

NAELA JOURNAL

National Academy of Elder Law Attorneys • Volume 15 • e-Issue • Fall 2019

**Directed Trusts: A Primer on the Bifurcation
of Trust Powers, Duties, and Liabilities in
Special Needs Planning**

*By William D. Lucius, Esq., and
Shirley B. Whitenack, Esq., CAP, Fellow*

Copyright © 2019 by the National Academy of Elder Law Attorneys, Inc. Any use of the contents of this publication without the express written permission of the publisher is strictly prohibited.

NAELA Journal (ISSN 1553-1686) is published annually by the National Academy of Elder Law Attorneys, Inc., 1577 Spring Hill Road, Suite 310, Vienna, VA 22182, and distributed to members of the Academy and to law libraries throughout the country. Two e-Issues are published — one in Spring and one in Fall.

NAELA's mission is to educate, inspire, serve, and provide community to attorneys with practices in elder and special needs law.

Elder and special needs law topics range over many areas and include: preservation of assets, Medicaid, Medicare, Social Security, disability, health insurance, tax planning, conservatorships, guardianships, living trusts and wills, estate planning, probate and administration of estates, trusts, long-term care placement, housing and nursing home issues, elder abuse, fraud recovery, age discrimination, retirement, health law, and mental health law.

Articles appearing in *NAELA Journal* may not be regarded as legal advice. The nature of elder and special needs law practice makes it imperative that local law and practice be consulted before advising clients. Statements of fact and opinion are the responsibility of the author and do not imply an opinion or endorsement on the part of the officers or directors of NAELA unless otherwise specifically stated as such.

A subscription to *NAELA Journal* is available to law libraries for \$70 per year. A combined subscription to *NAELA News*, distributed four times a year, and *NAELA Journal* is available to law libraries for \$135 per year. Back issues of *NAELA Journal* and *NAELA News* are available to NAELA members and subscribing law libraries in electronic format on www.NAELA.org. Address changes or other requests regarding subscription information should be directed to Nancy Sween, Sr. Director of Communications and Publications, nsween@naela.org.

Directed Trusts: A Primer on the Bifurcation of Trust Powers, Duties, and Liabilities in Special Needs Planning

By William D. Lucius, Esq., and Shirley B. Whitenack, Esq., CAP, Fellow

I.	Introduction	2
A.	The Confluence of Multiparticipant and Directed Trusts	3
B.	A Departure From Traditional Delegation Principles	6
C.	Avoiding the Paralysis of Decision-Making by Committee.....	6
II.	Evolution of Directed Trust Law	8
A.	Restatement (Second) of Trusts and Restatement (Third) of Trusts.....	8
B.	Uniform Trust Code	9
C.	Uniform Directed Trust Act.....	10
III.	State Approaches and Other Considerations	12
A.	State Approaches to Directed Trustee Liability	12
B.	Planning Considerations.....	14
C.	Best Interests of the Beneficiary Versus Settlor Autonomy.....	17
IV.	Conclusion	18

About the Authors

William D. Lucius, Esq., a member of the Florida, Michigan, and Wisconsin bar associations, speaks frequently on special needs trusts and special needs planning at the state and national level. Having practiced extensively in the areas of estate planning, elder law, and disability rights across Michigan and Wisconsin, Mr. Lucius is currently the director of special needs trusts at Raymond James Trust, N.A., at its headquarters in St. Petersburg, Florida, where his department oversees the administration of numerous special needs and settlement preservation trusts across the nation. He also serves as co-editor of the weekly *NAELA eBulletin* online publication, is an adjunct professor at Stetson University College of Law, and serves on the Hillsborough County (Florida) Council on Aging.

