** issued to Patricia and Thomas are revoked; and Stephen's full legal capacity is restored.

Patricia and Thomas now should proceed to put the health care proxy and the power of attorney in place, and they are directed to account for their proceedings as guardian of Stephens property in an expeditious manner.

THIS IS THE DECISION AND ORDER OF THE COURT

Dated: March, 2019

White Plains, NY

Matter of KeyBank N.A.

Surrogate's Court of New York, Saratoga County

September 25, 2017, Decided

2016-769

Reporter
58 Misc. 3d 235 *; 67 N.Y.S.3d 407 **; 2017 N.Y. Misc. LEXIS 3800 ***; 2017 NY Slip Op 27321 ****

[**1]** In the Matter of ***KeyBank*** National Association et al., Petitioners.

Core Terms

beneficiary, social services, eligibility, regulations, venue, surrogate's court, amend, modification, reformation, grantors, modified, social services department, trusts, disabled, law law law, drafting, requests, terms, remainder interest, parties, health department, accounting, provisions, proper venue, provides, marital deduction, cross petition, amendment amendment amendment, observations, supplemental

Headnotes/Summary

Headnotes

Trial — Place of Trial — Demand for Change of Venue — Application for Trust Modification

1. Saratoga County Surrogate's Court was the proper venue for petitioners' proceeding seeking to modify the special needs trust established for the benefit of their son, and there was no basis to transfer the proceeding to the Albany County Supreme Court. Although venue would have been appropriate in either Saratoga County or Albany County, "[w]here [proper] venue may lie in more than one county under [SCPA 207 (1)], the court where a proceeding is first commenced with proper venue shall retain jurisdiction" (SCPA 207 [2]). Surrogate's Court acknowledged jurisdiction over the matter without objection from either party. The matter represented an active and pending proceeding before the court, and was the first and only proceeding seeking to address the relief requested in the petition. There was no pending proceeding in Supreme Court, and there had never been a commensurate proceeding commenced in the Albany County Surrogate's Court. Even assuming there was an open proceeding in Supreme Court, a supreme court will defer to the surrogate's court on matters where the surrogate's court has expertise, such as the review and administration of trusts.

Trusts — Special Needs Trust — Modification

2. In a proceeding commenced pursuant to SCPA 2101, the special needs trust (SNT) established for the benefit of petitioners' son was modified to require the trustee, upon the death of the beneficiary, to pay certain administrative expenses prior to reimbursement to the State for all medical assistance provided to the beneficiary during his lifetime, in order to maximize his eligibility for supplemental security income. The language of the proposed SNT conformed with the applicable statutes, provided the State of New York with the remainder interest as required by Social Services Law § 366 (2) (b) (2) (iii) (A), and had no negative effect upon the beneficiary's eligibility for Medicaid. Moreover, EPTL 7-1.9 (a) did not apply because the SNT provided that the "[g]rantor shall have no right [to] amend, revoke, or terminate" the agreement or trust "without approval by a court of competent jurisdiction." Nothing in the authority governing an SNT increases or broadens the role of respondent Department of Social Services beyond one of assessment and determination of an applicant's initial and continuing eligibility for Medicaid into the dictation of the terms or the drafting process of an SNT. The SNT met the statutory requirements for approval, and modification was appropriate to achieve petitioners' specific intent and objective of maximizing their son's eligibility for benefits.

Counsel: *Wilcenski & Pleat PLLC*, Clifton Park (*Edward V. Wilcenski* of counsel), for petitioners.

Stephen M. Dorsey, *County Attorney*, Ballston Spa (*Hugh G. Burke* of counsel), for Saratoga County

Department of Social Services, objectant.

Judges: HON. RICHARD A. ***KUPFERMAN***, SARATOGA COUNTY SURROGATE.

Opinion by: Richard A. ***Kupferman***

Opinion

[*236] [409]** Richard A. ***Kupferman***, S.

Against the backdrop of a myriad of complex federal and state statutes and regulations governing Medicaid eligibility, this case analyzes the extent and limitations of the authority of a local department of social services in an application to modify or reform a supplemental needs trust.

Kevin J. Tyrrell (the beneficiary) was the plaintiff in a personal injury/medical malpractice action commenced on his behalf by his parents, Kenneth F. Tyrrell and Polly E. Tyrrell, in Albany County Supreme Court. By stipulation of settlement dated January 15, 2001 the underlying litigation was settled in the Albany County Supreme Court. Thereafter, by agreement dated February 15, 2001, a special needs trust (SNT) was established for the benefit of the beneficiary by his parents as lawful grantors. A review of the original SNT at the time of its creation establishes the beneficiary's parents as cotrustees along with ***KeyBank*** as the third (corporate) trustee and repository of the trust assets. Further, (1) the beneficiary of the SNT **[*237]** (Kevin J. Tyrrell) was (and remains) under 65 years of age, and (2) was (and remains) an individual with a disability thus eligible for the establishment of an SNT, and (3) the SNT was being established by the beneficiary's parents, and (4) the SNT provides the State is a Medicaid remainderman beneficiary **[**410]** upon the death of the beneficiary. Thus, there appears to be no issue that the SNT as originally written comports with and had no negative effect upon the trust beneficiary's eligibility for Medicaid and is thus a lawfully created SNT.

By order dated February 27, 2001, the Albany County Supreme Court approved the terms of the above-referenced settlement and directed that the beneficiary's share of the settlement be periodically paid into the SNT as established above. Pursuant to the terms of the order, on March 20, 2001, the parties executed a stipulation of discontinuance and filed same with the Albany County Supreme Court. Upon the filing of the stipulation of discontinuance, the matter in the Albany County Supreme Court was concluded and the parties (the beneficiary and his parents) had no further dealings in the Albany County Supreme Court and relocated soon thereafter to Saratoga County.

By verified petition dated January 5, 2017 to this court, Kenneth and Polly Tyrrell (the beneficiary's parents, grantors and trustees) as well as ***KeyBank*** National Association commenced the instant action seeking permission to amend the terms of the February 27, 2001 SNT pursuant to Surrogate's Court Procedure Act § 2101. Specifically, the SNT provides under article II that upon the death of the beneficiary, the trust will terminate and the trustee shall divide and distribute the remaining principal and accrued and undistributed income in the trust estate as follows:

> "A. In the event that the probate estate of Kevin J. Tyrrell shall contain insufficient assets to cover all funeral expenses and debts of Kevin J. Tyrrell, administration expenses of his Estate, or applicable estate taxes, the Trustee is authorized to distribute from the Trust Estate herein, to the extent of such insufficiency, such amounts as are necessary to pay said funeral expenses, debts, administration expenses and estate taxes of Kevin J. Tyrrell.
>
> "B. The Trustee shall reimburse the State of New York and/or any other state which has provided **[*238]** Medicaid assistance to Kevin J. Tyrrell during his lifetime, in an amount equal to the Medicaid assistance rendered to or paid on behalf of Kevin J. Tyrrell by such state or states. If Kevin J. Tyrrell received Medicaid assistance in more than one state, then the amount distributed to each state shall be based upon each state's proportionate share of the total amount of Medicaid assistance paid by all states on behalf of Kevin J. Tyrrell."

As written, the provision that permits the payment of funeral expenses after death of the beneficiary and prior to reimbursement to the State is now inconsistent with *42 USC § 1396p (d) (4) (A)*, which authorizes the use of an SNT by Social Security and Medicaid recipients. (*See also* Social Security Administration, Program Operations Manual System, ch SI 011, § 01120.203 [B] [3] [a].) The SNT in its current form renders the beneficiary ineligible to receive supplemental security income (SSI).

Thus, in order to render the beneficiary eligible to qualify for SSI, the petitioners have made this application seeking amendment of article II of the SNT. Specifically, the petitioners seek to amend the language of article II

to provide that upon the death of the beneficiary that the trustee may only pay those expenses enumerated in the Social Security Administration, Program Operations Manual System § 01120.203 (B) (3) (a) prior to reimbursement to the Medicaid program for all medical assistance provided to the beneficiary during his lifetime.

[411]** After receiving the instant petition, the court issued a citation returnable on January 31, 2017 to the parties and to the local social services district; e.g. the Saratoga County Department of Social Services (the Department). Upon return of the citation on January 31, 2017, counsel for the petitioners appeared as well as the Saratoga County Attorney's Office on behalf of the Department. At this appearance, the Department asked for additional time to review the instant petition and trust. The court then directed the Department to submit any objections (if so **[****2]** inclined to object) to the relief requested within 30 days and then the petitioners would have seven days within receipt upon which to respond.

