Medicaid Outside the Context of Long Term Care, Including Special Needs Trusts

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I. Medicaid and Medicaid Waivers

A. Medicaid

Medicaid[1] is a program jointly funded by federal and state funds, but administered by the individual states. Generally, federal funds are given to the states to establish medical assistance programs for low income and disabled individuals who reside within that state. The way the programs are developed and carried out varies from state to state. Applicants for Medicaid must meet certain requirements. The program is means-based, with both income and resource testing. Although the individual states are able to determine many details of the program, there are certain medical services that Medicaid must cover.[2]

In Michigan, Medicaid is available to aged, blind, and disabled individuals. There are also asset and income tests that the individual must pass in order to be eligible.

B. Medicaid Waivers

Medicaid waiver programs were first enacted by Congress in 1981.[3] The Social Security Act §1115, allows the Secretary of the Department of Health and Human Services (HHS) to waive certain requirements of the traditional Medicaid program.[4] The Secretary of HHS provides federal Medicaid funds to a state, and under the waiver, that state may provide coverage that does not necessarily meet federal standards. In essence, it waives some of the federal requirements.

For people with developmental disabilities, the waivers represent a progression away from unnecessary institutionalization, toward integration in the community. Medicaid Waiver programs require "budget neutrality," meaning that a particular state's federal funding for a waiver program cannot exceed what the cost of traditional Medicaid would be in that state without such a program.[5] The states that use waivers take the federal funds, create a number of available slots for eligible Medicaid beneficiaries, and then fill the slots accordingly with the

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[1] For more information on the Medicaid program, see http://www.cms.hhs.gov/home/medicaid.asp.
[2] Enumerated mandatory services may be found at 42 USC § 1396d(a)(1)-(24).
[3] Julia Gilmore Gaughan, Comment, *Institutionalization as Discrimination: How Medicaid Waivers, the ADA, and §1983 Fail*, 56 U. Kan. L. Rev. 405, 408 (2007).
[4] The Henry J. Kaiser Family Foundation, The New Medicaid and CHIP Waiver Initiatives 11 (2002) [hereinafter *The New Medicaid*], http://www.kff.org/medicaid/4028-index.cfm.
[5] *The New Medicaid* at 11.

eligible individuals.[6] If there are more individuals than slots, waiting lists are employed until a slot becomes available.[7] While on a waiting list the individual will remain on traditional Medicaid.

1915(b) waivers[8] are available for individuals with developmental disabilities or severe mental illness. Besides the basic Medicaid covered services for medically necessary health care, this waiver expands coverage to psychological testing, psychiatric evaluations, behavioral analysis, and other services related to mental health.

Home and community-based services waivers (HCBS), codified in § 1396n(c), are used in many states to keep people with different types of disabilities integrated in the community, and out of institutions.[9] The waivers differ from traditional Medicaid in that the waivers do not adhere as strictly to income and resource requirements, and allow the states to experiment with different types of alternative care. These Medicaid waivers are especially helpful for individuals living with mental illness, as the waivers give these individuals more choice and flexibility in their treatment. From 1992 to 2002, Medicaid spending on HCBS waivers has more than doubled, jumping from 15% to 31% of the long term care budget in those 10 years.[10] In 2002, more than 2 billion individuals received services through the HCBS waivers.[11]

The HCBS is a program in which aged or disabled persons may receive services in their homes rather than requiring care in a nursing home without the waiver.[12] HCBS is provided by waiver agents located throughout the state.[13] The spouse of a HCBS recipient is still known as the community spouse.[14]

In addition to the criteria for traditional Medicaid, including the $2,000 monthly asset limit, there is also a strict income cap for potential HCBS recipients. This income cap is $1,911 in gross income per month in 2008.[15] Unlike traditional Medicaid, no deductions from income are allowed, including medical spend-downs.[16] This rule can lead to harsh results in that a

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[6] "States often have more individuals in need of waiver services than the number of available spaces, called 'slots,' on a program. Many states use waiting lists when their program slots are filled." The Henry J. Kaiser Family Foundation, Medicaid 1915(c) Home and Community-Based Service Programs: Data Update, 9, (2005), http://www.kff.org/medicaid/upload/7345.pdf.

[7] *Id.* at 9.

[8] 1915(b) waivers are also known as "Managed Care or Freedom of Choice" waivers. Like other waivers, the 1915 (b) waiver allows a state to waive certain traditional Medicaid requirements. See www.cms.hhs.gov follow the "Medicaid" hyperlink.

[9] 42 U.S.C. §1396n(c)(1).

[10] The Henry J. Kaiser Family Foundation, Medicaid 1915(c) Home and Community-Based Service Programs: Data Update, 1, (2005), http://www.kff.org/medicaid/upload/7345.pdf.

[11] *Id.* at 1.

[12] PEM 106, page 1.

[13] *Id* at 4-6

[14] The Medicaid Glossary defines "community spouse" as: L/H or waiver patient's spouse when the spouse: Has NOT been, and is NOT expected to be, in a hospital and/or LTC facility for 30 or more consecutive days, and for waiver patients only, the spouse is NOT also approved for the waiver.

[15] PEM 164, page 2.

[16] *Id.*

potential HCBS recipient who is over the income cap by any amount, no matter how much or how little, will be precluded from utilizing the waiver.

Because the PEMs are not law themselves, a protective order from a probate court will supersede the PEMs and be binding on the Department of Human Services (DHS). The PEMs acknowledge this and outline procedures by which a probate court can increase spousal protections. One section to be aware of is PEM 546 whereby a court may increase the community spouse income allowance used for determining a post-eligibility Patient Pay Amount (PPA).[17] The PPA does not apply to the waiver program. However, because the community spouse is entitled to keep his or her income, it is only a short step to conclude that the procedures outlined in PEM 546 for increasing the amount that the community spouse may keep when a nursing home is involved should also apply to the waiver situation. For example, where a potential waiver client has too much income to qualify for the waiver, in theory it is possible to use the procedures in PEM 546 to divert a portion of the potential waiver recipient's income to the community spouse, thereby reducing the potential waiver recipient's income to below the waiver income-cap.

My firm is currently attempting this procedure and I have attached examples of the pleadings at Attachment 1. The first step is to use court form PC 639 "Petition for Appointment of Conservator and/or Protective Order." It should be filled out according to the facts at hand. Additional exhibits should be used to elaborate on the facts to help explain to the court why it should grant the protective order (and ignore the relevant PEMs). Finally, court form PC 609 "Order" should be used which spells out the requested relief. As this seems to be untried in Michigan at the moment, the pleadings attached may undergo revision at some point in the future.

