

The Anatomy of a Special Needs Trust: Duty of Loyalty

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I. 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 author will primarily reference Michigan law regarding the trustee and attorney for the trustee's fiduciary or derivative duty to a beneficiary, with the understanding that Michigan trust law, much like trust law in other jurisdictions, is derived from common law, the Uniform Trust Code, and/or secondary sources, such as the Restatement of Trusts.

Also for purposes of this discussion, the author will focus her discussion on first party special needs trusts rather than third party special needs trusts, but notes 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.

II. 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).

Duty to Inform and Account to Beneficiaries. 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 default provisions in the event the Trust Agreement does not specify to whom, how often and how detailed, a trust accounting must be. Therefore, the following discussion presumes the applicable Trust Agreement is silent or specifically incorporates the provisions of EPIC into its terms regarding trust accounting.

Certain Definitions.

"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.

Supplemental Security Income (SSI) and Medicaid

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.

Content of the Trust Accounting. 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.

III. Duties of Trustee's Attorney to the Beneficiary

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."¹

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 lawyer 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.² It is clear that under this perspective the duties owed to the beneficiary are minimal at best.

¹ *Counseling a Fiduciary*, ABA Committee on Ethics and Professional Responsibility, Formal Opinion 94-380 (1994).

² *Counseling the Fiduciary: Report of the Special Study Committee on Professional Responsibility*, 28 Real Prop 825, 830 (1994).

In *Spinner v. Nutt*³ 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*⁴ 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.

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.⁵ 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.

³ *Spinner v. Nutt*, 417 Mass. 549, 631 N.E.2d 542 (1994).

⁴ *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).

⁵ *Riggs National Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976).

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*⁶, 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.⁷ 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."⁸

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*⁹ 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,

"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."¹⁰

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.

⁶839 P.2d 1303 (Nev. 1992).

⁷ *Id.*

⁸ *Id.* at 1307.

⁹ 355 A.2d 709 (Del. Ch. 1976).

¹⁰ *Id.* at 712.

In *Comegys v. Glassell*¹¹ 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”¹² 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.”¹³

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.

IV. 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.”¹⁴ 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

¹¹ *Comegys v. Glassell*, 839 F.Supp 447 (E.D. Tex. 1993).

¹² *Id* at 448.

¹³ *Id* at 449.

¹⁴ *Model Rules of Professional Conduct, Rule 1.1, Competence.*

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.

a. Case A (See Attachment One)

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 public 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 its 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 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 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.

b. Case B (See Attachment Two)

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 GAL¹⁵ 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.¹⁶

V. Conclusion

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

¹⁵ 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.

¹⁶ *Model Rules of Professional Conduct, Rule 1.1, Competence.*

STATE OF MICHIGAN
WAYNE COUNTY PROBATE COURT

IN THE MATTER OF [REDACTED]
Irrevocable Trust

PATRICIA E. KEFALAS DUDEK,
Trustee & Petitioner

Case No. [REDACTED]
Honorable Milton Mack

v.

[REDACTED],
Former Co-Trustee

HARLEY D. MANELA (P40453)
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Guardian ad Litem
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Troy, Michigan 48084
[REDACTED]

[REDACTED]
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Southfield, Michigan 48075
[REDACTED]

PETITIONER'S BRIEF IN SUPPORT OF THE CONTINUATION
OF THE SPECIAL NEEDS TRUST F/B/O [REDACTED]

I. FACTUAL BACKGROUND

██████████ (hereinafter ██████████) is a twenty-four year-old person (date of birth October 15, 1982) with several disabilities, including cerebral palsy; permanent and extensive brain damage; mild retardation and developmental delay.¹ His disabilities stem from medical malpractice. He is currently living at ██████████ Murray Crescent Drive, ██████████, Michigan 48076.

The ██████████ Irrevocable Trust dated October 8, 1998 (hereinafter "Trust") was set up for his benefit on October 8, 1998, with ██████████ (hereinafter "██████████") acting as Co-Trustee and attorney.² As stated on pages four (4), six (6), seven (7), eight (8), twelve (12), and eighteen (18) of the Trust agreement, the sole purpose of the Trust is to protect proceeds from the Wayne County Circuit Court settlement of a lawsuit stemming from the accident which caused some of ██████████'s disabilities (Case No. 96-██████████), to qualify ██████████ for government benefits, and to protect ██████████ *Exhibit B*.

As a result of an annual 're-determination of benefits' form not being returned to the Family Independence Agency, and the denial of benefits from the Social Security Administration, ██████████ stopped receiving government benefits during 1999 and did not received any from 1999 until just recently *Exhibit C*, when Petitioner Dudek assisted ██████████ with obtaining such benefits, *Exhibit D*. Bobrin, as former Co-Trustee, did not assist ██████████ in applying for Social Security Disability Insurance (SSDI), Supplemental Security Income (SSI), Food Stamps, Mental Health Services, or Medicaid.

As documented on the Annual Accounts submitted by ██████████, ██████████ incurred medical expenses in excess of \$23,000.00. *Exhibits E thru M*. Those medical expenses should not have been paid from the Trust. Had ██████████ been eligible for Medicaid and Mental Health Services, public benefits would have paid these expenses.

Trust assets were needlessly lost also, in connection with obtaining housing for ██████████. At some point between October 1999 and October 2000, the trust paid \$20,000 towards the

¹ see *Exhibit A* of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account

² see *Exhibit B* of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account.

purchase of a home, located in Detroit, Michigan, for [REDACTED]'s benefit.³ [REDACTED] failed to secure and protect the \$20,000 distribution from the trust and the assets and trust payment were lost in a subsequent foreclosure sale. In December of 2001, [REDACTED] as Trustee of the trust contributed \$200,000.00 towards the purchase of a second home located in Southfield, Michigan, for the benefit of [REDACTED].⁴ For reasons unknown to Dudek, the house was transferred to [REDACTED]'s mother, [REDACTED], (former Co-Trustee of the trust, hereinafter referred to as [REDACTED]). In 2006, when Dudek was hired by [REDACTED] and appointed Co-Trustee of a revised Exception A Special Needs Trust drafted and requested by Dudek and discovered the transfer to [REDACTED] and the failure of the Trust-owned house to abide by the "sole-benefit" requirements of the Trust, Dudek required the title of the property to be transferred back to the trust.⁵