Thereafter and by letter dated February 13, 2017, the Department provided its objection to the petition and its **[*239]** request to amend the terms of the SNT.[1] Specifically, the Department objected to the proposed language relative to the prepaid funeral expenses, and proceeded to make several "observations" and requests to amend the language of further sections of the trust document. In support of its position, the Department posited that the filing of the application to amend an existing SNT subjects the language of the *entire* document to modification.

In response thereto, by letter dated February 22, 2017, counsel for the petitioners submitted a reply to the specific objection of the Department, as well as replies to the Department's "observations" and requests to amend language as well as the Department's position relative to its right to have a seat at the drafting (or in the instant case, redrafting) table of the SNT. Specifically to address the Department's objection to the language of the prepaid funeral expenses, the petitioners identified that the language of the existing SNT rendered the beneficiary ineligible for SSI and the proposed amendment merely brought the language into the eligibility standards set forth in the Social Security Administration, Program Operations Manual System and under relevant federal and state guidelines for SSI eligibility. In its reply, the petitioners acknowledged that the Department does have a role in the formation and reformation of an SNT, but that role is limited to that which is specifically laid out in federal and state statutes. Specifically, to review an SNT to confirm that it meets the statutory criteria under *42 USC § 1396p (d) (4) (A)* and Social Services Law 366 (2) (b) (2) (iii) and to confirm that the SNT is being administered (and that the State's right as a remainderman under the terms of same is being upheld) consistent with statutory law and social services regulations.

The petitioners identify that nothing in the Department's objections or observations suggests that the instant SNT as written (pre- and post-amendment) fails to comply with the federal and state statutory language governing same. The petitioners likewise identify that nothing in the authority governing the drafting and approval of an SNT enlarges the role and responsibility of the Department beyond that which is expressly codified.

Thereafter, correspondence flowed between the parties, and the court encouraged counsel for both parties to work collaboratively **[*240]** at resolving the issues and disagreement between them. By letter dated April 19, 2017, counsel for the petitioners submitted a proposed decree to **[**412]** the court with a request for the court to sign same and accompanying therewith a letter which outlined that the parties had yet to reach common ground on certain issues and identified the remaining issues of disagreement. The court then scheduled a conference on the issues raised above and directed the parties to submit memoranda of law detailing their respective positions. Counsel for both sides submitted memoranda of law. The court held a telephone conference on May 11, 2017, whereupon counsel for the Department acknowledged that issues remained in disagreement, that he objected to the terms of the proposed decree and for the first time raised the issue that the entire proceeding in the Saratoga County Surrogate's Court was improperly venued.

With the issue of venue having been raised for the very first time at the May 11, 2017 **[****3]** telephone conference, the court directed counsel for the Department to file (should he so choose to do so) a motion for change of venue by May 31, 2017, and a response (by cross petition or answer) to the relief requested in the petition by May 17, 2017. Counsel for the petitioners **[***9]** was given until June 21, 2017, to respond to both the Department's motion for change of venue and answer/cross petition.

[1] While not captioned as formal objections, the court chose to accept the Department's February 13, 2017 letter as such.

Counsel for the Department filed an answer and cross petition and motion to change venue and for dismissal of the petition for failure to recite grounds for relief under CPLR 2214 (a) en toto on May 17, 2017. The court thereafter instructed counsel to segregate his papers into a motion to change venue and an answer with cross petition as had been previously directed at the May 11, 2017 telephone conference. Counsel for the Department thereafter filed a notice of motion and affirmation in support of motion to change venue on May 31, 2017, along with amendments to its original submission which the court shall consider as its answer and cross petition for affirmative relief to enable the court to implement its (the Department's) recommendations to the SNT.

In its notice of motion, the Department asserts that the petitioners' application should properly be venued in Albany County as the court of original and continuing jurisdiction from the initial 2001 drafting of the SNT. The Department moved for a transfer of proceedings pursuant to SCPA 207, 209, 501; and CPLR 503 (b) and for dismissal of the petition on **[*241]** jurisdictional **[***10]** grounds for failure to recite grounds for relief sought under CPLR 2214 (a).[2]

Further, in its answer and assuming that the court retains venue over the matter, the Department nevertheless requests that the court implement the modifications asserted in the cross petition as set forth in its correspondence of February 13, 2017. In response thereto, counsel for the petitioners filed papers in opposition to the Department's motion to transfer and dismiss, and also filed a cross motion seeking attorney's fees pursuant to 22 NYCRR 130-1.1 (c) (3). Thereafter, counsel for the Department filed a cross motion seeking sanctions against petitioners pursuant to 22 NYCRR 130-1.1 (c) (1).

Oral argument was held on July 19, 2017 before the court. After significant argument **[**413]** by counsel for both parties, the petitioners' motion for an award of attorney's fees pursuant to 22 NYCRR 130-1.1 (c) (3) and the Department's motion for sanctions were dismissed, leaving before the court the issue of venue, as well as the Department's role in the drafting and reformation of the SNT. The court shall first address the question of venue, and then consider the authority or lack thereof to modify or reform an SNT in turn herein.

In its motion for change of venue, the Department asserts that the petition is **[***11]** improperly venued in this court. At the oral argument of July 19, 2017, counsel for the Department acknowledged and stipulated that jurisdiction was not in contest, merely venue. In support of its position, the Department first identifies that the institutional trustee (***KeyBank***) is listed as having its principal place of business in Albany County and that the location of the assets of the trust are thus in Albany County as well. The Department further avers that as the original **[****4]** proceeding giving rise to the instant SNT began in Albany County Supreme Court, the proper venue is with Albany County. The petitioners object, and note that the beneficiary and the grantors/trustees (the beneficiary's parents) all reside in Saratoga County, that there is no pending matter in the Albany County Supreme Court upon which to continue **[*242]** venue and/or jurisdiction, and that venue and jurisdiction has been properly acquired by the Saratoga County Surrogate's Court upon the commencement of the instant proceeding under Sections 201, 203 and 207 of the Surrogate's Court Procedure Act.

[1] As it relates to the Saratoga County Surrogate's Court as an appropriate venue, Surrogate's Court Procedure Act § 207 (1) states that a "proper venue for [a] proceeding[ ] . . . is the county where (a) assets of the trust estate are located, or **[***12]** (b) the grantor was domiciled at the time of the commencement of a proceeding . . . , or (c) a trustee then acting resides."

There is no argument that the grantors/trustees (the beneficiary's parents) reside in Saratoga County, and did so at the *commencement* of the instant proceeding. A proceeding has been commenced concerning the trust and the grantors/trustees are domiciled in Saratoga County, thus making the Saratoga County Surrogate's Court an appropriate venue pursuant to SCPA 207 (1) (b) and (c).

Here, the court acknowledges that the institutional trustee (***KeyBank***) has its principal place of business located within Albany County, which would make Albany County an appropriate venue under SCPA 207 (1) (c) as the Department suggests. The court finds no merit in the Department's position that Albany County is an appropriate venue under SCPA 207 (1) (a) because the

[2] Upon return of the motion at oral argument on July 19, 2017, the Department conceded that the court has jurisdiction to hear and preside over the matter, thus rendering the CPLR argument to dismiss relative to jurisdiction moot. In view of the same and of the Department's acknowledgment of jurisdiction, the court will consider the issue of jurisdiction settled and will not address the Department's motion to dismiss and will consider it withdrawn.

"assets of the trust" are located at the office of the institutional trustee in Albany County. The court takes note that ***KeyBank*** is a national banking and lending institution with offices and branches throughout Saratoga County and specifically in Clifton Park, the town of residence for the grantors/trustees. The court likewise notes that the "assets **[***13]** of the trust" are funds deposited into the trust account, and given the electronic nature of modern banking readily accessible at other locales as opposed to solely from the Albany County branch.

Even if the court were to find the assets to be located in Albany County, in *Matter of Myers (45 AD3d 955, 845 NYS2d 510 [3rd Dept. 2007])*, the Appellate Division, Third Department reconciled a similar question of venue. In that case, the subject **[**414]** property of the trust was located in Steuben County and the trustee resided in Chemung County. The Appellate Division found that venue for the proceeding was properly in Chemung County as the county of residence of the trustee (as opposed to the location of the assets of the trust) under *SCPA 207 (1) (c)*. (*SCPA 207 [1]*; *see also Matter of Kelly, 17 AD3d 791, 794 NYS2d 458 [3d Dept 2005]*.)

[*243] Two of the three trustees (the beneficiary's parents) reside in Saratoga County; the third and corporate trustee (***KeyBank***) while having its principal office physically located in Albany County has joined in filing the instant application. In view of the same, Saratoga County is a proper venue under *SCPA 207 (1) (c)*.