For more information on Medicaid Waivers, visit: http://www.cms.hhs.gov/.

C. Medicaid and Interstate Travel

Please see Attachment 2 for an article on a Medicaid beneficiary's struggle to move from Michigan to Illinois to live near his family. The article explores the young man's struggle in attempting to keep his Medicaid coverage while he sets up residency in a new state. The document at Attachment 2 specifically explores the Medicaid system, Medicaid Waivers, and the constitutional implications of a Medicaid recipient crossing state lines. This is an area of Medicaid that is in need of reform. As the case attached illustrates, a Medicaid recipient who wishes to move out of state (or in some cases even vacation out of state) faces barriers in keeping their services during the period while they move or are establishing residency. Please see Attachment 3 for the State of Michigan's troubling position on this issue.

II. Single Point of Entry

A. What is Single Point of Entry?

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[17] PEM 546, page 4.

Single Point of Entry (SPE) allows Medicaid consumers in Michigan to access an informational source on Long Term Care (LTC). There are currently four SPE programs in Michigan, but in October 2009 it will be implemented statewide. The goal of SPE is to provide consumers, their families, and their caregivers with assistance working through the complicated process of obtaining LTC services. The SPE agency will assist consumers in developing a LTC plans through Person Centered Planning (PCP).

B. Why is Single Point of Entry Necessary?

The vast majority of those who seek LTC have not developed a plan of action in advance. It often takes serious injury or illness before individuals and their caregivers begin the process of researching and obtaining LTC services. Prior to SPE, consumers faced a maze that was full of challenges that were only compounded by the urgent situation that most consumers found themselves in. SPE seeks to alleviate some of the stress and confusion by creating one entry point to all of the LTC resources these individuals will need.

C. What Types of Services are Coordinated?

SPE coordinates the following referrals for services to those seeking LTC: nursing homes, adult foster care, hospice, home respite services, home health, care management, MI Choice Waiver, nursing facility transition services, home delivered meals, and other services funded by Medicaid and Older Americans Act.

For more information regarding SPE, please visit:
http://www.michigan.gov/ltc/0,1607,7-148--151839--,00.html

Also, please see Attachment 4 for additional resources.

III. Balance Billing Issues

A. What is Balance Billing?

Balance billing is the practice that makes patients, not medial providers or health plans, responsible for paying the disputed difference between their provider's bill and the health plan's coverage. An August 28, 2008 article in Business Week explains balance billing as follows: "Balance billing most frequently occurs when medical providers participating in a managed-care network believe the plan's insurer is imposing too deep a discount on medical bills or is taking too long to pay. California, New Jersey and 45 other states ban in-network providers from billing insured patients beyond co-payments or co-insurance required by the plan. Similarly, federal law prohibits providers from billing Medicare patients for unpaid balances. These laws require medical providers to seek payment only from the insurer for services covered by the plan. Many states also shield insured patients from balance billing by out-of-network hospitals and doctors in emergencies, since patients usually don't control who treats them in those situations. (Bans on balance billing generally don't apply when a patient gets an elective procedure, such as cosmetic surgery, or seeks out-of-network, non-emergency service without a referral.)" [18]

As mentioned above, the prohibition against balance billing also applies to Medicare. Limits were placed on balance billing as it relates to Medicare in 1989.[19]

Prior to the cuts in Medicare payments to physicians that went into effect on January 1, 2008, the American Medical Association began pushing Congress to introduce legislation which would allow Medicare balance billing and also override state law prohibitions on balance billing using the Preemption Clause of the Constitution. "With no permanent fix for Medicare cuts in sight, doctors said it makes sense to pursue a law that lets them bill Medicare patients the difference between reimbursement rates and what it costs to treat patients. . . . It allows physicians to provide a fix to the Medicare crisis. Balance billing allows physicians to salvage the system."[20]

The AARP opposes any changes to the prohibition on Medicare balance billing and has fought against bills brought before Congress. Kristen Sloan, AARP's national coordinator of health and long-term care issues stated that: "[The] AARP strongly opposes lifting or extending the current Medicare balance-billing limits. Prior to enactment of the 1989 Medicare physician payment reform, Medicare beneficiaries were spending billions of dollars out of pocket on excess physician charges. The balance-billing limits were put into place to protect beneficiaries from extraordinary costs. . . . Lifting the limits is nothing more than a cost shift to patients. And it would only exacerbate out-of-control health care spending."[21]

During these tough economic times, it is important that the elderly and disabled continue to receive the healthcare that they need without adding to the already high costs that these vulnerable individuals are responsible for. While it is unfortunate that physicians must bear the burden of the difference between their costs to provide medical care and what Medicare reimburses under the current laws, they can more readily absorb the loss than can an elderly or disabled individual. Contact your representatives and let them know that balance billing must remain prohibited! Also, please see Attachment 5 for additional information.

IV. Special Needs Trusts Issues

A. Pooled Accounts Trusts in Michigan

Pooled Accounts Trusts (PATs) are a type of irrevocable trust created pursuant to Federal law.[22] A PAT allows a disabled individual (as defined by 42 U.S.C. §1382c(a)(3)) to transfer his

[18] Article available at http://www.wlns.com/global/story.asp?S=8936144.
[19] "Key Milestones in CMS Programs," available at http://www.cms.hhs.gov/History/Downloads/CMSProgramKeyMilestones.pdf.
[20] American Medical News, Volume 50, Number 45 (December 12, 2007), available at http://www.ama-assn.org/amednews/site/free/images/prhd1203.pdf.
[21] *Id.*
[22] 42 U.S.C. §1396p(d)(4)(c).

or her assets to the PAT and such transfer will not be a divestment nor counted as an asset for Medicaid/SSI purposes.[23] PATs operate by assigning each individual a separate sub-Trust but for investment purposes the sub-Trusts are pooled together. Upon joining, a beneficiary signs a "Joinder Agreement" which signifies his or her participation.

A PAT is exempt from a state's right to recover the amount of Medicaid services provided to a beneficiary so long as any remaining funds are kept by the PAT for use by other beneficiaries.

A PAT differs from a 42 U.S.C. §1396p(d)(4)(A) trust in that a person with a disability may create the sub-Trust using his own funds without court order. Because a PAT is managed by a non-profit organization, the person does not need to worry about appointing a trustee.