As Co-Trustee, [REDACTED] paid a \$1,000 monthly stipend to be paid to [REDACTED] for Co-Trustee fees and for the "care" of [REDACTED].⁶ The income was used to make house payments for the Southfield house and to support [REDACTED], Mr. [REDACTED], Co-Trustee [REDACTED] and other family members in violation of one sole benefit rule. This trust has been under the Supervision of this Honorable Court since January 19, 1999.⁷ On November 8, 2001, this Court appointed [REDACTED] as *Guardian ad Litem* for [REDACTED].⁸ Since 1998, the trust has disbursed monies in excess of \$23,000.00 to [REDACTED] for her services, which included drafting, obtaining court approval for, and giving advice to a trust that failed to ever be used for its intended purpose. Over thirty hearings have been held regarding the administration of this trust. *Exhibit V*.

Due to Dudek's diligence, Petitions for Guardianship and Conservatorship were filed on February 23, 2007, in the Oakland County Probate Court and transferred to and granted by this Honorable Court. *Exhibit W*. Additionally, several government benefit applications have been filed and, only very recently approved in August 2007.

³ see Exhibits N and O of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account.

⁴ see Exhibits P and Q of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account.

⁵ see Exhibit R of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account.

⁶ see Exhibit S of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account.

⁷ see Exhibit T of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account.

⁸ see Exhibit U of Petitioner's Brief in Support of Supplemental & Amended Objection to Attorney Fees and all Accounts Including Final Account.

II. ISSUE

Does the benefit of continuing the Special Needs Trust for the benefit of [REDACTED] outweigh the cost of administration?

III. ANALYSIS

a. Previous and Current Costs of Administration, including Legal Fees

[REDACTED] charged a total of \$26,504.70 for attorney services between 1999 and 2006. She did not differentiate between Co-Trustee and Attorney charges. Specifically, for the first accounting, she charged \$2,035.00 (Exhibit B); for the second accounting she charged \$2,931.50 (Exhibit F); for the third accounting she charged \$2,810.00 (Exhibit G); for the fourth accounting she charged \$5,876.00 (Exhibit H); for the fifth accounting she charged \$4,565.00 (Exhibit I); for the sixth accounting she charged \$2,134.00 (Exhibit J); for the seventh accounting she charged \$2,828.20 (Exhibit K); for the final (withdrawn) accounting she charged \$2,447.50 (Exhibit L); and for the actual final accounting she charged \$2,447.50 (Exhibit M).

The total guardian ad litem costs for years 2000 through 2006 were \$6,886.25. Specifically, for the second accounting the GAL charged \$975.00 (Exhibit F); for the third accounting the GAL charged \$481.25 (Exhibit G); for the fourth accounting the GAL charged \$2,510.00 (Exhibit H); for the fifth accounting the GAL charged \$900.00 (Exhibit I); for the seventh accounting the GAL charged \$1,120.00 (Exhibit K); and for the final accounting the GAL charged \$900.00 (Exhibit M).

In 2006, the current Trustee (Dudek), and Mall Malisow & Cooney, P.C., charged a combined total of \$7,364.72 for services rendered as Trustee (the sum of \$7,117.22 and \$247.50, their respective charges (Exhibits X and Y)). In 2007, the current Trustee has charged \$20,193.42 for services rendered as Trustee (Exhibit AA). Please note that the total charges for Trustee services in 2006-2007 exceed ordinary annual trustee fees due to the charges associated with setting up a guardianship and obtaining government benefits. Based on past experience, Petitioner assures this Honorable Court that once benefits are obtained and the guardianship is finalized, Trust administration costs will be significantly lower.

An additional \$3,620.75 has been charged in 2006, and \$28,128.74 in 2007, for costs associated with the action against [REDACTED] (the sum of the charge for Dudek's services (\$6,355.48, Exhibit Z and BB) and the charge for Mall Malisow & Cooney services (\$21,773.26, Exhibits Y and CC).

b. Potential Benefits of a Properly Administered Special Needs Trust, and Losses to the Trust Resulting from Failures in Prior Trust Administration

As a person with a developmental disability, with a properly administered Special Needs Trust and diligence on the part of all the parties involved, Andrew will have no problem

becoming eligible for community based mental health services, Medicaid insurance, Social Security Income, and Food Assistance Program benefits.

Community-based services are support services that are provided for people with disabilities, like [REDACTED], who live in their own homes and communities. Community-based services provide help for all aspects of a person's life and may include the following:

- ◊ Residential services and facilities, including supervised apartments or group homes.
- ◊ Personal assistance services, including assistive technology.
- ◊ Care planning, case management, and a comprehensive individualized plan, that includes a case manager, the person in need of services, and other people that support the individual.
- ◊ Day programs, including placement in activity centers and adult skills programs.
- ◊ Vocational services, including supported employment programs, job training and placement, and job coaching.
- ◊ Other quality of life services, such as recreation, leisure, and transportation.

According to a recent report published by the Kaiser Commission on Medicaid and the Uninsured, and the Urban Institute, per enrollee Medicaid spending for community based services for persons with disabilities is \$34,930.00 annually.⁹ In addition to the community based services, the average Medicaid medical spending per "disabled" enrollee in Michigan is estimated as being \$10,629.00 per year. *Exhibit DD*.¹⁰ Furthermore, a person similarly situated with Andrew would receive a total of \$50,268.00 in Social Security Income disbursements for years 1999 through 2006. *Exhibit EE*.

Using these very conservative numbers and assuming that [REDACTED] would have been eligible for services since 1999, over the past seven years he could have received approximately \$65,847.00 in Medicaid medical benefits, \$279,440.00 in community based services, and \$50,268.00 in SSI benefits. *see chart, next page*. The total amount of potential benefits, \$395,555.00, combined with \$61,905.68 in expenses incurred by the Trust for covered services and expenses such as medical bills, prescriptions, and tutoring, combined with the loss the Trust suffered as a result of the Detroit house expenditure, results in a total loss of \$457,460.68. This significant loss could have been avoided had Andrew's eligibility for government assistance been sustained. This Honorable Court must not permit a discontinuation of the Trust which will result in continued loss of Trust assets which could be used for [REDACTED] benefit.