Under the facts of the instant case, venue would appropriately be in both Saratoga County and Albany County. Accordingly, the analysis must then turn to a reading of *SCPA [****5] 207 (2)*.[3]

In the instant proceeding, there exists **[***14]** before the court a duly filed petition and commensurately proper proceeding under *SCPA 203*. As set forth above, the court acknowledges that both Albany County and Saratoga County are proper venues for the filing of this petition under *SCPA 207 (1)*. Under *SCPA 207 (2)* "[w]here [proper] venue may lie in more than one county under the provisions of subdivision one, the court where *a proceeding* is first commenced with proper venue shall retain jurisdiction" (emphasis added).

In surrogate's court, all proceedings are special proceedings commenced by the filing of a petition and pursuant to Surrogate's Court Procedure Act § 203. In addition, *SCPA 301 (a)* provides that a proceeding is commenced with the filing of a petition, provided process is issued and service on all respondents is completed within 120 days. (*See Matter of DeMaio, 13 Misc 3d 190, 819 NYS2d 648 [Sup Ct, Kings County 2006]*.)

Here, a verified petition was filed with the court on January 5, 2017, and the Department, having been duly served, appeared before the court on the return date of January 31, 2017. The court acknowledged jurisdiction over the matter without objection from either party, including the Department. In view of the same, the instant matter represents an active and pending proceeding before the Saratoga County Surrogate's Court, and is the first and only proceeding **[***15]** seeking to address the relief requested in the petition. There is no pending proceeding in the Albany County Supreme Court and there has never been a commensurate proceeding commenced in the Albany County Surrogate's Court.

Even assuming, arguendo, that there was an open proceeding or that the proceeding remained open in the Albany County **[*244]** Supreme Court, the law is well settled that a supreme court will defer to the surrogate's court on matters where the surrogate's court has expertise. (*H & G Operating Corp. v Linden, 151 AD2d 898, 542 NYS2d 868 [3d Dept 1989]*.) The review and administration of trusts is one of the experiential hallmarks of a surrogate's court. Even assuming (again, arguendo) that a subsequent proceeding were to be commenced in the Albany County Surrogate's Court, the Saratoga County Surrogate's Court would still retain possession of the matter as the "first" court upon which the proceeding was commenced. (*See SCPA 207 [2]*.)

[415]** Accordingly, the court finds that the Saratoga County Surrogate's Court is the proper venue for this matter and that there is no basis to remove this proceeding from the Saratoga County Surrogate's Court and transfer it to the Albany County Supreme Court. Therefore, the Department's motion for a change of venue is hereby denied.

[2] The court **[***16]** now directs its analysis to the true issue in contention between the petitioners and the Department, specifically what, if any, authority the local social services district has to seek modification or reformation of an existing SNT.

[3] Ignoring, parenthetically, that the Albany County trustee joined in the petitioners' request for the petition and proceeding to be held in Saratoga County.

To begin, the court notes that an SNT is a "discretionary trust established for the benefit of a person with a severe and chronic or persistent disability [*EPTL 7-1.12 (a) (5)*] that is designed to enhance the quality of the disabled individual's life by providing for special needs without duplicating services covered by Medicaid or destroying Medicaid eligibility." (*Cricchio v Pennisi, 90 NY2d 296, 303, 683 NE2d 301, 660 NYS2d 679 [1997]* [internal quotation marks omitted]; *Matter of Abraham XX., 11 NY3d 429, 900 NE2d 136, 871 NYS2d 599 [2008].)* SNT is a **[****6]** planning device authorized by federal and state law to insulate assets of a chronically ill and severely disabled individual "for the dual purpose of securing or maintaining eligibility for state-funded services, and enhancing the disabled person's quality of life with supplemental care paid by his or her trust assets." (*Abraham XX., 11 NY3d at 434*; *see also Matter of Morales, 1995 NY Misc. LEXIS 726, 214 NYLJ 19 [Sup Ct, Kings County 1995]*.)

Under the pertinent statutes, *42 USC §1396p (d) (4) (A)* and Social Services Law § 366 (2) (b) (2) (iii), neither the corpus nor the income of an SNT is considered a resource or income available to the beneficiary. (*See Abraham XX., 11 NY3d at 435*; *Cricchio, 90 NY2d at 303*; *see also 18 NYCRR 360-4.5 [b] [5] [i] [a]*.) Rather, the SNT is designed to "address[ ] the unique and **[*245]** difficult situation faced by severely disabled individuals **[***17]** with assets that are sufficient to end their Medicaid eligibility but insufficient to account for their medical costs." (*Abraham XX. at 437*.)

Such treatment is extended to an SNT as long as the trust documents setting up same conform to the language and the requirements of *EPTL 7-1.12 (a) (5)*, as well as the applicable regulations of the Department of Health (*see Cricchio, 90 NY2d at 303*; *see also* Social Services Law § 366 [2] [b] [2] [iii],[iv]). Specifically, an SNT is exempted from the general rules governing available resources and Medicaid eligibility when (1) the recipient is "disabled" as that term is defined at *42 USC § 1382c (a) (3)*, and *(2)* the SNT contains the following provision:

> "The assets of such a disabled individual which was established for the benefit of the disabled individual while such individual was under sixty-five years of age by . . .a parent, grandparent, legal guardian, or court of competent jurisdiction, if upon the death of such individual the state will receive all amounts remaining in the trust up to the total value of all medical assistance paid on behalf of such individual." (Social Services Law § 366 [2] [b] [2] [iii].)

The relationship between the SNT, its beneficiary and the State is set forth in its clearest form by the Court of Appeals decision of *Abraham XX.*, specifically that

> "[t]he SNT is available only to applicants under the age of **[***18]** 65 with severe disabilities as defined by statute. Unless the **[**416]** applicant placed excess assets in the Medicaid SNT for supplemental care, he or she would no longer be eligible for Medicaid, thus relieving the State of a substantial financial burden. In order to further Medicaid's purpose of providing medical assistance to needy persons, the State agrees to continue paying Medicaid costs—in instances where it would otherwise be relieved of this obligation—in exchange for the possibility of reimbursement upon the recipient's death. The State in a sense is like an insurer calculating risk. For every recipient who depletes the trust before death, the State can expect some trusts to have sufficient assets upon a recipient's death to offset the additional cost of continuing Medicaid payments **[*246]** for these severely disabled individuals who otherwise would be ineligible. Moreover, the State's right to reimbursement occurs only upon the death of the beneficiary—at a time when the life-enhancing purpose of the trust can no longer be effectuated. The Medicaid SNT reflects a policy decision to balance the needs of the severely disabled and the State's need for funds to sustain the system." (*Abraham XX., 11 NY3d at 436-437* [emphasis omitted].)

The State **[***19]** thus has a statutory role within the establishment and maintenance of an SNT. Specifically, the State's role is twofold: first to determine the SNT beneficiary's continued eligibility for Medicaid by ensuring that the proposed SNT comports with existing Federal and State Medicaid law, and second to protect the State's ultimate remainder interest.

Under the Federal Medicaid statute, it is the individual state departments of health that are tasked with this particular review. In New York State, it is the Department of Health that is bound by these regulations, and the responsibility for its administration falls to the local social services district of each county as the individual Medicaid provider. Specifically, the local social services district (through the Department of Social Services) is to evaluate an applicant's interest in irrevocable trusts for purposes of Medicaid eligibility.

To this end, within the framework of the SNT statutes, there are safeguards in place to protect both the beneficiary and the remainder interest. Specifically, Social Services Law §366 (2) (b) (2) (iv) clearly seeks to protect "the remainder interest" of the State by authorizing the promulgation of regulations to assure fulfillment of the **[***20]** trustee's fiduciary obligations. Further, Social Services Law § 366 (2) (b) (2) (iv) directs in relevant part that

> "[t]he department [of health] shall promulgate such regulations as may be necessary to carry out the provisions of this [section, and such] regulations shall include provisions for . . . assuring the fulfillment of fiduciary obligations of the trustee with respect to the remainder interest of the department or state; monitoring pooled trusts; applying this [section] to legal instruments and other devices **[*247]** similar to trusts, in accordance with applicable federal rules and regulations."[4]

In addition to the aforementioned, there are numerous other safeguards and oversights prescribed under the Surrogate's Court Procedure Act, the Estates, Powers and Trusts Law, the Social Services Law and Executive Law § 63.

The statutory safeguards outline the responsibilities and procedural remedies of **[**417]** the State in its review of proposed SNTs. The role of the State is clearly defined and relates specifically to the review of proposed SNTs for their comport to the relevant statutes, Medicaid eligibility and protection of the State's remainder interest. There is nothing in the Federal Medicaid statute, the New York State Social Services Law and regulations that **[***21]** expands the responsibility of the State or its local social services departments beyond its statutory role, e.g., the assessment and determination of an applicant's initial and continuing eligibility for Medicaid. The State and its local social services departments are responsible for the *review* of an SNT and have not been granted any formal authority in the *drafting* of an SNT, as such responsibility is left with the creators of the SNT.