The beneficiary must not be able to direct or compel the disbursements in any way from his or her sub-Trust. Moreover, the main purpose of the PAT should be to preserve the eligibility of government entitlement programs, so the Trustee should never make disbursements for food, shelter, or clothing, nor should cash ever be given outright to a beneficiary. A list of permissible distributions is located at Section B, below.

To be valid, a PAT must meet the following requirements:[24]

1. Be created and managed by a non-profit organization;
2. A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts;
3. Accounts in the trust are established solely for the benefit of individuals who are disabled by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court;
4. To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State.

The Michigan Department of Human Services (DHS) recognizes PATs and refers to them as "Exception B" trusts.[25]

I have enclosed the following documents at Attachment 6: A sample Joinder Agreement that a beneficiary executes upon joining; the Declaration of Trust of the Springhill Housing Corp., Pooled Accounts Trust; PEM 401 pages 7-8; a letter from the Deputy Director of the Medical Services Administration stating that the Family Independence Agency (now known as the DHS) will recognize PATs; a letter from the Social Security Assistant Regional Commissioner regarding the status of PATs; and a sample letter that we send to the local DHS office upon the opening of a sub-Trust for a Medicaid recipient..

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[23] PEM 401, pages 7-8.
[24] 42 U.S.C. §1396p(d)(4)(C)(i)-(iv).
[25] PEM 401, pages 7-8.

PATs can provide wonderful Medicaid/SSI planning options and help disabled individuals live fuller lives than what they would be able to on state benefits alone. However, due to the stringent requirements that both Federal and state law imposes, it may not be right for everyone.

B. Special Needs Trust List of Permissible Distributions

The Trustee(s) of a Special Needs Trust may utilize any of the foregoing listing for expenditures from the Trust. The following list of non-support items is provided for purposes of description and shall not limit the Trustee(s) in making other distributions for other items of amenities that the trustee may believe are in the best interest of the beneficiary. Those items may include, but are not limited to:

1. Automobile/Van
2. Accounting services
3. Acupuncture / Acupressure
4. Alterations or mending to clothing – shoe repairs
5. Appliances (TV, VCR, stereo, microwave, stove, refrigerator, washer/dryer and maintenance/repairs)
6. Assistive Technology and Assessments
7. Bottled Water or water service
8. Bus pass/public transportation costs
9. Camera, film, recorder and tapes, development of film, photo albums, scrapbook supplies, web cite or blog services
10. Carpet cleaning
11. Clothing and shoes
12. Clubs and club dues (record clubs, book clubs, health clubs, service clubs, zoo, Advocacy Groups, museums, wine clubs)
13. Computer hardware, software, program, maintenance/service
    a. Internet service
    b. Assistive technology
14. Conferences and travel related to same
15. Courses or classes (academic or recreational) including supplies
16. Craft and supplies
17. Curtains, blinds, drapes and the like
18. Dental work not covered by Medicaid, including anesthesia.
19. Down payment on home or security deposit on apartment.
20. Dry cleaning and/or laundry services and/or supplies
21. Elective surgery
22. Fitness equipment, personal trainers, bike and maintenance including a helmet
23. Funeral expenses
24. Furniture, home furnishings and insurance
25. Gasoline and/or Maintenance for automobile
26. Haircuts / Salon services
27. Hippo therapy, horse back riding lessons, equipment and the like
28. Holiday Decorations, parties, dinner dances, holiday cards and postage

29. Home alarm and/or monitoring/response system
30. Home improvements, repairs and maintenance (not covered by Medicaid), including tools to perform home improvements, repairs and maintenance by homeowner, paint, wallpaper, contracts for same
31. Home Purchase (to the extent not covered by benefits)
32. House cleaning / maid services/lawn services/snow removal
33. Independent Care Managers/Case Managers
34. Insurance (automobile, home and/or possessions)
35. Insurance Co-Payments not covered by any other source
36. Legal Fees/Advocacy
37. Linens, towels, bedding and other household furnishings
38. Massage, facials and other similar services/treatments
39. Musical instruments (including lessons and music)
40. Non-food grocery items (laundry soap, bleach, fabric softener, deodorant, dish soap, hand and body soap, personal hygiene products, paper towels, napkins, Kleenex, toilet paper, any household cleaning products, allergy medications, asthma supplies)
41. Over the counter medications (including vitamins and herbs, etc.)
42. Personal Assistance Services not covered by Medicaid or any other source
43. Pets and pet's supplies, veterinary services
44. Physical therapy and equipment not covered by any other source
45. Physician specialists if not covered by Medicaid or any other source
46. Private counseling if not covered by Medicaid or any other source
47. Repair services (appliance, automobile, bicycle, household, fitness equipment)
48. School supplies
49. Snow removal/Landscaping/Lawn Service
50. Sporting goods/equipment/uniforms/team pictures/travel to games/tournaments
51. Stationary, stamps, cards, etc.
52. Storage Units
53. Taxi cab
54. Telephone service and equipment, including cell phone, pager, etc.
55. Any therapy (physical, occupational, speech) not covered by Medicaid – or any other source
56. Tickets to concerts or sporting events (for beneficiary and an accompanying companion, travel)
57. Transportation (automobile, motorcycle, bicycle, moped, gas, bus passes and helmets)
58. Utility bills (direct TV, cable TV, electric, heating as long as not basic needs)
59. Vacation (including paying for personal assistance to accompany the beneficiary)

Examples of Trust Distributions which will Reduce SSI Benefit

1. Basic shelter related expenses
2. Food
3. Cash for any purpose (including for gambling)

Examples of Impermissible Trust Distributions

1. Paying for a service already paid for by another source

2. Distribution not in the best interest of the beneficiary (made primarily for the benefit of another person)

C. Special Needs Trust: Duty of Loyalty

Introduction

Working with Special Needs Trusts (SNTs) is both challenging and exciting. After spending hours of labor crafting a complex legal document, it is hard to admit that the document is really only as good as the person responsible for administering the funds in compliance with your carefully crafted provisions. There is a huge tendency for courts to treat SNTs as they would a Conservatorship. It is important to keep in mind that these trusts are not Conservatorships, and they have specific terms that must be complied with.

In addition, attorneys who represent trustees have a duty not only to that trustee but also to the beneficiary of the trust. The attorney must execute their duty to both parties to their utmost ability.