⁹ The Urban Institute & Kaiser Commission on Medicaid and the Uninsured, *Medicaid's Long-Term Care Beneficiaries: An Analysis of Spending Patterns*, published November 2006
< <http://www.kff.org/medicaid/upload/7576.pdf> > (accessed April 16, 2007).

¹⁰ According to the Kaiser Family Foundation's "Medicaid and the Uninsured" datasheet for fiscal year 2002, the average Medicaid payment, per "disabled" enrollee, in Michigan, was estimated as being \$6,234.00. *see Exhibit T*. Without being able to find additional information on Michigan per-enrollee spending for the years 1999-2001, and 2003, 2005, and 2006, the annual increases in spending listed in the Table for those years are estimates. The per-year difference used to estimate the per-enrollee spending for the years 2003, 2005, and 2006 is \$2,197.50 (the difference between the 2004 value of \$10,629.00 and the 2002 value of \$6,234.00, divided by two). For the years of 1999, 2000, and 2001, the 2002 rate of \$6,234.00 was reduced by one-thousand per year.

Applying the current Medicaid, SSI, and community based service estimates to future years, with a properly administered Trust, [REDACTED] would be eligible for approximately \$56,741.00 in government benefits annually. As of 2006, [REDACTED]'s monthly income is \$2,951.70, resulting in an annual income of \$35,420.40. With a properly administered Trust, many of [REDACTED]'s expenses (such as food, medical expenses, tutoring, psychological services, and any of the community services listed *supra*) would be paid for by the government; allowing the Trust's corpus to grow and better provide for [REDACTED]'s supplemental needs. Instead of [REDACTED] spending his monthly income of \$2,952.70 on items and services that could be paid for by Medicaid, Social Security, or FAP benefits, the money could be spent for his benefit or saved for a crisis situation, like when family is no longer able or willing to take care of him.

	<u>Potential Medicaid Medical Benefits</u>	<u>Potential SSI Benefits</u>	<u>Potential Benefits of Community Based Services</u>		<u>Actual "Covered" Expenses, Incurred by Trust</u>
1999	\$3,234.00	\$3,084.00	\$34,930.00		
2000	\$4,234.00	\$6,312.00	\$34,930.00	Acct 2:	\$20,000.00
2001	\$5,234.00	\$6,533.00	\$34,930.00	Acct 3:	\$4,660.75
2002	\$6,234.00	\$6,708.00	\$34,930.00	Acct 4:	\$4,437.90
2003	\$8,431.50	\$6,792.00	\$34,930.00	Acct 5:	\$6,025.00
2004	\$10,629.00	\$6,936.00	\$34,930.00	Acct 6:	\$4,931.78
2005	\$12,826.50	\$7,116.00	\$34,930.00	Acct 7:	\$19,950.25
2006	\$15,024.00	\$6,787.00	\$34,930.00	Acct 8:	\$1,900.00
<u>SubTotals:</u>	\$65,847.00	\$50,268.00	\$279,440.00		\$61,905.68
<u>Total of Lost Potential Benefits:</u>	\$395,555.00				
<u>Total Loss:</u>	\$457,460.68				

c. Comparison of Costs of Administration and Benefits of Continuing the Trust

As this Honorable Court is aware, a claim is pending against former Co-Trustee [REDACTED] for recovery of Trust assets lost as a result of her incompetence. Thus far, the cost of the action against [REDACTED] has been \$31,749.49. Had the Trust been properly administered, and had Medicaid, SSI benefits, food stamps, and community based living services been

obtained, the Trust would have saved \$61,905.68 in covered expenses, and [REDACTED] could have received an estimated \$395,555.00 in government benefits. In addition to requesting a recovery of the benefits and losses associated with [REDACTED] malpractice, Petitioner is requesting reimbursement by [REDACTED] to the Trust for attorney fees paid during her term as Co-Trustee, in the amount of \$26,504.70.

Further, if Petitioner prevails on the action against [REDACTED], Petitioner will request that the court not only reimburses the Trust for the \$457,460.68 in lost benefits/expenses, and [REDACTED]'s fees in the amount of \$26,504.70, but also for the \$31,749.49 in attorney fees associated with the action against [REDACTED]. If Petitioner prevails and this Honorable Court approves the request for fees, then there is no question that the benefit of bringing this action outweighs the cost as the Trust could stand to acquire \$515,714.87. If we prevail and the court does not approve a request for fees, then the benefit of bringing this action could still be as large as \$483,965.38; vastly outweighing the cost of not bringing the action.

If Petitioner does not prevail in the action against [REDACTED], the Trust will have to reimburse the firms for approximately \$31,749.49 in attorney fees. However, even if Petitioner does not prevail in the action against [REDACTED], her diligent actions as Trustee will have led to [REDACTED] being eligible for approximately \$56,741.00 per year in Medicaid, community based services, food stamps, and SSI benefits. Thus, even if the legal action is fruitless, the overall cost will be overshadowed within one year's time by the benefit of the acquired government benefits.

Furthermore, applying the current government benefit estimates to future years, with a properly administered Trust, [REDACTED] could be eligible for an estimated \$56,741.00 in government benefits annually. As stated *supra*, though the 2007 cost of Trust administration is quite high (\$20,193.42), it is expected that once all of [REDACTED]'s government services and benefits are acquired, the annual cost of administration will be greatly reduced. The 2007 costs of administration reflect a highly contentious battle of wills between all the parties involved. If all the parties continue to fail to cooperate in the future, and if the annual cost of administration is still approximately twenty thousand dollars, the fifty-seven thousand dollars in potential annual government benefits will continue to greatly outweigh the price of administration.

d. Maximizing Government Benefits While Maintaining Flexibility

This Honorable Court is rightly concerned with the practicality of providing for [REDACTED]'s needs while the vast majority of his assets are "tied up" in the Trust. This Honorable Court requested an explanation as to how [REDACTED] can maintain a higher standard of living when he is technically living at poverty levels. While it is true that [REDACTED] will not be able to have direct control over his assets, and the Trust cannot "support" him, there are very few short hurdles for him to clear in order to receive distributions for supplemental needs.