For as the State has a statutory role in the establishment and maintenance of the SNT, so too do the trustees and fiduciaries responsible for the SNT. The responsibilities of these individuals are set forth in Article 11 of the Surrogate's Court Procedure Act and at *18 NYCRR §360-4.5(b)(5)(iii)* and require a trustee of an SNT to fulfill not only its fiduciary obligation to the SNT beneficiary but also its concomitant fiduciary obligations with respect to the State's remainder interest in the trust. Specifically, under *18 NYCRR §360-4.5(b)(iii)* the trustee must, by way of example;

> "(a) notify the appropriate social services district of the creation or funding of the trust for the benefit of an MA applicant/recipient;
>
> "(b) notify the social services district of the death of the beneficiary of the trust;
>
> "(c) notify the social services district in advance of any **[***22]** transactions tending to substantially deplete the principal of the trust, in the case of a trust **[*248]** valued at more than $100,000; for purposes of this clause, the trustee must notify the district of disbursements from the trust in excess of the following percentage of the trust principal and accumulated income: five percent for trusts over $100,000 up to $500,000; 10 percent for trusts valued over $500,000 up to $1,000,000; and 15 percent for trusts over $1,000,000;
>
> "(d) notify the social services district in advance of any transactions involving transfers from the trust principal for less than fair market value; and
>
> "(e) provide the social services district with proof of bonding if the assets of the trust at any time equal or exceed $1,000,000, unless that requirement has been waived by a court of competent jurisdiction, and provide proof of bonding if the assets of the trust are less than $1,000,000, if required by a court of competent jurisdiction."

Thus, the SNT represents a "bargain struck between the SNT beneficiary and the State" whereby the eligibility rights of the SNT beneficiary for social services are preserved, and the pecuniary remainder rights of the State are **[***23]** protected. (*See Matter of Abraham XX., 11 NY3d 429, 900 NE2d 136, 871 NYS2d 599 [2008].)*

In addition to the roles of the State and the SNT parties, the court likewise has a role in this process. The court's role is to strike a balance to protect both the beneficiary and the State's remainder interest, thereby seeking also

[4] It is important to distinguish at this point in the analysis that the New York State Department of Health is a distinct and separate entity from the Department and that the Department in and of itself has no independent authority to promulgate regulations absent the procedures found in Social Services Law § 20 (3) (a).

to protect public interest to fulfill "the ultimate goal of Medicaid—that the program 'be the payer of last resort.' " (*Matter of Costello v Geiser, 85 NY2d 103, 105, 647 NE2d 1261, 623 NYS2d 753 [1995]*; *Cricchio, 90 NY2d at 305*.)

As it relates to the court's role and responsibilities regarding an SNT, the following **[**418]** opinion most clearly defines same, specifically that

> "it is appropriate for the court to seek assurance that a proposed supplemental needs trust complies with the controlling laws and rules regarding Medicaid eligibility. This is consistent with the function of the court to assure that the best interests of the incapacitated person are promoted. It would be a clear dereliction of that duty for the court to deliberately overlook provisions of a proposed supplemental needs trust if such provisions were inconsistent with statutory guidelines and thus would bar an incapacitated person from **[*249]** receiving Medicaid benefits by its establishment. To do so would permit the diverting of assets from the ownership or title of the incapacitated person **[***24]** to another legal entity with no consequent benefit to the incapacitated person." (*Matter of McMullen, 166 Misc 2d 117, 119, 632 NYS2d 401 [Sup Ct, Suffolk County 1995]* [citations omitted].)

These provisions, however, should not be read as obviating any additional controls required by the court since the regulations promulgated by the State are for the protection of its own remainder interest whereas the court is primarily concerned with the protection of the disabled person and likewise to assure fulfillment of the establishment of an SNT; thus, "in the inherent exercise of its power, the court may fashion or condition the exercise of that privilege in such manner as it believes will sufficiently protect the interest of the disabled person." (*Matter of Goldblatt, 162 Misc 2d 888, 618 NYS2d 959 [Sur Ct, Nassau County 1994]*.)

Turning to the instant matter, the petitioners have come before this court and seek the approval of a modification with respect to the SNT for Kevin Tyrrell. The Department has reviewed the proposed modification to the SNT and has presented certain "observations" relative to same, as well as requests to modify certain language within the SNT. The Department has not raised any challenge that the SNT as written has any negative effect upon the beneficiary's **[****7]** financial eligibility for Medicaid, nor that the application and SNT should be denied.[5]

There is no dispute **[***25]** that the beneficiary (Kevin Tyrrell) is disabled and under 65 years of age. Likewise, the petitioners, as parents of the beneficiary, are lawful grantors under Social Services Law § 366 (2) (b) (2) (iii) and possess the requisite skill and competency to serve as trustees. The language of the proposed SNT is in conformance with *EPTL 7-1.12*, 7-3.1; Social Services Law § 366 (2) (b) (2) (iii) and *42 USC §§ 1396p (d) (4) (A)*; *1382b (e) (5)* and provides the State of New York (e.g., Saratoga County Department of Social Services) with the remainder interest as described in and required by Social Services Law § 366 366 (2) (b) (2) (iii) (A).

[*250] There likewise appears to be no dispute that the SNT as written comports with, and has no negative effect upon, the trust beneficiary's eligibility for Medicaid. Thus, the court finds that (1) the beneficiary of the SNT (Kevin Tyrrell) is under 65 years of age, and (2) is an individual with a disability thus eligible for the establishment of an SNT, and that (3) the SNT is being established by the beneficiary's parents and guardians, and (4) the SNT provides the State as a Medicaid remainderman beneficiary upon the death of Kevin Tyrrell.

[419]** The Department's papers and accompanying brief aver that the terms to modify the SNT must be guided by *EPTL 7-1.9 (a)*, and specifically

> "[u]pon the written consent, acknowledged or proved in **[***26]** the manner required by the laws of this state for the recording of a conveyance of real property, of all the persons beneficially interested in a trust of property, heretofore or hereafter created, the creater of such trust may revoke or amend the whole or any part thereof."

The Department believes that their consent as a beneficially interested party is necessary for the grantor to amend the trust. In support of its position, the Department relies on *EPTL 7-1.9 (a)* and cites the case of *Matter of Perosi v LiGreci (98 AD3d 230, 948 NYS2d 629 [2d Dept 2012])* in its papers. The court acknowledges that the Department is a person beneficially interested in a trust of property for purposes

[5] In court and on the record, the Department has repeatedly supported the proposed modification to the SNT (although desires that different language be used) and has stated that there would be no financial harm to the Department as a remainderman by the court's acceptance of same.

of EPTL 7-1.9 (a) and therefore their consent to amend said trust would be necessary.

However, the Department's reliance on EPTL 7-1.9 (a) is inapposite with regard to *this* specific SNT. EPTL 7-1.9 (a) does not apply in this case, because article VI of the SNT states that "this Agreement and Trust created hereby are irrevocable. The Grantor shall have no right in any respect to later, amend, revoke, or terminate this Agreement or the Trust created hereby without *approval by a court of competent jurisdiction*" (emphasis added). Likewise, the holding in Perosi can be readily distinguished. In Perosi, the approval of the local social **[***27]** services department was required to amend the terms of the trust because the subject trust was silent on the issue of amendment. Here, Article VI of the subject SNT does set forth an amendment procedure by application to a court of competent jurisdiction for approval of same.

The petitioners have exercised the specific procedure laid out in the SNT to seek an amendment by the filing of the instant **[*251]** proceeding with the court. Therefore, taking this grant of express authority to amend the SNT, the court will now set upon the analysis of judicial powers and limitations with regard to modification or reformation of an SNT. Reformation is generally available to correct mistakes in inter vivos instruments so that the written instrument accurately expresses the settlor's actual intent. As the court noted in *Matter of Dickinson* (NYLJ, Aug. 4, 1999 at 26, col 5 [Sur Ct, NY County 1999], *affd* 273 AD2d 89, 709 NYS2d 69 [2000]), reformation may not be **[****8]** used to change the terms of a trust to effectuate what the settlor would have done had the settlor foreseen a change of circumstances that has occurred.

Similar to the facts in *Dickinson*, the petitioners herein seek to correct an element of the trust so as to allow the beneficiary to maximize the availability of benefits. **[***28]** Courts have the power not only to ascertain the "validity, construction or effect" of language in a testamentary instrument (SCPA 1420), but also to reform such instrument and to add, excise, change or transpose language to effectuate a decedent's intent. (*See e.g.* Matter of Snide, 52 NY2d 193, 418 NE2d 656, 437 NYS2d 63 [1981].)