For purposes of this discussion, the analysis will focus on first party special needs trusts rather than third party special needs trusts. Please note that the discussion as to the trustee and the attorney for the trustee's fiduciary and derivative duty remains the same, and the potential impact of trust distributions on a beneficiary's Supplemental Security Income (SSI) benefit amount and/or Medicaid eligibility is similar whether the distribution comes from a first party or third party special needs trust.

Duties and Responsibilities of the Trustee to the Beneficiary

This Section outlines the various *duties* and *responsibilities* of a Trustee under current Michigan law. Additionally, it provides guidelines regarding Trustee compensation and other commonly discussed areas of concern with our clients who, as individuals, are not generally professional Trustees. The Memorandum is divided into four major categories for purposes of discussion:

1. **First,** the Memorandum addresses the meaning of a *Trustee*. This section provides the overall framework from which a Trustee's role is governed.

2. **Second**, the general *duties and liabilities* of a Trustee are addressed. This section more specifically details a Trustee's legal duties to a trust's beneficiaries, that if not satisfied appropriately may lead to Trustee liability, and the nature of that liability.

3. **Third**, considerations regarding various *administrative* aspects of trust administration are discussed, including the preparation of applicable tax returns, the payment of debts and expenses and trust distributions.

4. **Fourth**, the factors which guide the appropriate payment of *Trustee compensation* are detailed.

SECTION I
Trusteeship

A Trustee is considered a *fiduciary*. Thus, one's duties as a Trustee are bound by the laws governing fiduciary relationships. Michigan's definition of a *"fiduciary relationship"* under its Probate Code, *The Estates and Protected Individuals Code* is as follows:

> "*A fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary. A fiduciary shall observe the standards of care described in section 7302 and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees and beneficiaries; care and prudence in actions; and segregation of assets held in the fiduciary capacity. With respect to investments, a fiduciary shall conform to the Michigan Prudent Investor Rule.*" M.C.L.A. §700.1212.

SECTION II
General Duties and Liabilities of Trustees

The terms of the Special Needs Trust govern your duties and responsibilities as the trustee. The primary duty of a Trustee is to administer a trust expeditiously for the **benefit of the beneficiary**. Typically, the goal and objective of a special needs trust is to primarily rely upon State and Federal benefits to provide for the beneficiary's basic needs, (i.e. food and shelter, and to have the trust funds supplement any benefits the beneficiary is entitled to receive from state and federal benefits or programs.

This Trust must be administered solely in the best interests of the beneficiary. It is only the health and well being of the beneficiary that should be considered when making decisions in the administration of the trust. As trustee, you are held to a higher standard of care when administering the trust than you are required to use during an ordinary business transaction. In your position as trustee, you can be held personally responsible to the beneficiary. That means that you may be required to pay back any damages that may result from improper administration of the trust.

More specifically, however, a Trustee is bound by the following in performing his or her responsibilities:

> Standard of Care. Under Michigan law, the Trustee is required to invest in accordance with either the express terms of the trust or the *prudent investor rule*. If the Trustee possesses any special skill or expertise, then Trustee has the duty to use those skills.

Under Michigan's *Prudent Investor Rule*, a Trustee *"shall invest and manage assets held in a fiduciary capacity as a prudent investor would, taking into account the purposes, terms, distribution requirements expressed in the governing instrument, and other circumstances of the fiduciary estate. To satisfy this standard, the fiduciary must exercise reasonable care, skill, and caution."*

Some of the requirements of a prudent investor are to diversify investments of the trust, and act solely in the interest of the beneficiary(ies), with authority to delegate the investment and management functions to an agent, *so long as the Trustee exercises care in selection, scope and review of investment duties delegated.* (Emphasis added).

<u>Duty to Inform and Account to Beneficiaries</u>. In Michigan, the general rule is that a Trustee has a duty to account to the beneficiaries of a trust annually and keep them informed of the trust and its administration. The Estate and Protected Individuals Code (EPIC) provides two distinct sets of rules regarding accountings for the administration of revocable living trusts and the administration of all other trusts. In both cases, the provisions of EPIC serve as <u>default</u> provisions in the event the Trust Agreement does not specify <u>to whom</u>, <u>how often</u> and <u>how detailed</u>, a trust accounting must be. Therefore, the following discussion presumes the applicable Trust Agreement is silent <u>or</u> specifically incorporates the provisions of EPIC into its terms regarding trust accounting.

<u>Certain Definitions</u>.

"Settlor". A "Settlor" is the individual who creates the trust.

"Current Trust Beneficiary". A "current trust beneficiary" is a beneficiary who (i) has a current right to receive all or a portion of the income, if any, of the trust property; (ii) is currently eligible to receive all or a portion of a mandatory or discretionary distribution of income or principal; *or* (iii) possesses a testamentary or presently exercisable general or special power of appointment. **M.C.L.A. 700.1103(j)**.

"Interested Trust Beneficiary". An "interested trust beneficiary" is a beneficiary who is a "current trust beneficiary" or who has a life estate in the trust property or who is eligible for a mandatory or discretionary distribution by the trustee of income or principal upon the termination of a life estate or of the interest of a beneficiary currently eligible to receive a mandatory or discretionary distribution by the trustee of income or principal.

It is important to remember that one of the primary reasons this trust has been established is to protect the benefit eligibility of the beneficiary. It is also important to understand the source and nature of the benefits the beneficiary receives. Following is a brief description of two major types of benefits, Supplemental Security Income and Medicaid.

<u>Supplemental Security Income (SSI) and Medicaid</u>

Supplemental Security Income (SSI) is administered by the Social Security

Administration (SSA). SSI is a federally financed and administered needs-based program. A person who is eligible for SSI benefits receives a monthly cash payment for support. To qualify, the beneficiary must be aged, blind, or disabled and his or her assets and income must be low enough to meet a "means test". Once a beneficiary has met these requirements, the individual is considered "categorically needy" and is eligible for SSI. Under the current federal law, SSI benefits are intended to provide for the beneficiary's food, and shelter.

It is possible that the SSA or the Family Independence Agency will request verification of expenditures made. The state does have the right to monitor trust distributions to make certain that funds are used for the benefit of the disabled person. It is very likely that you will be required to produce necessary documentation of expenditures.