If [REDACTED] receives Medicaid, his medical needs will be taken care of by the government. If [REDACTED] receives SSI and FAP benefits, he will be able to afford food and other expenses that the Trust is unable to pay for. If [REDACTED] becomes eligible for community based living services expenses related to his vocational, educational, recreational, and leisure needs could be reduced or completely paid for. Any supplemental needs that [REDACTED] may have, that are not covered by any other source, are permissible distributions under the Trust. Permissible distributions include

dental work not covered by Medicaid, furniture, haircuts, appliances, musical instruments, over the counter medications, snow removal, telephone service, and utility bills. An extensive list of permissible distributions is included as Exhibit FF.

As long as the Trust functions appropriately, with all of his basic needs met by Medicaid, SSI, FAP, and community based living services, and with all of his supplemental needs met by the Trust, there is no need for [REDACTED] to live in poverty. Further, if [REDACTED]'s family members are unable to be gainfully employed due to their extensive efforts in caring for [REDACTED], there is no need for [REDACTED]'s family to live in poverty. Under the terms of the Trust, family members can be reimbursed for the time and effort spent caring for [REDACTED]. If the family paid rent to the Trust, they should be able to continue residing with [REDACTED] and helping him reach his maximum potential. The Trust may pay for [REDACTED]'s utilities and other housing expenses, such as lawn maintenance and furniture, to the extent these are incurred solely for [REDACTED]'s benefit.

If this Honorable Court terminates the Trust, [REDACTED] will suffer. If [REDACTED] and Mr. [REDACTED] have control over the assets, [REDACTED] will be ineligible for all government benefits. Even if this Honorable Court assumes that Mr. [REDACTED] would aid [REDACTED] in properly managing the assets, there is a high likelihood that the funds would be depleted prior to [REDACTED] obtaining a ripe age. If the Trust is discontinued, [REDACTED] will be left facing an uncertain future, with the Trust he has SSI, Medicaid, Medicare (at some point) and mental health services.

If this Honorable Court permits the Trust to continue providing for [REDACTED]'s supplemental needs, thereby ensuring eligibility for government assistance, the only thing that could throw a wrench into the beautiful art of Special Needs Trust administration is if Mr. [REDACTED] continues to thwart Dudek's honest efforts at sheltering for [REDACTED] by failing to communicate [REDACTED]'s needs and by failing to cooperate with the certification and annual recertification process associated with obtaining and continuing government assistance.

IV. RELIEF REQUESTED

ARGUMENT

RELIEF REQUESTED

I declare under the penalties of perjury that this Petition has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Respectfully submitted,

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**STATE OF MICHIGAN
OAKLAND COUNTY PROBATE COURT**

**In the Matter of Irrevocable Special Needs
Trust f/b/o [REDACTED]**

**File No: [REDACTED]
Honorable Eugene Arthur Moore**

**Patricia E. Kefalas Dudek,
Former Co-Trustee**

Petitioner

**Patricia E. Kefalas Dudek (P46408)
Petitioner/Former Co-Trustee
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**PETITIONER'S BRIEF REGARDING APPROVAL OF
CO-TRUSTEE AND ATTORNEY FEES**

Petitioner Patricia E. Kefalas Dudek submits this Brief in support of her Petition requesting that this Honorable Court award and approve Co-Trustee and attorney fees of Petitioner, Dudek and/or her office (collectively referred to herein as "Dudek") for services provided to and for the benefit of the Irrevocable Special Needs Trust f/b/o [REDACTED] and in support thereof states as follows:

PROCEDURAL AND FACTUAL HISTORY

1. Dudek began providing services to [REDACTED] and [REDACTED] (Co-Trustee and mother of [REDACTED]) in 2001 when Dudek was retained to establish a conservatorship for [REDACTED] as a protected individual, coordinate the legal action filed on [REDACTED]'s behalf under the National Childhood Vaccine Injury Act, and the custody dispute between [REDACTED] and her ex-husband [REDACTED] (see Trust Retainer Agreement attached as Exhibit A).
2. Following the settlement of the vaccine injury act suit, Dudek drafted and petitioned the court to create the Irrevocable Special Needs Trust f/b/o [REDACTED] (the "Trust") to be funded with the settlement proceeds (Order attached as Exhibit B).
3. Dudek and [REDACTED] were appointed by the Court to serve as Co-Trustees of the Trust.
4. Over a year into the Trust's administration, the Co-Trustee relationship between Dudek and [REDACTED] proved untenable. [REDACTED] refused to accept Dudek's advice and recommendations on how to manage the Trust for [REDACTED]'s sole benefit.
5. Dudek filed a "Petition for Approval to Withdraw as Co-Trustee; Appointment of New Trustee; Approval of First Annual Accounting of Co-Trustees and Appointment of Guardian ad Litem" on May 3, 2006. (Exhibit H).
6. Over [REDACTED]'s objections, this Honorable Court granted Dudek's Petition and entered an "Order Allowing Withdrawal of Co-Trustee, Patricia E. Kefalas Dudek, Appointment of New Co-Trustee, and Approval of First Annual Accounting of Co-Trustees" on August 15, 2006. (Exhibit I).

7. Dudek filed a "Petition for Approval of Final Account of Co-Trustees for the Period January 1, 2006 Through August 31, 2006, Approval of Legal and Trustee Fees and Discharge Co-Trustee, Patricia E. Kefalas Dudek" on October 17, 2006.
8. A motion for Summary Disposition was filed by Dudek on January 10, 2007.
9. The current Co-Trustees of the Trust, [REDACTED] and [REDACTED] (hereinafter "Co-Trustees") filed a Response to Petitioner's Motion for Summary Disposition on January 29, 2007.
10. Dudek filed an Answer to Co-Trustee's Response to Motion for Summary Disposition on March 5, 2007.
11. A hearing was held on Dudek's Motion for Summary Disposition, during which this Honorable Court denied Dudek's prayer for Summary Disposition, determining that "reasonableness" of fees was a factual inquiry.