Whether construction and/or reformation is sought in the context of an estate, the paramount duty of the court is to determine the intent of the testator from a reading of the will in its entirety (Matter of Bieley, 91 NY2d 520, 695 NE2d 1119, 673 NYS2d 38 [1998]; Matter of Snide, 52 NY2d 193, 418 NE2d 656, 437 NYS2d 63 [1981]). Courts have reformed instruments so that estates could take full advantage of available tax deductions and exemptions, but only if the literal application of an instrument's provisions **[**420]** would frustrate the testator's actual intent as reflected in the court's review of the entire document. (Matter of Martin, 146 Misc 2d 144, 549 NYS2d 592 [Sur Ct, NY County 1989]; Matter of Choate, 141 Misc 2d 489, 533 NYS2d 272 [Sur Ct, NY County 1988]; Matter of Lepore, 128 Misc 2d 250, 492 NYS2d 689 [Sur Ct, Kings County 1985].)

Of specific relevance to the court's instant analysis is the holding of Matter of Lepore (128 Misc 2d 250, 492 NYS2d 689 [1985]). In Lepore, the court permitted the reformation of a will so that certain "inadvertently excluded words" could be added to the document's definition of the marital deduction (id. at 253). In Lepore, the original will defined the marital deduction under prior law, which had limited the amount of the marital deduction to the greater of $250,000 or one half the adjusted gross estate, **[***29]** instead of the unlimited marital deduction under current law. The court found that the complete reading of the will **[*252]** made it clear that the testator had intended to give his wife the largest possible bequest by use of the maximum available marital deduction, and in view thereof the court allowed reformation of the instrument to ensure that the entire residuary estate would qualify for the unlimited marital deduction.

In this case, the petitioners' intent in seeking a modification to the terms of the SNT is clearly to ensure that the beneficiary receives and is eligible for the maximum government entitlements, namely Medicaid and SSI, that are available to him. (Matter of Lepore, 128 Misc 2d 250, 492 NYS2d 689 [Sur Ct, NY County 1985]; Matter of Carcanagues, 2016 NY Misc. LEXIS 343, 2016 NY Slip Op 31765[U] [Sur Ct, NY County 2016].)

Explicitly throughout the Department's moving papers and oral argument was reliance on the concept of the "bargain" as espoused in Abraham XX. to elevate its status in the drafting and redrafting process of the SNT. It appears to the court that through its "observations" and requests to amend the language of certain provisions of the SNT, the Department seeks to expand its role beyond that of Medicaid eligibility review and into the actual drafting process of the SNT. The Department posits that as a result the "bargain" between **[***30]** the beneficiary and the State as a Medicaid eligibility remainderman that it is due a seat at the drafting table.

The Department's interpretation of the Court of Appeal's rationale of how the SNT represents a "bargain" is misguided. The bargain in an SNT represents the priority interest in the balance of the SNT upon the beneficiary's death in exchange for the beneficiary's receipt of Medicaid. This is contrary to the Department's assertion that the Court of Appeals language in *Abraham XX.* should be read to expand and somehow broaden the "bargain" and thereby authorize the Department to require additional modifications/reformations beyond the relief sought by the **[****9]** petitioners. The Department's interpretation is also contrary to the plain language of *Abraham XX.* and of the statutory authority governing SNTs.

Further, that the Department considers an SNT to be a "special" type of trust and thus seeks to broaden its authority into the dictation of the terms of an SNT or for that matter insert itself into the drafting process is likewise misplaced. This court shares the opinion of Surrogate Czygier in "that a supplemental needs trust trustee should not be treated differently than a testamentary **[***31]** or *inter vivos* trustee. There are safeguards in place to protect the lifetime beneficiary and DSS." **[*253]** (*Matter of Kaidirmaoglou, NYLJ, Nov. 5, 2004 at 16, 2004 NYLJ LEXIS 5562, *2 [Sur Ct, Suffolk [**421] County 2004]* [emphasis added].) There is nothing "special" about an SNT that would separate it from other types of trusts and thus grant an expansion of the authority of the State and its local social services department beyond that which is already provided for. To treat an SNT differently from similarly fashioned trusts without the authority to do so would set same upon the precipice of a slippery slope towards an overreach of State authority.

The court observed from its review of *Abraham XX*. that nothing within that decision suggests an intention to deviate from established state law of trusts or to expand the rights given to the state agency in court proceedings. Likewise, the court notes that there is nothing in the authority governing an SNT (the Federal Medicaid statute, the New York State Social Services Law and regulations) that increases or broadens the role of the Department beyond one of assessment and determination of an applicant's initial and continuing eligibility for Medicaid. The clearly defined role of the Department **[***32]** is to determine whether the SNT as written comports with and affects the trust beneficiary's eligibility for Medicaid.

The State and its local social services department cannot exceed that authority which has been set forth in its own regulations. The local social services department is subordinate to the State Department of Health (DOH). DOH is authorized to

"supervise [the] local social services departments and in exercising such supervision . . . *shall approve or disapprove* rules, regulations and procedures made by local social services officials within thirty days after filing of same with the commissioner; such rules, regulations and procedures shall become operative immediately upon approval or on the thirtieth day after such submission to the commissioner unless the commissioner shall specifically disapprove said rule, regulation or procedure as being inconsistent with law or regulations of the department." (*See* Social Services Law § 20 [3] [a] [emphasis added].)

The court cannot reach the Department's position that a local social services department, acting without the approval of the Department of Health, would have the unilateral authority **[*254]** to make its own rules and regulations. To do so would invite every local social services district **[***33]** across the State to implement rules that may not necessarily be cohesive or comport with existing regulations promulgated by the Department of Health.

As observed by the Court of Appeals in *Matter of Beaudoin v Toia, 45 NY2d 343, 380 NE2d 246, 408 NYS2d 417 [1978])*,

> "[i]nasmuch as the local commissioners are agents of the State department they may not substitute their interpretations of the regulations of the State department for those of the State department or the State commissioner. To recognize any such right would be to undermine the supervisory authority of the State commissioner and to invite administrative chaos." (Citations omitted; *Matter of Samuels v Berger, 55 AD2d 913, 390 NYS2d 445 [2d Dept 1977]*; *Matter of Bonfanti v Kirby, 54 AD2d 714, 387 NYS2d 461 [2d Dept 1976]*; *Matter of Barbaro v Wyman, 32 AD2d 647, 300 NYS2d 856 [2d Dept 1969]*.)

The Department misinterprets its role in this proceeding. The Department has no authority to impose demands for reformation for that which is neither mandated by statute and **[****10]** regulations nor in keeping with the grantors' intent. To echo the opinion of Surrogate Preminger in *Matter of Rubin (4 Misc 3d 634, 781 NYS2d 421 [Sur Ct, NY County 2004])*, "[t]o reform the trust[ ] in the manner requested would stretch the

doctrine of reformation beyond recognition."

[422]** Here, as the SNT meets the statutory requirements for approval as written, the court will not consider and review each and every one of the Department's "observations" and requests for modification relative to same. The court notes that none of **[***34]** the Department's proposed changes to the SNT has anything to do with the beneficiary's eligibility (or ineligibility) for Medicaid. Many of the Department's requested modifications are duplicative to the language of the SNT,[6] unnecessary as already covered under statute,[7] or in direct contravention to **[*255]** existing authority.[8] It is not necessary to mandate that which is not required by statute and regulations.[9]

It is well settled that New York courts have historically been reluctant to reform or modify the terms of a trust other than in very limited circumstances. Because a proceeding such as this seeks to modify documents which were established by a grantor based upon a set of facts and circumstances that existed at the time of creation, a court should use this form of relief sparingly. Modification, although intended to be used sparingly, is appropriate to achieve a specific objective. (*Matter of Carcanagues, 2016 NY Slip Op 31765(U) [Sur Ct, NY County 2016]*.) Here, modification of the terms of the SNT are appropriate to achieve the specific intent and objective sought by the petitioners, specifically the maximization of the beneficiary's eligibility for benefits.

In view of the same, the court will direct that article II (A) of the SNT be modified to require the **[***35]** trustee to pay those administrative expenses enumerated in the Social Security Administration, Program Operations Manual System § 01120.203 (B) (3) (a).