To determine how and when payments should be made from the trust on behalf of the beneficiary requires some knowledge of the rules established by the SSA regarding assets and income. It is also necessary to have an idea of those things that you would like to purchase or accomplish for the beneficiary. Once you have established this combined basis for moving forward, you will be able to determine the most prudent way to distribute assets from the trust without jeopardizing the beneficiary's eligibility for benefits.

The SSA has established a set of rules to deal with the establishment of trusts. The Administration has decided that trust principal will not be considered as a resource to an individual who does not have the power to revoke the trust and use the principal for his or her own support and maintenance. When the SSA is informed that a trust has been established for a beneficiary, it will review the trust to determine whether it is revocable or irrevocable. Whether a trust is determined revocable or irrevocable will determine whether a beneficiary's assets are countable when determining eligibility for benefits.

If a trust has been established by the Conservator, Guardian or Representative Payee of the individual, as is often the case with respect to a first party special needs trust, and the individual is the sole beneficiary, then the trust may be classified as a revocable trust by the SSA. A general rule of trust law states that a trust may be revoked by the mutual consent of the creator of the trust and all of the beneficiaries. Therefore, the SSA has concluded that if the same person is both the creator of the trust and the sole beneficiary of the trust, then he or she is able to independently revoke the trust. If this determination is made, then the funds held in the trust will be counted when determining eligibility.

If the trust is irrevocable by its terms and under state law, then the trust principal is not considered a resource of the individual or a countable asset. This will allow the beneficiary of the trust to maintain his or her eligibility. It is important that the trust be determined irrevocable.

There are a number of things that may be done to avoid the inference that the trust is revocable. It is especially important that the trust clearly state that it is irrevocable and the beneficiary does not have the ability to access any of the trust funds. The beneficiary should also be given the right to determine who should receive the remaining trust property upon his or her death, with approval from a court to avoid any issues later regarding capacity. The trust contains a provision that directs that the State is entitled to repayment for any Medicaid benefits that have been expended on behalf of the beneficiary during his or her lifetime. Allowing the beneficiary to determine who should receive the remaining trust property will occur only after the state has been repaid for benefits provided during the beneficiary's lifetime.

If the trust is irrevocable by its terms and under State law, then the trust principal is not considered a resource or a countable asset. It is very important that the trust be found irrevocable. This will allow the beneficiary of the trust to maintain his or her benefit eligibility.

Even if a trust is irrevocable and not considered as a resource to the beneficiary, it is possible that disbursements from the trust can be considered as income. The SSA looks to the beneficiary's countable resources when determining his or her benefit eligibility. A countable resource is defined as any asset counted by SSI rules when determining eligibility. A resource is often referred to as a "countable asset". When determining benefit eligibility, a SSI recipient is allowed to have only $2,000.00 or less in "resources".

However, it is permissible for a beneficiary to have "exempt" assets. Exempt assets are defined as those assets that are **not** counted when determining a beneficiary's eligibility. Ownership of exempt assets will not jeopardize benefits. As trustee, it is important to be careful when purchasing or providing the beneficiary with exempt assets.

Do not provide the beneficiary with cash to purchase exempt assets. Any payments of money to the beneficiary are always considered income to the beneficiary. You should always make purchases of exempt assets as the trustee.

The following are examples of exempt assets: a home; household goods and personal effects limited to a total value of $2,000.00 each; a car; some types of life insurance; a burial plot or other burial space worth any amount; and a revocable burial fund worth up to $1,500. There are also certain personal effects that are not counted. These include, but are not limited to, the following: video and board games; books; magazines and magazine subscriptions; radios; travel; education; recreation; and entertainment.

Even if the trust principal is not considered a resource and is not countable, disbursements from the trust may be considered "income" for SSI purposes. This will be determined by looking at the purpose of the disbursement. Income that the beneficiary has received during the month is considered income throughout the calendar month of receipt. This is true even if money has been deposited into a bank account. If it remains in the bank account, the money becomes a countable resource. Any cash or money that you provide directly to the beneficiary will be considered direct income to the beneficiary and will reduce his or her benefits on a dollar for dollar basis. SSI rules also say that anything given to the beneficiary that is convertible to cash will be counted as income.

Any distribution made by the Trustee to a third party that results in the beneficiary's receiving items that are not food or shelter will not be considered income when determining eligibility. Examples of this type of distribution include, but are not limited to, the following: pre-paid services for the beneficiary, such as hair appointments and nail appointments;

memberships to health clubs or community groups; and pre-paid cable television for a set period of time.

It is important that you are aware of the distinction made by in-kind income. In-kind income exists when you provide the beneficiary with something other than money. There are three primary ways to distribute allowable "in-kind" income. You may distribute services or goods directly to the beneficiary. You may make a direct payment to a provider who will in turn provide goods or services to the beneficiary. You may also give the beneficiary the right to obtain the goods or services. The third option presents potential difficulties and you must be extremely careful. By providing the beneficiary with the right to obtain the goods or services, you have probably provided the beneficiary with cash. As discussed above, this may lead to severe difficulties with benefit eligibility.

If the beneficiary receives food or shelter as a result of payments by you as the trustee to other persons, then the beneficiary will have received income in the form of in-kind support and maintenance (ISM). This provides many difficulties for you as the trustee. It is possible that the beneficiary's SSI benefits will be reduced or eliminated if the beneficiary receives payments of ISM. There are many fine distinctions when defining ISM. For example, it is possible to pay for some travel arrangements. Air line tickets may be purchased. However, hotel arrangements may not be provided as that would be providing shelter.

It is possible that payment of ISM will affect benefits. However, the effect will be different than the rate of a dollar-for-dollar basis. Different formulas exist for determining ISM depending on household and living arrangements. Make certain that you explore any existing alternatives when you are faced with this issue.

Finally, the SSA requires periodic reports for all SSI recipients. Often, the representative payee is asked to complete these reports. When you are asked to complete this report, you must inform the SSA of the existence of the trust and provide copies if requested. Also be aware that the following changes must be reported: changes in address; changes in employment status; any changes in income; changes in any resources; eligibility for other public benefits; changes in health insurance coverage; medical improvements; changes in marital status; admission to or discharge from any health facility or public facility; and any trips that have been or will be taken outside the United States. This report is due 10 days after the end of the month in which the event occurred. Make certain to keep copies of all reports that you file with the SSA.

If either you or the beneficiary is notified that the SSA or FIA intends to reduce or eliminate the beneficiary's benefits, an appeal should be made in writing within 10 days of notification. By acting quickly, you will be able to preserve the beneficiary's benefits during the appeal period. If you miss the 10 day period, the beneficiary's benefits will be discontinued until the issue is resolved. It is very important that you remain informed about changes in the beneficiary's benefits in order to make informed decisions as the trustee.