ISSUES

1. Did Dudek render Co-Trustee services during the establishment and administration of the Trust, are the fiduciary fees charged by Dudek reasonable, and is she entitled to compensation?
2. Did Dudek render Attorney services during the establishment and administration of the Trust, are the attorney fees charged by Dudek reasonable, and is she entitled to compensation?

ARGUMENT

I. DUDEK RENDERED CO-TRUSTEE SERVICES DURING THE ESTABLISHMENT AND ADMINISTRATION OF THE TRUST, THE FIDUCIARY FEES CHARGED BY DUDEK ARE REASONABLE, AND SHE IS ENTITLED TO COMPENSATION.

The Estate and Protected Individuals Code provides that a Trustee shall receive just and reasonable compensation for services provided to a Trust. In *Comerica Bank v City of Adrian (In re Estate of Fee)*, 179 Mich App 712, 724; 446 NW2d 553 (1989), the Michigan Court of Appeals set forth twelve factors to be considered in determining the reasonableness of a Trustee's fee:

(1) the size of the trust, (2) the responsibility involved, (3) the character of the work involved, (4) the results achieved, (5) the knowledge, skill, and judgment required and used, (6) the time and the services required, (7) the manner and promptness in performing its duties and responsibilities, (8) any unusual skill or experience of the trustee, (9) the fidelity or disloyalty of the trustee, (10) the amount of risk, (11) the custom in the community for allowances, and (12) any estimate of the trustee of the value of his services. *Id.*

When determining which factors are to be given weight, the probate court is required to consider the circumstances of the case. *Id.* The determination of reasonable compensation is within the probate court's discretion. *Id.*

Dudek was hired by [REDACTED] to provide legal services in establishing a conservatorship, with [REDACTED] serving as conservator, for [REDACTED] as a protected individual. Dudek began her representation in May of 2001. The conservatorship was established in late 2002 and was terminated following the creation of the present Special Needs Trust in the fall of 2004. The Trust was established by the Oakland County Probate Court, the Honorable Eugene A. Moore. The Trust was established with a lump sum payment of

\$332,617.26 and funded with continuing payments from an annuity purchased with an additional \$704,776.18 received from the resolution of a National Childhood Vaccine Injury Act claim filed on behalf of [REDACTED]. The Trust was established with Co-Trustees: Dudek and [REDACTED]

During the first year of the establishment of the Trust, Dudek's Co-Trustee duties were extensive. Dudek initially drafted and established the Trust. As Co-Trustee Dudek was responsible to review, advise, and make a determination on disbursement requests from [REDACTED]. Dudek met directly, in writing, and telephonically with [REDACTED] to explain the Trust provisions, and was often required to clarify [REDACTED]'s misconceptions as to the purpose of the Trust and the proper use of Trust funds. Dudek provided numerous funding options to [REDACTED] with regards to the Trust, provided assistance with mortgage options and provided assistance in obtaining a loan for the purchase of a new home.

Dudek established a bank account for the Trust, made arrangements for an investment account, provided payment to numerous creditors that were entitled to reimbursement prior to the establishment of the Trust, and made extensive disbursements in the first year of the Trust. Many of the disbursements were reimbursements to [REDACTED] for items that had previously been purchased, which required verification of the purchase price and substantiation that the purchase was for [REDACTED]'s sole benefit.

As Co-Trustee, Dudek provided [REDACTED] with long-term plans pursuant to the terms of the Trust, but had to repeatedly counter [REDACTED]'s resistance to the proper use of the Trust funds for the sole benefit of [REDACTED]. Understandably, due to [REDACTED]'s unstable personal financial situation, she became dependent on the Trust's income, even though Dudek had arranged for her to be paid as Co-Trustee and Care Coordinator for [REDACTED]. This led to

■■■■'s attempts to misuse the Trust's funds for improper purchases, which hindered, to a degree, the security and independence afforded to ■■■■. During this time, Dudek had numerous discussions with ■■■■ as to the disbursements made by the Trust account.

For example:

1. ■■■■ argued about mortgage terms, but failed to secure any lender to loan money to the Trust for the purchase of a home. It was solely through a contact of Dudek that a mortgage was secured (see emails attached as Exhibit C);
2. ■■■■ insisted that the Trust pay for a boat and the marina slip fee, notwithstanding it was not for ■■■■'s sole use (see emails attached as Exhibit C);
3. ■■■■ argued about ■■■■'s father being paid for working on the home (see emails attached as Exhibit C) when he has never provided legal child support for ■■■■
4. ■■■■ argued about purchasing ■■■■'s father's house as an investment for the Trust, as well as building and selling houses as an investment and employing ■■■■'s father as the contractor (Exhibit C);
5. ■■■■ argued about the purchase of a treadmill for ■■■■ who uses a wheelchair and, when asked by Dudek, failed to provide a doctor's prescription indicating that this would be for the sole benefit for ■■■■. (Exhibit C);
6. ■■■■ argued about Trustee fees being too high to safeguard ■■■■'s interest, in spite of the fact that the Trust paid ■■■■ a salary to support her living expenses and from which she purchased a Jaguar automobile for herself (Exhibit C); and
7. ■■■■ refused to follow Dudek's advice to invest the Trust money in an investment management program thus failing to provide proper management and security of the Trust assets (Exhibit C).

8. [REDACTED] unilaterally made purchases without the approval or agreement of Dudek, including taking her boyfriend on vacation with her and [REDACTED] at [REDACTED]'s expense.

All of Dudek's actions as Co-Trustee were provided in detailed invoices submitted to [REDACTED] as Co-Trustee on a monthly basis. As detailed in the invoices, the services provided by Dudek were necessary for the efficient administration of the Trust and the resultant fees charged were reasonable (Exhibit D). The time and expenses listed in the invoices, which were previously consented to by [REDACTED] illustrate the reasonableness of Dudek's fiduciary acts and justify the fees for the time, effort, and expense spent in the administration of the Trust.