Further, in the court's discretionary role to "balance" the interests of the State with that of the **[****11]** beneficiary, the court directs that article VII be modified to require that the trustee shall prepare an annual accounting of the trust and file same with the local social services district, or other appropriate Medicaid entity, responsible for determining the beneficiary's Medicaid eligibility at the time of the accounting. (*See Matter of Goldblatt, 162 Misc 2d 888, 618 NYS2d 959 [Sur Ct, Nassau County 1994]*; *Matter of Morales, 214 NYLJ 19, 1995 NY Misc LEXIS 726 [Sup Ct, Kings County 1995]*.) The SNT as written directs the trustee to file its annual accounting specifically with Albany County, and the court will amend the SNT accordingly to **[*256]** permit **[**423]** the trustees to file their annual accounting with their local social services department or other appropriate Medicaid servicing entity.

It is therefore so ordered that article II, paragraph (A) of the trust agreement for the benefit of Kevin J. Tyrrell dated February 15, 2001, be modified as follows: "(A) The Trustee shall pay those administrative expenses enumerated in the Social Security **[***36]** Administration, Programs Operations Manual System SI 01120.203 (B) (3) (a)"; and it is further ordered that article VII of the trust agreement for the benefit of Kevin J. Tyrrell dated February 15, 2001, be modified as follows: "The Trustee shall prepare an annual accounting of the Trust and file same with the local social services district, or other appropriate Medicaid entity, responsible for determining Kevin J. Tyrrell's Medicaid eligibility at the time of the accounting"; and it is further ordered that all other motions not specifically addressed herein are dismissed.

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[6] The Department requests that article VIII be amended to reflect that the trustees are required to file a formal accounting for judicial approval and settlement with the court. The SNT as drafted already provides that the trustees are required to submit a final accounting for judicial settlement and the proposed amendment is duplicative.

[7] The Department requests that article V be modified to reference that the trustees are liable as per *EPTL 11-1.7* and not exonerated for failure to use reasonable care. The existence of the statute already imposes said liabilities.

[8] The Department requests that article II (b) be modified to provide notice to the local social services district within 30 days of the beneficiary's death. *18 NYCRR 360-4.5 (b) (5) (iii) (b)* directs that a trustee must notify the local social services department of the death of the trust beneficiary within a reasonable time. The Department has no authority to mandate that the SNT exceed or further define that which is already in the regulation.

[9] The Department requests that articles IX (b), (d) and XI be modified to require that all trustees (including the corporate trustee) acquire and serve with a bond. *18 NYCRR 360-4.5* directs that no bond is required from the trustees. The Department has no authority to mandate that the SNT exceed that which is already set forth under the regulation or requested by the grantors.

End of Document

Matter of Tinsmon (Lasher)

Surrogate's Court of New York, Albany County

February 22, 2018, Decided

2011-216/B

Reporter
61 Misc. 3d 218 *; 79 N.Y.S.3d 854 **; 2018 N.Y. Misc. LEXIS 3215 ***; 2018 NY Slip Op 28238 ****

[**1]** In the Matter of the Petition for Advice and Direction Pursuant to SCPA 2107 for the Guardianship Pursuant to SCPA article 17-A of Jennifer Lasher Tinsmon. Christopher J. Lasher and Helena Lasher, Petitioners.

Subsequent History: Affirmed by *Matter of Tinsmon (Lasher), 2019 N.Y. App. Div. LEXIS 1449, 2019 NY Slip Op 1471 (N.Y. App. Div. 3d Dep't, Feb. 28, 2019)*

Core Terms

eligibility, benefits, exempt, funds, guardian ad litem, titled, means-tested, ownership, guardian, mortgage, ongoing, guardianship, transferred, Traumatic, recipient, Services, provides, payback, advice, assign, reside, Brain, individually, supplemental, survivorship, outstanding, recommends, settlement, appointed, nonexempt

Counsel: **[***1]** Edward V. Wilcenski, Esq., Attorney for Petitioners, Wilcenski & Pleat, PLLC, Clifton Park, New York.

Albert Dingley, Esq., Assistant County Attorney, Albany County Department of Social Services, Albany, New York.

JulieAnn Calareso, Esq., Guardian ad Litem for Jennifer Lasher Tinsmon, The Shevy Law Firm, LLC, Albany, New York.

Judges: Hon. Stacy L. Pettit, Surrogate.

Opinion by: Stacy L. Pettit

Opinion

[*219] **[**854]** Stacy L. Pettit, S.

Before this Court is an application by petitioners Christopher J. Lasher and Helena **[**855]** Lasher for advice and direction pursuant to *SCPA 2107*. The guardian ad litem assigned for Jennifer Lasher Tinsmon has issued her report and respondent Albany County Department of Social Services has filed an answer/objections to the petition. The matter is now submitted for decision.

By way of background, Tinsmon is a 50-year-old resident of Albany County. She is unmarried and has three children ranging in age from 12 years to 19 years of age. She sustained a traumatic brain injury in February 2011 as a result of personal injury. Shortly thereafter, petitioners, her parents, were appointed as the guardians of her person and property pursuant to *SCPA article 17-A*. At that time, the mortgaged residence in which Tinsmon still resides was owned jointly **[***2]** with right of survivorship by Tinsmon and her mother, petitioner Helena Lasher (hereinafter Lasher). Tinsmon also owned bank accounts in the approximate amount of $82,000 and a vehicle. By order of this Court dated August 5, 2011, a first party supplemental needs trust was established for Tinsmon's benefit, and petitioners were appointed as trustees of the trust. The trust, which includes a pay-back provision on Tinsmon's death for outstanding Medicaid payments made on her behalf, was funded with cash assets so that she would be eligible to **[****2]** participate in government benefit programs, such as the Traumatic Brain Injury Waiver program (*see 42 USC 1396p [d] [4] [A]*; *EPTL 7-1.12*; *Social Services Law § 366 [2] [b] [2] [iii]*). Tinsmon's interest in her residence was not

transferred to the supplemental needs trust, as a residence is an exempt asset which may be retained by an individual (*see* 20 CFR 416.1212; 18 NYCRR 360-4.7). The trust has paid mortgage payments and other carrying costs for the real property since its formation. In 2017, **[*220]** the trust received $1,345,310 in settlement funds from a Supreme Court action related to Tinsmon's injury. Pursuant to the terms of that settlement, the Department received $375,000 in full satisfaction of its outstanding Medicaid lien.

Petitioners have now commenced **[***3]** a proceeding for advice and direction under SCPA 2107 with regard to Tinsmon's residence. The property was purchased in December 2010, before Tinsmon's injury, as the residence for Tinsmon and her young children, and was titled to Tinsmon and Lasher as joint tenants. Both owners were mortgagors on the original mortgage on the property in the amount of $225,028.00, and, as of August 31, 2017, the principal balance was $196,835.12. Lasher does not reside in the residence, but has personally paid one half of the mortgage payments each month from her personal checking account, while petitioners have paid the other half from the trust assets. Lasher paid a total of $14,096.44 towards the mortgage. Because Lasher is not a disinterested third party, and is a guardian and trustee for Tinsmon, petitioners seek approval from the Court to have the trust pay to purchase Lasher's interest in the property, so that Lasher's half interest in the residence may be transferred to the guardians of the property and owned solely by Tinsmon. The proposed payment to Lasher for her interest in the property is the sum of $14,096.44. Petitioners assert that ownership of the property will not affect Tinsmon's participation **[***4]** in the Traumatic Brain Injury Waiver program, or her eligibility for Supplemental Security Income, as the property is an exempt resource for eligibility purposes (*see* 20 CFR 416.1212; 18 NYCRR 360-4.7; Social Security Program Operations Manual System [POMS] SI 01130.100). Petitioners also request that the Court confirm that, as guardians, they have ongoing authority to withdraw, transfer and assign nonexempt guardianship property to the trust so as to **[**856]** maintain Tinsmon's ongoing eligibility for means-tested benefits.

The Department does not oppose the payment, or the amount of the payment, to purchase Lasher's half interest in Tinsmon's residence. The Department's opposition to the petition, instead, is to ownership of the purchased interest by Tinsmon, through her guardians. The Department believes the real property should be transferred to the trust and titled in the names of the co-trustees. In support of its argument, the Department relies upon the Program Operation Manual System (POMS) for the Social Security Administration, which provides that, if **[*221]** trust funds are used to purchase a house, "the individual (or the trust)" must be shown as the owner (*see* POMS SI 01120.201 [F] [1]). The guardian ad litem recommends **[***5]** that the Court approve the purchase, with trust assets, of Lasher's interest in the residence, and title the property to Tinsmon through her guardians, and not title the property to the trust. The guardian concludes that the proposal is in Tinsmon's best interest, as the payment sought by Lasher is not unreasonable or unfair, nor would the sale jeopardize Tinsmon's ongoing eligibility for means-tested government benefits. The guardian ad litem also recommends that the Court clarify that petitioners have the authority, as guardians, to transfer assets to the trust, but require that assets which are exempt for eligibility for means-tested government benefit programs continue to be held by the guardians, so as not to defeat any potential testamentary or intestacy distribution of such assets on Tinsmon's death.