<u>Content of the Trust Accounting</u>. Annually, and upon a change of Trustees or upon Trust termination, the Trustee must provide an accounting to each *current trust beneficiary.* The Trustee need only send an accounting to an *interested trust beneficiary* upon request by such

individual. It is important to be cognizant of what must be contained in a trust accounting. There are two categories of accountings: 'compliant' and 'acceptable'.

The following are the six requirements of a 'compliant' trust accounting pursuant to Michigan law:

- The accounting must be reasonably understandable.

- The accounting must begin with a summary of purpose and content.

- The accounting must contain sufficient information to notify recipients of all significant transactions affecting administration during the accounting period.

- The accounting must include both *tax cost* and *current asset values* at the beginning and end of the accounting period.

- The accounting must show gains and losses *separately*.

- The accounting must show transactions that do not affect the amount for which the Trustee is accountable (i.e., stock splits). **M.C.L.A. 700.7307(3)**.

The following are the criteria for an 'acceptable' accounting:

- The accounting must contain a concise description of the trust purposes and the manner in which the trustee applied the trust estate and income toward such purposes.

- The accounting must contain an itemized statement of receipts and disbursements during the accounting period.

- The accounting must contain a statement of the property on hand at the end of the accounting period. **M.C.R. 5.722(B)**.

Liability of fiduciary. A Trustee may be *personally* liable for any losses to the trust that arise from embezzlement; loss through commingling estate or trust money with the Trustee's money; negligence in handling a trust or estate; self-dealing, and failure to account, to name a few examples. In an action for breach of trust, if the accounting satisfies the criteria stated above and is, thus, a 'compliant' accounting, a beneficiary has only *one year* from the date he or she received the accounting to make such a claim. If the accounting is not 'compliant', a beneficiary has *three years* from the date he or she received the accounting to file an action for breach of trust.

SECTION III
Administrative Responsibilities

Each beneficiary will have different needs and desires. A careful examination of each individual beneficiary's situation and the current rules and regulations in effect for state and federal benefits **must** be made **prior** to making distributions for or on behalf of the beneficiary. Always keep in mind that the decisions you make as trustee will have an impact on the beneficiary in more ways than one.

Included in one's responsibilities with regard to trust administration are the following:

1. The payment of other debts and expenses.

2. The division and distribution of trust assets.

3. The preparation of returns and payment of taxes associated with individual and/or trust income tax liability.

4. Preparation of an Annual Account.

You must have a starting point to properly administer the trust. At the time the decision was first made to establish a trust, you and the beneficiary probably had thoughts and ideas about things that the beneficiary would like to have or to accomplish. It is a good idea to begin a list of those ideas and goals. This will provide you with a starting point as you begin your duties.

This list will also allow you to determine whether there are alternative resources to provide for certain needs and/or goals. Perhaps some of the items on the list that you have established pertain to the more basic needs of food, clothing and shelter. By the terms of the trust and the requirements of the law, the trust is unable to provide for such things. By keeping and frequently modifying this list, you will be better able to properly address the needs of the beneficiary as you administer the trust.

It is important that you maintain accurate records. This will also help you to make certain distributions are made appropriately and fall into the correct categories. We recommend that you keep your records in a timely manner. Make certain that you keep a journal of the expenses paid on behalf of the beneficiary and that you retain receipts of such payments. Good record keeping will help you as you proceed as trustee.

In the case of a Special Needs Trust, once the Trust is funded, the trust will require its own tax identification number, which may be obtained through the Internal Revenue Service, and an IRS Form 1041 must be prepared and submitted by the Trustee in each year of the trust's existence. In addition, an Individual Income Tax Return may also be required to be prepared.

Trust divisions and distributions for the benefit of the beneficiaries must be made in accordance with the terms of the Trust Agreement. Determinations of when and in what amounts *discretionary* distributions must be made on a case-by-case basis.

SECTION IV
Trustee Compensation

It is proper pay trustee compensation from the trust estate. However, there is not a fixed 'rate' of pay. The reasonableness of each individual Trustee's compensation depends upon a variety of factors and must be looked at in light of individual circumstances. Case law in Michigan reports a number of factors for reviewing the appropriateness of trustee compensation. They include:

(1) Size of trust,
(2) Responsibility involved,
(3) Character of work involved,
(4) Results achieved,
(5) Knowledge, skill and judgment required and used,
(6) Time and services required,
(7) Manner and promptness in performing its duties and responsibilities,
(8) Any unusual skill or experience of the trustee,
(9) Fidelity of the trustee,
(10) Amount of risk,
(11) Custom in the community for allowances, and
(12) Estimate of the trustee of the value of its services.

The weight to be given any factor and the determination of reasonable compensation is within the probate court's discretion. *Comerica Bank v Adrian*, 179 Mich App 712, 724, 446 NW2d 553 (1989). So we look to the Probate Court for guidelines.

§7205 of EPIC preserves the court's power to review the trustee's employment of any agent, including attorneys, auditors and investment advisors as well as the trustee's own compensation. The Court may be asked to determine the reasonableness of compensation paid.

<u>Duties of Trustee's Attorney to the Beneficiary</u>

There are two main views regarding the trustee's attorney's duties to the beneficiary. Under the Majority Perspective, the trustee is the attorney's only client, and the attorney owes few (if any) duties to the beneficiary. The Minority Perspective states that the attorney owes a duty not only to the trustee, but a derivative duty to the beneficiary as well. Below is a discussion of each perspective.

a. Majority Perspective

The Majority Perspective, as found in ABA Formal Opinion 94-380, dictates that the trustee is the sole client of the attorney. This perspective states that the trustee's attorney does not have fiduciary obligations to the beneficiaries, despite the trustee's fiduciary obligations to the beneficiary. Although trustee's attorney does not have a fiduciary relationship with the beneficiaries under this perspective, there are certain minimal duties that the attorney of the trustee owes to the beneficiary. "If duties are owed to non-client beneficiaries, they are not the full range of duties and ethical obligations that a lawyer owes to a client. The duties that the lawyer for the fiduciary owes to a beneficiary who is not a client consist of prohibitions against certain types of conduct by the lawyer."[26]

Some of the duties which the lawyer is said to have to the beneficiaries under this perspective include: the lawyer may not facilitate another person's taking advantage of the estate, the layer should not participate in a breach of fiduciary duty by the fiduciary, the lawyer may not cover up breaches of duty by a fiduciary nor assist in such a cover-up, communication from the lawyer to a beneficiary must not be inaccurate, the lawyer must clarify their role if it appears that the beneficiary believes the lawyer is representing him.[27] It is clear that under this perspective the duties owed to the beneficiary are minimal at best.