In accordance with the twelve *Comerica Bank* factors listed *supra*, Dudek's fiduciary fees are reasonable, were for [REDACTED]'s best interests, and she is entitled to compensation. First, the Trust is large: it was established with a lump sum payment of \$332,617.26 and funded with continuing payments from an annuity purchased with an additional \$704,776.18. Second, Dudek was charged with the responsibility of not only protecting the Trust assets from being spent on items not for [REDACTED]'s sole benefit, but Dudek was responsible for complying with the Prudent Investor Rule, and for obtaining government benefits for [REDACTED]. Third, as has been illustrated by the pleadings filed by both parties, the character of the work involved was not only difficult, but was highly contentious. Fourth, during her time as Co-Trustee, Dudek's fiduciary services resulted in the establishment of not only the Trust itself, the purchase and modification of a home for [REDACTED], a bank account, the payment of creditors, the visualization of a long-term plan for the Trust, and protection of the Trust assets from attempts by [REDACTED] to use the assets in

ways that were not for the sole benefit of [REDACTED]. Fifth, the level of knowledge, skill, and judgment required to create and administer a Special Needs Trust, especially when there is an inexperienced Co-Trustee involved, is unquestionably high and time consuming. Sixth, as evidenced by the invoices attached as Exhibit D, a large amount of time and services were required to administer this Trust and protect the assets of the Trust from being used for purposes that were not for [REDACTED]'s sole benefit. Seventh, Dudek provided services to the Trust in a prompt and efficient manner; at times, the most prompt and efficient manner of providing services required the coordination of support staff services. Eighth, as discussed at length below, Dudek is an attorney who possesses an extraordinary amount of skill and expertise and is a nationally recognized leader in the area of estate planning for persons with disabilities and parents of children with disabilities. Ninth, Dudek was never disloyal to the Trust or [REDACTED], and Dudek only motioned this Honorable Court to be removed as Co-Trustee when her discourse with [REDACTED] ceased being beneficial to the Trust and [REDACTED] began to use Trust assets unilaterally. Exhibit H. Tenth, a Trustee of a Special Needs Trust always faces a certain amount of risk due to the extensive tax, Medicaid, and SSI regulations concerning Special Needs Trusts, and coordination of same with the Federal Vaccine Compensation Act. Eleven, it is customary for Co-Trustees to be paid for their services. Lastly, Dudek has estimated the value of the services she rendered as Co-Trustee as being worth \$250 (or more). This estimation is based upon her own experience as well as the expert opinions of other well-known and highly respected attorneys in this field. For example, Attorney Elizabeth Luckenbach Brown, of Jaffe Raitt Heuer & Weiss, P.C., believes that other Trustees of Special Needs Trust charge between \$200.00 and \$300.00 an hour; Attorney Sanford

Mall, of the Mall Malisow Firm, PC, charges \$275.00 per hour when acting as the Trustee of a Special Needs Trust, and believes that other attorneys in this field charge between \$200.00 and \$300.00 an hour; and Attorney Don Rosenberg of Barron Rosenberg Mayoras & Mayoras charges \$250.00 per hour when acting as the Trustee of a Special Needs Trust, and believes that other attorneys in this field charge between \$200.00 and \$300.00 per hour. Exhibit F.

Under the circumstances of this case, the services Dudek provided as Co-Trustee were rendered necessary; and as determined under the *Comerica Bank* factors, *supra*, the Co-Trustee fees charged by Dudek are reasonable. All of Dudek's charged activities were set forth in the first, second, and final accountings prepared by Dudek and provided to [REDACTED]. The services performed were in the best interests of [REDACTED] and the Trust and benefited both the Trust and [REDACTED]. The accountings are true and accurate. There is no wrongdoing on the part of Dudek as Co-Trustee and there is no viable objection to her performance as Co-Trustee or the fees charged for her service. As such, Dudek is entitled to compensation for Trustee fees in the amount \$8,686.71 (\$5,386.70 outstanding) for the period covered by the second and final accounting.

II. DUDEK RENDERED ATTORNEY SERVICES DURING THE ESTABLISHMENT AND ADMINISTRATION OF THE TRUST, THE ATTORNEY FEES CHARGED BY DUDEK ARE REASONABLE, AND SHE IS ENTITLED TO COMPENSATION.

An attorney is entitled to recover reasonable compensation for her services. MCL 700.5413; *In re Estate of Esther Benfer*, Michigan Court of Appeals, per curium decision, No. 262895 (Nov 21, 2006). "To be chargeable against the estate, the attorney fees must

be for services rendered on behalf and befitting the estate.” *In re Prichard Estate*, 164 Mich App 82, 86 (2987).

Michigan Rule of Professional Conduct 1.5(a) states that

A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.
- emphasis added.*

In addition to the clear statutory authority for this Honorable Court to approve the Co-Trustee and Attorney fees of Dudek, case law supports the application of *quantum meruit*. *Quantum meruit* is literally translated as “as much as he as deserved” and is defined as “a claim or right of action for the reasonable value of services rendered.” *Black’s Law Dictionary* 1255 (Bryan A. Garner ed., 7th ed, West, 1990). The Court of Appeals in *Reynolds v Polen*, 222 Mich App 20; 564 NW2d 467 (1997) stated “A clear line of authority indicates that when an attorney rightfully withdraws from a matter, recovery of attorney fees on a *quantum meruit* basis is appropriate.”

Michigan case law has established a test to determine the reasonableness of challenged attorney’s fees. A probate court has broad discretion in determining what

amount constitutes reasonable compensation for attorney services, *In re Estate of L'Esperance*, 131 Mich App 496 (1994); *In re Krueger Estate*, 176 Mich App 241, 248 (1989), and where the amount of attorney's fees is in dispute, each case must be reviewed in light of its own particular facts. *In re Martin*, 205 Mich App 96, 109-110 (1994), rev'd on other grounds, 450 Mich 204 (1995). In making this determination, the probate court has directed that it should adhere to the guidelines for determining "reasonableness" set forth in *Crawley v Schick*, 48 Mich App 728, 737 (1973). *L'Esperance, supra*, at 501.

The Court in *Crawley* stated:

There is no precise formula for computing the reasonableness of an attorney's fee. However, among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.

48 Mich App at 737. The Michigan Supreme Court adopted the *Crawley* standards in *Wood v DAHE*, 413 Mich 573, 588 (1982).