Arguing against transfer of title of the residence to the trust, the guardian ad litem asserts **[****3]** that Tinsmon purchased the property for herself and her three young children, and would have intended to pass the home or its resulting equity to her children in the future. The guardian ad litem opines that titling the property in trust would not be in Tinsmon's best interest because **[***6]** it would thwart the potential inheritance by her children of the exempt asset, and instead, subject it to payback for any Medicaid payments accrued at the time of her death. With respect to Medicaid estate recovery, the guardian states that Medicaid does not have a right to recover for benefits paid before the Medicaid recipient reaches age 55. She notes that the trust has a payback provision for all benefits paid regardless of age; however, she states that assets owned by Tinsmon individually are not subject to estate recovery except for benefits paid after age 55 and for benefits paid within the ten-year period immediately preceding her death. According to the guardian, titling the property in the name of the trust would benefit the Department, by increasing the funds available from which it can be repaid, and would harm Tinsmon as it would divest her of her opportunity to engage in estate planning. The guardian points out that Tinsmon's present one-half ownership in the exempt residence has not caused any eligibility problems, thus, ownership of the entire interest would also not cause eligibility problems.

With respect to a trust established for the benefit of or on behalf of an **[***7]** individual, POMS provides that **[*222]** "[i]f funds from a trust that is a resource are used to purchase durable items, e.g., a car or **a house, the individual** (or the trust) must be shown as the owner of the item in the percentage that the funds represent the value of the item. When there is a deed or titling document, **the individual** (or trust) must be listed as an owner" (POMS SI 01120.201 [F] [1] [emphasis added]). While the Department argues that this section indicates that the property must be owned by and titled in the trust, the plain language of the provision provides that when trust funds are used to purchase a house, either the individual or the trust must be **[**857]** the owner, and the provision does not appear to promote one type of ownership over the other. Presumably, the trustees could expend funds to purchase a house outright for Tinsmon to be the sole owner; thus, the trustees should also be able to purchase Lasher's half-interest and name Tinsmon as the sole owner. While there may be reasons why trustees choose to hold title to real property in the trust's name, the Department has failed to establish that such a practice is required in all circumstances. Here, Tinsmon and Lasher presently **[***8]** own the home in fee simple as joint owners with survivorship rights, and have owned it in that form since before the trust's creation. Accordingly, Tinsmon already has legal title to the exempt residence. It is noted that, with respect to determining the eligibility of disabled individuals to receive supplemental security income, one's home is not included as a resource, regardless of its value (*see* *42 U.S.C. § 1382b [a] [1]*; *see also* Social Security Program Operations Manual System [POMS] SI 01130.100 [B] [1]). Nonetheless, Medicaid paid to a recipient who is age 55 or older (which Tinsmon is not) is recoverable from the estate of the recipient upon death (*see* *Social Service Law § 369*). If Tinsmon should die after age 55, the Department may still recover against Tinsmon's real property at that time should the trust funds be insufficient to repay Medicaid benefits paid on her behalf after she reaches age 55.

With respect to petitioners' request for advice and direction, the Court finds that although one of the petitioners is an interested party in the proposed transaction, the transaction appears fair and reasonable and, as it will not affect Tinsmon's eligibility for benefits, is in her best interest. Accordingly, the Court approves **[***9]** of the proposed transaction.

Petitioners also request that the Court confirm that they have ongoing authority to withdraw, transfer and assign guardianship property to the trust so as to maintain Tinsmon's **[****4]** **[*223]** ongoing eligibility for means-tested benefits. The guardian ad litem requests that the Court specify that the guardians are only permitted to transfer those assets which are not exempt from means-tested benefits, and not any assets which are exempt and could pass to Tinsmon's heirs. The Court agrees that it is unnecessary for petitioners to transfer exempt assets into the trust. Otherwise, petitioners, as guardians, have continuing authority to transfer nonexempt guardianship property to the trust in order to preserve Tinsmon's eligibility for benefits.

Finally, the guardian ad litem has submitted an affirmation of legal services along with her report. The Court finds that her requested fee of $852.50 is reasonable and orders petitioners to pay said amount. This constitutes the decision and order of the Court.

Dated: February 22, 2018

Hon. Stacy L. Pettit, Surrogate

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Matter of Tinsmon (Lasher)

Supreme Court of New York, Appellate Division, Third Department

February 28, 2019, Decided; February 28, 2019, Entered

526747

Reporter
169 A.D.3d 1305 *; 95 N.Y.S.3d 411 **; 2019 N.Y. App. Div. LEXIS 1449 ***; 2019 NY Slip Op 01471 ****; 2019 WL 960161

[**1]** Guardianship of JENNIFER LASHER ***TINSMON***. and CHRISTOPHER J. LASHER et al., Respondents; ALBANY COUNTY DEPARTMENT OF SOCIAL SERVICES, Appellant.

Prior History: *Matter of **Tinsmon** (Lasher), 61 Misc. 3d 218, 79 N.Y.S.3d 854, 2018 N.Y. Misc. LEXIS 3215 (Feb. 22, 2018)*

Core Terms

benefits, Services, trust assets, petitioners', funds, supplemental, eligibility, guidelines, mortgage, statutes, act act act, interpretations, expenditures, implementing, means-tested, state-funded, unencumbered, encumbering, first-party, restricting, contradict, acquiring, appointed, approving, deference, disabling, enhancing, expertise, impacting, obligated

Case Summary

Overview
HOLDINGS: [1]-The trial court did not err in approving petitioner parents' proposal to expend funds of a special needs trust to purchase the co-owner's interest in their mentally disabled daughter's home and pay off its mortgage, giving them title as their daughter's guardians without impacting her SSI or Medicaid benefits, as it was within their sole and absolute discretion under the trust to make expenditures for their daughter's benefit after considering any impact on her access to government benefits; [2]-There was no statutory support for respondent department of social services' contention that, in order to assure reimbursement to the entities that provided Medicaid benefits to the daughter during her life, petitioners had to either hold title to the home as trustees or provide security to the trust for its investment into the home.

Outcome
The order was affirmed.

Counsel: **[***1]** Daniel Lynch, Albany County Attorney, Albany (Albert F. Dingley of counsel), for appellant.

Wilcenski & Pleat PLLC, Clifton Park (Edward V. Wilcenski of counsel), for respondents.

Judges: Before: Egan Jr., J.P., Clark, Mulvey, Devine and Rumsey, JJ. Egan Jr., J.P., Clark, Mulvey and Rumsey, JJ., concur.

Opinion by: Devine

Opinion

[*1305] **[**412]** MEMORANDUM AND ORDER

Devine, J.

Appeal from an order of the Surrogate's Court of Albany County (Pettit, S.), entered February 22, 2018, which granted petitioners' application, in a proceeding pursuant to *SCPA 2107*, for advice and direction regarding a proposed sale of certain real property.

In 2011, Jennifer Lasher ***Tinsmon*** suffered a disabling traumatic brain injury at the age of 42. Petitioners are her parents and, following her injury, were named the guardians of her person and property. They are also the trustees of a first-party supplemental needs trust that was established in August 2011 and exists "to shelter

[***Tinsmon***'s] assets for the dual purpose of securing or maintaining eligibility for state-funded services, and enhancing [her] quality of life with supplemental care paid by [the] trust assets" (*Matter of Abraham XX., 11 NY3d 429, 434, 900 N.E.2d 136, 871 N.Y.S.2d 599 [2008]*; *see 42 USC § 1396p [d] [4]*). ***Tinsmon***'s home, which is jointly owned by herself and petitioner Helena Lasher, was not **[***2]** placed in trust inasmuch as a residence cannot be counted in determining eligibility for certain means-tested benefits (*see 42 USC § 1382b [a] [1]*; *20 CFR 416.1212 [a]*; *18 NYCRR 360-1.4 [f]*; *360-4.7 [a] [1]*). ***Tinsmon*** **[**413]** qualified for and began receiving such benefits, namely, supplemental security income (hereinafter SSI) and Medicaid benefits.

In September 2017, petitioners commenced this proceeding pursuant to *SCPA 2107* to obtain, as is relevant here, approval for their proposal to expend trust funds to purchase Lasher's interest in ***Tinsmon***'s home and pay off an encumbering mortgage on it, leaving them with title to the home as ***Tinsmon***'s guardians. Over respondent's opposition, Surrogate's Court approved the plan. Respondent now appeals.