In *Spinner v. Nutt*[28] the beneficiaries of a trust brought action against the trustee's attorneys for damages due to loss in value of the trust. Over ninety percent of the trust was comprised of stock of a publishing company. The trustees received offers to buy the stock for significant sum of money, one of the trustees wished to accept the offer while the other did not. The two could not reach a decision and the value of the publishing company substantially dropped while a decision was being reached. The beneficiaries argued that the trustee's attorneys owed them a duty of care which was violated by the attorney's inaction. The court disagreed with the beneficiaries and held that Trustee's attorneys did not owe a duty of care to trust beneficiaries, and thus were not negligent with regard to beneficiaries and that the attorneys had no attorney-client relationship with the beneficiaries and to impose on trustee's attorney a duty of care to beneficiaries would create conflict of interest between the attorney's duty to trustees and to beneficiaries.

Furthermore, in *Huie v. DeShazo*[29] trust beneficiaries sued the trustee alleging that he commingled funds and converted the trust property. The trustee's lawyer was deposed, but refused to answer certain questions claiming attorney client privilege. The court held that the trustee which retains the attorney is the real client, rather than trust beneficiaries when determining if the attorney client privilege applies and further that neither the trust beneficiary nor the trust itself was a client of the attorney retained by the trustee and therefore the attorney client privilege applied to confidential communication by trustee to the attorney concerning administration of the trust.

As these cases clearly demonstrate, the majority opinion purports that the attorney for the trustee owes little if any duty to the beneficiary of a trust. I do not agree with the majority perspective and rather feel that the minority opinion discussed below is a more accurate depiction of what duties the trustee's attorney owes to the beneficiary.

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[26] *Counseling a Fiduciary, ABA Committee on Ethics and Professional Responsibility,* Formal Opinion 94-380 (1994).
[27] *Counseling the Fiduciary: Report of the Special Study Committee on Professional Responsibility* , 28 Real Prop 825, 830 (1994).
[28] *Spinner v. Nutt*, 417 Mass. 549, 631 N.E.2d 542 (1994).
[29] *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).

b. Minority Perspective

As stated above, the Minority Perspective holds that a lawyer retained by a trustee for trust administration, represents both the trust and its beneficiaries.[30] As opposed to the Majority Perspective, this view holds that the ultimate duty of loyalty is owed to the beneficiaries, over the trustee.

Example: If a disagreement arises between the trustee and a beneficiary, an attorney acting under the Minority Perspective (or in a jurisdiction that has adopted this perspective) would be permitted to disclose communications between the attorney and the trustee, to assist the beneficiary. It is important for an attorney who adopts the Minority Perspective to clearly inform both trustees and beneficiaries, in writing, of their responsibilities and limitations with regard to both parties.

Oftentimes an attorney in Minority jurisdictions will owe fiduciary duties to the beneficiaries. In certain circumstances courts have found that attorney owe fiduciary duties to beneficiaries, even when there was no attorney-client relationship with the beneficiaries.

In *Charleson v. Hardesty*[31], the Supreme Court of Nevada held that an attorney for the trustee owes fiduciary duties to the beneficiaries, *as a matter of law*, when trustee's attorney knows that the trustee is acting improperly in his capacity as trustee. In *Charleson*, trustee's attorney was aware that trustee was not acting in the best interest of the trust, not completing annual accountings of the trust assets, and writing himself checks from the trust account.[32] The court stated that a trustee must act in good faith toward beneficiaries and the trust and that the when the trustee does not act in good faith, the trustee's attorney must step in and protect the beneficiaries. The court went on to say that "when an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law."[33]

Many courts have addressed the attorney for the trustee's duty to beneficiaries in regards to attorney client privilege. Issues arise as to whether information, documents and communications made between an attorney and a client who is acting in the capacity of trustee are covered under attorney client privilege, or if that information is open to discovery by beneficiaries of the trust who are impacted by the trustee's actions.

In *Riggs National Bank v. Zimmer*[34] a dispute arose between the trustees and the beneficiaries of a trust. The trustees sought to have a legal memorandum produced that was the result of the trustees seeking a legal opinion from a law firm regarding administration of the trust. The court held,

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[30] *Riggs National Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976).
[31] 839 P.2d 1303 (Nev. 1992).
[32] *Id.*
[33] *Id.* at 1307.
[34] 355 A.2d 709 (Del. Ch. 1976).

"The ultimate or real clients were the beneficiaries of the trust, and the trustee, in his capacity as fiduciary was, or at least should have been, acting only on behalf of the beneficiaries in administering the trust. At that stage there were no proceedings requiring the trustees to seek legal advice personally…Moreover, there is nothing before the court to suggest that the purpose of the workman memorandum was defensive on the trustee's part. Clearly the, the rights of the beneficiaries would have been the foremost consideration in the trustee's consultations and communications with his legal advisors."[35]

The court said, therefore, since the memorandum was created for the trustees for the benefit of the trust beneficiaries, those beneficiaries should have access to the documents. This case demonstrates the minority perspective that the lawyer representing the trustee has an ultimate duty to the beneficiary as well.

In *Comegys v. Glassell*[36] a dispute arose between a bank which held property in trust, and the beneficiaries of that trust. The trustee bank maintained documents relating to the operation of the property and the beneficiaries sought to gain access to those documents. The bank claimed the documents were not discoverable by the beneficiaries under the attorney client privilege. Citing *Riggs* the court held that again the "real clients"[37] were the trust beneficiaries since these records were kept for the benefit of the beneficiaries rather than that of the trustee in his individual capacity. The court said, "The beneficiaries are the real clients because the trusts were created for their benefit. The bank as trustee owes fiduciary duties to the beneficiaries and cannot protect its own interests under the guise of attorney client privilege…Therefore, the Court holds that no independent attorney client privilege exists between a trustee and its attorney to the exclusion of the beneficiaries when the alleged privileged documents relate to administration of the trust or the trust res."[38]

It is my opinion that this perspective reflects the duties that the attorney of a trustee owes to a beneficiary. The attorney cannot blindly and solely represent the interest of the trustee and ignore those of the beneficiaries whom the trust was created for from the outset. The attorney has a duty to represent the trustee, but in matters related to trust administration the attorney owes the duty to the beneficiary as well. This may include disclosing communication or documents that were sought by the trustee for trust administration purposes. Further it may require the attorney to bring to the beneficiary or the courts attention any behavior of the trustee which the attorney feels will harm the beneficiary and is not in line with the trust language and purpose.