Although there is no universal yardstick which can be used to measure the reasonableness of charges for services of all attorneys, it may be generally stated that among the principal elements or factors to be considered in determining the fair and reasonable value of an attorney's services are the skill and experience called for, the character of the services, the importance of the case, the time spent, the expenses incurred, the difficulty of the case, the professional standing of the attorney, and the results accomplished. A particular charge or allowance for legal services rendered will be sustained if, on a consideration of all the facts and circumstances, in accordance with

the rules stated above, the amount thereof is determined to be sufficient, reasonable, and proper.

In *Crawley*, the Court adopted several of the general standards of the Code of Professional Responsibility and Ethics, Disciplinary Rule 2-106, for determining reasonable attorney fees. Although Disciplinary Rule 2-106(B) relied on in *Crawley* has been repealed, its successor, MRPC 1.5(a), is substantially the same. That rule parrots the *Crawley* factors with the addition of one supplementary relevant factor--that the fee charged is in line with fees customarily charged in the locality for similar legal services. MRPC 1.5(a)(3).

Pursuant to these factors there is no question that the attorney fees Dudek charged for legal services rendered to the Trust are reasonable for the time period in question. Based on the difficulty of the matter, the appropriateness of the time allocated to the services listed in the invoices, the reasonable hourly rate charged, and Dudek's expertise in the administration of special needs trusts, the hourly rate and amount of time expended constitute an appropriate amount of attorney's fees charged. The Trust (and [REDACTED]) was well served and received value and protection from Dudek's legal representation.

First and foremost, the hourly rate charged by Dudek for legal services was reasonable and customary, and was clearly known to [REDACTED]. Pursuant to the Trust Retainer Agreement (Exhibit A) [REDACTED] entered with Dudek in 2002, Dudek initially charged the Trust \$200 per hour for her attorney services.¹ The hourly rate was later increased to \$250 per hour as authorized by the retainer agreement. The Trust Retainer Agreement provides in pertinent part:

¹ It is without question that [REDACTED] was aware and agreed to the initial hourly rate of \$200 per hour. While Dudek maintains that the increased rate of \$250 per hour is reasonable and should be approved, it is clear that the rate amount cannot be below \$200 per hour.

[T]he attorneys shall be paid at the rate of Two Hundred (\$200.00) Dollars per hour....These hourly rates may increase during a lengthy representation and you will be charged accordingly.

* * *

We will send you monthly statements to you detailing the services provided. In addition to the fees, our firm will advance costs as may be needed on your behalf. Typical costs include such items as filing fees for petitions and delivery to the court, express mail charges and any out of pocket costs. ...

* * *

...All accounts not paid in full are subject to seven (7) percent interest annually.

██████ was provided copies of the legal services invoices which clearly reflected the work provided by Dudek, the costs forwarded and the increased \$250 hourly rate. The increase in the hourly rate was clearly detailed in the Trust Retainer Agreement that ██████ agreed to (Exhibit A).

The increase in the hourly rate was not an indiscriminate change, rather it came after Dudek had provided legal services to ██████ and the conservatorship created to manage ██████'s estate. This interaction with ██████ and ██████ predates the creation of and services provided to the Trust. As stated *supra*, Dudek was hired by ██████ to provide legal services in establishing a conservatorship, with ██████ serving as conservator, for ██████ as a protected individual. Dudek began her representation in May of 2001. The conservatorship was established in late 2002 and was terminated following the creation of the present Special Needs Trust in the fall of 2004. During this period Dudek successfully defended against an attempt by ██████'s father to be appointed co-conservator and co-trustee, maintained Supplemental Security Income ("SSI"), Medicaid, and Community Mental Health Services through MORC, Inc.

Dudek charged \$200 per hour for this multitude of services, but because [REDACTED] and [REDACTED]'s conservatorship did not have the assets to pay the legal fees, Dudek's bills were not paid during this three and one half year period. Not until the vaccine injury settlement had been paid to [REDACTED]'s estate did Dudek receive any compensation for services provided and even then Dudek voluntarily waived the imposition of the seven percent interest she was contractually entitled to under the retainer agreement. This Court authorized a payment to Dudek to be made from the Trust (Exhibit B). By that time Dudek's legal services bill had grown to \$10,908.17.

It was only after this extended period of unpaid representation that Dudek increased the hourly rate to \$250--a rate that is reasonable and customary for attorneys of Dudek's experience and expertise. The \$250 hourly rate is within the range of expected and accepted rates charged by attorneys in Southeast Michigan and in particular attorneys that practice in the area of estate planning for persons with disabilities.²

As stated in Dudek's Motion for Summary Disposition, Dudek has practiced in the area of probate and special needs estate planning for over 14 years. She is a nationally recognized leader in the area of estate planning for persons with disabilities and parents of children with disabilities. She is the former chairwoman of the Elder Law and Advocacy Section of the State Bar of Michigan, and a member of the Probate and Estate Planning Section. Dudek is the immediate past chair of the National Academy of Elder Law Attorneys' (NAELA) Trust Special Interest Group. Dudek is a frequent

² By way of comparison, the hourly rate is the same charged by [REDACTED]'s personal attorney, [REDACTED], an attorney with limited to no experience in protecting the rights of people with disabilities or the administration of special needs trusts. [REDACTED]'s fees were paid unilaterally by [REDACTED] to object to supervision of this Trust and the appointment of a GAL to protect [REDACTED]'s best interests. If any fees are unreasonable, Dudek contends they are [REDACTED]'s legal fees.

lecturer on the topic of special needs trusts and is a distinguished presenter and recent key-note speaker at NABLA conferences, and the 2005 NABLA Pawley Award Winner.

The skill, time, and labor required in administering a Special Needs Trust in general is considerable; and this effort was only exacerbated by the difficult interaction with Co-Trustee [REDACTED]. Dudek drafted and established the Special Needs Trust for the benefit of [REDACTED]. Through Dudek's efforts the Trust has been managed to assist [REDACTED]'s financial affairs in order to provide him with the greatest degree of security and independence and serve his best interests. The nature and the length of Dudek's professional relationship with [REDACTED] and the Trust justifies the fees charged by Dudek, and thus the fees are not excessive under MRPC 1.5(a)(6) and the factors enumerated in *Crawley, supra*. Further, the unpaid fees were required for Dudek to act in [REDACTED]'s best interests, to disallow these fees now serves to punish Dudek for Petitioning for Supervision of the Trust and the appointment of a GAL to protect [REDACTED].