We affirm. Petitioners proposed acquiring Lasher's interest in the home on very favorable terms and paying off the mortgage, actions that would leave ***Tinsmon***, through petitioners as her guardians, as the sole owner of an unencumbered residence without impacting her SSI or Medicaid benefits. A **[*1306]** guardian ad litem appointed for ***Tinsmon*** by Surrogate's Court supported this proposal, which appears to be well within petitioners' "sole and absolute discretion" under the trust agreement to make expenditures for ***Tinsmon***'s benefit **[***3]** after considering any impact on her access to government benefits (*see EPTL 7-1.12*). Respondent objected only to the proposed transfer of title to petitioners as ***Tinsmon***'s guardians, arguing that administrative interpretations of the applicable statutes require that petitioners either hold title to the home as trustees or provide security to the trust for its investment into the home. Respondent's interest in this regard may be explained by the fact that the trust assets remaining when ***Tinsmon*** dies, regardless of how old she is when that occurs, will be first used to reimburse the entities that provided Medicaid benefits to her during her life (*see 42 USC § 1396p [d] [4] [A]*; *Social Services Law § 366 [2] [b] [2] [iii]*; *Matter of Abraham XX., 11 NY3d at 436*; *compare Social Services Law § 369 [2]* [restricting the respondent's ability to recover against the assets of a benefits recipient who dies before reaching 55 years of age]).

Respondent does not point to, and our review does not disclose, any statutory authority that would require its desired outcome. Respondent suggests that such a requirement may be found in guidelines, used by the Social Security Administration to process SSI benefit claims, that reflect the agency's expertise in implementing the pertinent statutes and are "entitled to 'substantial deference'" (*Lopes v Department of Social Servs., 696 F3d 180, 186 [2d Cir 2012]*, quoting **[***4]** *Bubnis v Apfel, 150 F3d 177, 181 [2d Cir 1998]*; *see Matter of Jennings v Commissioner, N.Y.S. Dept. of Social Servs., 71 AD3d 98, 109, 893 N.Y.S.2d 103 [2010]*). The guidelines contradict respondent's argument, however, providing that when funds from a trust are "used to purchase durable items, e.g., a car or a house, *the individual (or the trust)* must be shown as the owner of the item in the percentage that the funds represent the [item's] value" (Program Operations Manual System [POMS] former SI 01120.201 [F] [1] [emphasis added]). Further, petitioners are not obligated to conserve trust assets for respondent's eventual benefit, which would conflict with their mandate to act for ***Tinsmon***'s benefit by using "so much (even to the extent of the whole) of the net income and/or principal of th[e] trust" (*EPTL 7-1.12 [e] [1] [1]*; *see e.g. Matter of Shah [Helen Hayes Hosp.], 95 NY2d 148, 163, 733 N.E.2d 1093, 711 N.Y.S.2d 824 [2000]*). Surrogate's Court was accordingly correct to conclude that petitioners' proposal was permissible and did not err in approving it.

To the extent that the contention is properly before us, the **[*1307]** Social Security Administration **[**414]** does not possess a "remainder interest" in the trust that would entitle it to notice of this proceeding (*Social Services Law § 366 [2] [b] [2] [v]*; *see 42 USC § 1396p [d] [4] [A]*; *SCPA 103 [39]*; *2101 [3]*). Respondent's remaining arguments have been examined and are lacking in merit.

Egan Jr., J.P., Clark, Mulvey and Rumsey, JJ., concur.

ORDERED that the order is affirmed, **[***5]** with costs.

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McMichael

Surrogate's Court of New York, Queens County

August 2, 2017, Decided; August 11, 2017, Published

2000-59/A

Reporter
2017 NYLJ LEXIS 2245 *

McMichael

(Matter of McMichael, 2000-59/A, NYLJ, Aug. 11, 2017 at 33)

Core Terms

payee, structured settlement, Originations, Funding, best interest, advice, financial consequences, fair and reasonable, independent advice, lump sum payment, self-represented, long-term, intends, monies, waived, spent

Judges: [*1] Surrogate ***Peter Kelly***

Opinion

Cite as: Matter of McMichael, 2000-59/A, NYLJ 1202795156511, at *1 (Surr., QU, Decided August 2, 2017)

Surrogate's Court, ***Queens*** County

2000-59/A

For Plaintiff: For Petitioner, J.G. Wentworth: Law Office of Michel F. Nestor, LLC. Petitioner: Nigel Criss, was self-represented

CASENAME

In the Matter of the Petition of J.G. Wentworth Originations, LLC and Nigel Criss, sole distributee of the Estate of Shanetha Dejetta McMichael, Deceased, pursuant to Article 5 Title 17 of the New York General Obligations Law.

2000-59/A

Decided: August 2, 2017

ATTORNEYS

For Petitioner, J.G. Wentworth: Law Office of Michel F. Nestor, LLC.

Petitioner: Nigel Criss, was self-represented

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In this proceeding petitioners, J.G. Wentworth Originations, LLC ("J.G. Wentworth") and Nigel Criss ("Nigel"), seek approval of the transfer of certain structured settlement payments from Nigel to J.G. Wentworth.

The structured settlement payments to which Nigel is entitled amount to $429,780.32. The discounted present value of the payments is $351,203.10. Under the proposed purchase agreement, Nigel intends to sell the payments for the net amount of $245,000.00.

As a preliminary matter, the New York Structured Settlement **[*2]** Protection Act ("SSPA") originated in response to concerns that certain structured settlement payees are vulnerable to both financial exploitation and the rapid dissipation of their awards (see *General Obligations Law §5-1701 et seq*; *In re Settlement Funding of N.Y. L.L.C.,195 Misc 2d 721, 722 [Sup Ct, Rensselaer County 2003]*). Accordingly, institutions

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seeking to acquire a payee's structured settlement rights are required to commence a special proceeding seeking judicial approval, irrespective of the payee's willingness to go forward with the transaction (see id; *General Obligations Law §5-1705*]).

To pass muster, the proposed transfer must be in the best interest of the payee, the transaction must be fair and reasonable, and the payee must be advised in

writing to seek independent professional advice regarding the transfer and has either received such advice or waived such advice in writing (see *Matter of J.G. Wentworth Originations, LLC v. Maurello, 2012 NY Misc LEXIS 678 [Sup Ct, Nassau County 2012])*.

Determination as to whether the transfer is in the best interests of the payee warrants a fact-sensitive and oftentimes paternalistic analysis, taking into consideration the payee's age, maturity level, income sources independent of the structured payments, whether the payee has any dependents, the stated purpose of the transfer, the extent to which the payee appears to understand the financial consequences of the transaction, and whether the payee **[*3]** has received independent advice (see *Matter of Benes v. American Gen. Annuity Serv. Corp., 2011 NY Misc LEXIS 6174 [Sup Ct, Nassau County 2011])*.

According to his affidavit, the payee, Nigel, is 18 years of age, single, with no dependents, and is currently a full time student. He seeks a lump sum payment of $245,000.00 for the purpose of purchasing a home in Allentown, Pennsylvania at a cost of $210,000.00. The remaining monies are to be used for home

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improvements, the purchase of a vehicle, and covering day-to-day expenses. According to Nigel, he plans on attending a "Barbering Program" to obtain his license. No supporting documents have been submitted by Nigel in support of the petition.

It seems that at the still-tender age of 18, Nigel intends to spend the entirety of the lump sum payment immediately, in lieu of receiving payments over time that are designed to provide for his long-term financial security. Significantly, the court observes that Nigel, upon recently reaching the age of majority, has already accessed the monies in his ***guardianship*** account which amount to approximately $186,000.00. Nigel's unfettered use of those funds is not described in the petition or his affidavit. If the funds have not been spent, they can certainly assist Nigel with the purposes set forth in his affidavit. **[*4]** If, on the other hand, they have already been spent, the court must presume that Nigel has little to show for it. Either way, both scenarios militate against granting the requested relief (see *Matter of 321 Henderson Receivables Origination LLC v. Lugo, 23 Misc 3d 1138[A] [Sup Ct, Kings County 2009])*.

In the court's view, Nigel, who has waived receiving any independent advice regarding the transaction, does not fully appreciate the long-term financial consequences of selling his payments. The court cannot sanction an impulsive transfer for which there is no real urgency, particularly when it is diametrically opposed to the very purpose of the SSPA (see e.g. *In re Settlement Funding of NY L.L.C., 195 Misc 2d 721 [Sup Ct, Rensselaer County 2003])*.

As the court has determined that the transfer is not

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in Nigel's best interests, the court need not consider whether the terms of the transaction itself are fair and reasonable. The petition is denied.

This is the decision and decree of the court.

Dated: August 2, 2017

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