It is important for the practitioner to be aware of his client's behavior when the attorney represents the trustee. The attorney should be constantly alert to what his client is doing and assuring that the trustee's behavior is benefiting the beneficiaries and the trust and are consistent with trust purposes.

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[35] *Id* at 712.
[36] *Comegys v. Glassell,* 839 F.Supp 447 (E.D. Tex. 1993).
[37] *Id* at 448.
[38] *Id* at 449.

What Happens when the Attorney is Acting as a Trustee?

Oftentimes an attorney will serve as a trustee or a co-trustee. The attorney acting as a trustee has all of the typical duties set forth above in Section II. An attorney, as opposed to a lay person, may have an even higher duty as a professional to the beneficiaries as they are well aware of what the position entails and have an obligation to act accordingly. Under the Model Rules of Professional Conduct, and attorney must, "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[39] This rule can be extended to the situation where the attorney is acting in the position of trustee. The attorney owes a duty to the client to act with knowledge, skill and thoroughness, which in this context would amount to acting in the best interest of the beneficiary, and to act in accordance with trust terms and purpose. If the attorney falls short of this they are in violation of the duty which is owed.

Below are two cases I have recently been involved with that demonstrate the spectrum of behavior which occurs when attorneys act as trustees.

c. Case A *(See Attachment 7)*

Case A involved an attorney who was acting in the capacity of Co-Trustee with a family member of the beneficiary. The sole purpose of the trust was to protect proceeds from a settlement of a lawsuit stemming from an accident which caused some of the beneficiary's disabilities, and to qualify the beneficiary for public benefits, and to overall protect the beneficiary. This was an Exception A Trust.

The actions, or rather inactions of the attorney resulted in severe loss of trust assets and the beneficiary not being able to qualify for pubic benefits, which was in direct violation of the trust terms.

The attorney committing the violations argued that there was a lack of cooperation by the Co-Trustee of which she had no control. Attorney Dudek argued that if the Co-Trustee was not acting properly, in order for the attorney/co-trustee to be in compliance with her duty of loyalty, the attorney should have alerted the court to the conflict and the effect that the disagreement would have on the trust and it beneficiaries.

A trustee is obligated to use a reasonable amount of skill and care when administering the trust, as any attorney should. In ignoring the express and repeated intent of the trust to safeguard the beneficiary and maintain eligibility for government benefits, the attorney breached the duty of loyalty owed to the beneficiary.

The rest of the story: The trust was maintained. A new Trustee was appointed and Ms. Dudek had the fees reduced. The beneficiary received benefits.

This case clearly illustrates what can happen when an attorney who is acting as trustee does not fully pursue and execute his or her duties. The cost to the trust and the beneficiaries can

[39] *Model Rules of Professional Conduct, Rule 1.1, Competence.*

be devastating and can, as here, lead to near complete exhaustion of trust assets. The attorney has a duty of loyalty to the beneficiaries to assure that trust assets are preserved and that actions taken are for those beneficiaries benefit and best interest. This may, as noted in the case below, require that the attorney to clarify with the co-trustee the duties and bounds of their position or if that fails call to the court's attention any behavior by a co-trustee that does not comply with trust provisions and the benefit of the beneficiary.

d. Case B *(See Attachment 8)*

In stark contrast to the above case, in Case B Attorney Dudek was serving as Co-Trustee of a SNT. During the first year of the establishment of the Trust, Ms. Dudek's Co-Trustee duties were extensive. Ms. Dudek initially drafted and established the Trust. As Co-Trustee Dudek, was responsible to review, advise, and make a determination on disbursement requests along with the Co-Trustee. Ms. Dudek met directly, in writing, and telephonically with the Co-Trustee to explain the Trust provisions, and was often required to clarify Co-Trustee's misconceptions as to the purpose of the Trust and the proper use of Trust funds.

As Co-Trustee, Dudek provided the beneficiary with long-term plans pursuant to the terms of the Trust, but had to repeatedly counter the Co-Trustee's resistance to the proper use of the Trust funds for the sole benefit of the beneficiary. Ms. Dudek fully exercised her duty of loyalty to the trust and the beneficiary. In the end, Ms. Dudek motioned the court to be removed as Co-Trustee when her discourse with her fellow Co-Trustee ceased being beneficial to the beneficiary and the Co-Trustee began to use trust assets unilaterally.

The rest of the story: The court appointed a GAL[40] for the minor and retained supervision. Another attorney was appointed as co-counsel. Ms. Dudek was released, held harmless and had to redo fees.

The rest of the story part II: The same GAL was appointed in both of these cases in two different counties. Hopefully, the GAL will assure that trust administration is consistent with the trust terms.

As opposed to the attorney in Case A, Ms. Dudek was pro-active in exercising her duty of loyalty to the beneficiary, and safeguarding the beneficiary and the trust terms. This is the way that an attorney should conduct themselves when acting as a trustee. An attorney who takes steps to protect the trust and its beneficiaries is acting in compliance with the Model Rule of Professional Conduct stated above and is providing competent representation to a client including exercising legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[41]

Conclusion

In conclusion, it is my assertion that an attorney owes a strong duty of

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[40] MCL 712A.13a (f) "Guardian ad litem" means an individual whom the court appoints to assist the court in determining the child's best interests. A guardian ad litem does not need to be an attorney.

[41] *Model Rules of Professional Conduct, Rule 1.1, Competence.*

loyalty to the beneficiary of a trust. Whether the attorney is acting as trustee, co-trustee, or is serving as the trustee's attorney, it is an obligation and ethical duty of the attorney to protect the beneficiaries. This duty includes assuring that the trust's terms are being complied with as well as actions being taken are in the best interest of the client. After all, the trust was created for the benefit of these persons and therefore the ultimate duty is to assure that the settlor's instructions are carried out and those that the settlor wished to benefit are protected. This in the end is where the attorney's ultimate duty of loyalty lies.