Dudek charged \$200-250.00 per hour for her specialized services. Other similarly situated attorneys, who specialize in Probate, Estate, and Trust Administration, in Michigan, charge amounts similar to or higher than Dudek. For example, Attorney Doug Chalgian of Chalgian & Tripp Law Offices, PLLC, Lansing, Michigan, charges \$250.00 per hour, and Attorney Norman Harrison, of Saginaw, Michigan charges \$200.00 to \$250.00 per hour for attorney services. Exhibit E. Attorneys who are similarly situated, and are in Dudek's locality, also charge an hourly rate that is similar to that charged by Dudek. For example, Attorney Josh Ard, J.D., M.B.A., Ph.D., of Williamston, Michigan, charges \$275.00 to \$300.00 per hour when providing attorney services, Attorney Elizabeth Luckenbach Brown of Jaffe Raitt Heuer & Weiss, P.C., Southfield, Michigan,

charges \$225.00 per hour, Professor George A. Cooney of the Law Offices of George A. Cooney, Jr., Farmington Hills, Michigan, charges \$300.00 per hour, Attorney Michele P. Fuller, of Fuller & Stubbs, PLLC, Shelby Township, Michigan, charges \$225.00 per hour, Attorney Sanford Mall, of the Mall Malisow Firm, PC, Farmington Hills, Michigan, charges \$275.00 per hour, and Attorney Don Rosenberg of Barron Rosenberg Mayoras & Mayoras, Troy, Michigan, charges \$250.00 per hour for attorney services. Exhibit F. If other attorneys in the locality charge fees that are approximately the same fees or higher fees for similar legal services, then Dudek's fees are neither excessive or unreasonable under MRPC 1.5(a)(3). [REDACTED] objects to Dudek's fees because she is angry Dudek petitioned for Supervision of the Trust and appointment of a GAL for [REDACTED]. [REDACTED] also threatened Dudek with a malpractice suit.

In the *Response of Co-Trustees to Motion for Summary Disposition of Patricia E. Kefalas Dudek*, Co-Trustees unsoundly relied on outdated surveys from 2000 and 2003 concerning the hourly rates of attorneys specializing in Probate, Estate, and Trust Administration. During the winter of 2006, an extensive survey was conducted by the Probate and Estate Planning Section of the Michigan Bar which led to the publication of the *2006 Desktop Reference on the Economics of Probate and Estate Planning Practice in Michigan*, made available in the Winter 2006 Michigan Probate and Estate Planning Journal. The *2006 Desktop Reference* provides separate tables and reference materials concerning the hourly billing practices for attorneys by office locale, degree of specialization, firm size, classification of services rendered, and number of years in practice. Relevant portions of the *2006 Desktop Reference* are attached as Exhibit G.

According to the *2006 Desktop Reference*, the range of hourly rates for Trust Administration of an office located in Oakland County, south of highway M-59, is between \$100 and \$410. The range of hourly billing rates for an attorney who spends 100% of her time in Probate and Estate practice is \$100 and \$495 per hour, with a mean average of \$224 and the upper quartile charging \$251. A partner in a firm with two to seven partners will typically charge between \$135 and \$300 hourly, with a mean average of \$206 and the upper quartile charging \$228 per hour. Additionally, an attorney who has eleven to fifteen years of experience in this niche of the law will typically charge between \$175 and \$385 per hour, with a mean average of \$203 and the upper quartile charging \$225.

According to the *2006 Desktop Reference*, the highest hourly rates are above \$400, sometimes nearing \$500. Even if this court were to ignore Dudek's uniquely high degree of expertise in the field of special needs estate planning, simply being an attorney who practices in Oakland County, spends 100% of her time specializing in Probate and Estate matters, is a partner in a firm with five partners and has fourteen years of experience, the hourly rates that Dudek charged were in conformance with the hourly rates charged by similarly situated attorneys. Taking her level of expertise into consideration, Dudek's billing practices should be compared to attorneys who are charging the maximum rates. As such, Dudek's rate of \$250 was drastically beneath the reported amounts that reached as high as \$495 for Trust Administration and \$410 for Conservatorships. While Dudek is not petitioning this court to retroactively increase the hourly billing rate charged to the Trust, it is important to note that the fees sought by

Dudek are radically below what the Trust could have been charged. Further, Dudek has been forced to spend considerable time and energy to defend these fees.

Providing legal services to a Special Needs Trust is a cumbersome task, which requires a large amount of skill and experience. [REDACTED] and the Trust benefited from Dudek's fourteen years of experience as a Probate and Estate Planning attorney, and Dudek spent a large amount of time protecting the Trust from [REDACTED]'s attempts to misuse the assets. Considering the lengthy nature of her relationship with [REDACTED] and the Trust, and the statements provided by other highly esteemed attorneys in this field which unanimously support the conclusion that Dudek's fees are reasonable, this Honorable Court should approve the requested attorney fees in the amount of \$9,234.78 (\$6,636.78 outstanding) for the period covered by the second and final accounting of the Trust.

RELIEF REQUESTED

Dudek respectfully requests that this Honorable Court enter an order approving the payment of:

- A. Trustee fees in the amount of \$13,764.86, and attorney fees in the amount \$19,222.54 for the period covered by the first accounting;
- B. Trustee fees in the amount \$8,686.71 (\$5,386.70 outstanding) for the period covered by the second and final accounting;
- C. Attorney fees in the amount \$9,234.78 (\$6,636.78 outstanding) for the period covered by the second and final accounting;
- D. Annual interest in the amount of 7% accrued on the unpaid attorney and co-trustee fees, as agreed to in the written retainer agreement.
- E. All legal and trustee fees incurred by Dudek to transition Trust funds to the new co-trustee; and
- F. Directing the new co-trustee to pay Dudek all unpaid fees immediately.

Respectfully submitted,

HAFELI STARAN HALLAHAN
CHRIST & DUDEK, P.C.

Date: _____

By: _____
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