Shirley B. Whitenack, Esq., CAP, Fellow, is a partner at Schenck, Price, Smith & King, LLP, where she co-chairs the firm's Elder and Special Needs Law Practice Group as well as the Estate and Trust Litigation Practice Group. A member of the New Jersey State Bar Association, she has appeared before the U.S. District Court for the District of New Jersey and the U.S. Court of Appeals for the Third Circuit. Ms. Whitenack, whose practice focuses on elder and special needs law, estate planning and administration, and trust and estate litigation, is a NAELA Past President, a NAELA Fellow, and a member of NAELA's Council of Advanced Practitioners. In addition to her membership in many other organizations focused on elder law and disability rights, Ms. Whitenack has served as an adjunct professor in the JD and LLM elder law programs at Stetson University College of Law. She also publishes and lectures at the state and national level on topics related to guardianship, elder and special needs law, estate and trust litigation, and probate mediation.

I. Introduction

The provision of legal services in the fields of elder law and special needs planning has expanded over the past decade into a client-focused, holistic, and collaborative approach.¹ Consequently, this developing philosophy has permeated into the estate plans and trust instruments related to these fields, such as special needs trusts (SNTs)² and settlement preservation trusts (SPTs),³ wherein the selection of an

appropriate fiduciary is no longer a choice between two or among several individuals or corporate trustees. Nontraditional “multiparticipant trust agreements,”⁴ in which the “powerholders”⁵ may be a potpourri of trustees, co-trustees, distribution directors, investment advisers, trust advisory committees, and trust protectors, are becoming more commonplace.⁶ With the advent of directed trusts, these powerholders may now encroach upon the traditional trustee’s once overarching authority and compel the trustee to act (or not act) in furtherance of the trust’s objective.⁷

Consider the case of Nathaniel.⁸ Like most 4-year-olds, Nathaniel was curious and adventurous in equal measure. Due to the alleged negligence of a day care employee, Nathaniel left his day care facility through an open gate and wandered unsupervised to an adjacent parking lot. When Nathaniel attempted to climb through a half-open car window, his head became stuck and he could no longer support his

1 Rebecca C. Morgan, *Elder Law in the United States: The Intersection of the Practice and Demographics*, 2 J. Intl. Aging L. & Policy 103, 106 (Summer 2007).

2 SNTs are commonly referred to as either first-party or third-party SNTs depending on the source of funds used to establish them. A first-party SNT, funded with the assets of a beneficiary with a disability, is created pursuant to Title 42 U.S.C. § 1396p(d)(4)(a) (2018); a third-party SNT, funded with the assets of a third party, is largely a creature of state law. For purposes of this article, “SNT” is used to refer to both types of SNTs because the distinction does not bear heavily on the topic of this article. Moreover, intentionally omitted from this article are pooled SNTs authorized by Title 42 U.S.C. § 1396p(d)(4)(c) and Qualified Income Trusts as found in Title 42 U.S.C. § 1396p(d)(4)(b). The authors assume the readers are knowledgeable of the definitions, types, and purposes of SNTs.

3 SPTs are a type of irrevocable, discretionary support trust commonly used in special needs planning. SPTs do not have a federal authorizing statute and do not protect the beneficiary’s ability to receive means-tested benefits (e.g., Supplemental Security Income, Medicaid); therefore, they do not need to comply with the Medicaid payback requirements of Title 42 U.S.C. §1396p(d)(4)(a). In addition to affording a minimum level of creditor and spendthrift protection, SPTs may be useful planning tools for minor beneficiaries, beneficiaries with incapacity considerations, and those who may be vulnerable or susceptible to undue influence. See Thomas D. Begley Jr., *Settlement Protection Trusts*, 30 NAELA News 4 (Nov. 2018).

4 A multiparticipant trust, unlike the traditional single-fiduciary trust, employs a team of multiple trustees and/or advisers with specific roles and responsibilities. See John P.C. Duncan & Anita M. Sarafa, *Achieve the Promise — and Limit the Risk — of Multi-Participant Trusts*, 36 ACTEC L.J. 769, 772 (2011).

5 Powerholders are loosely defined in this article to include trust directors, trust advisers, trust protectors, trust advisory committees, and other parties with the power to direct another fiduciary on some aspect of the trust instrument.

6 Duncan & Sarafa, *supra* n. 4, at 773.

7 John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 1 (Winter 2019).

8 Nathaniel’s story is loosely based on the real events of a beneficiary of an SNT administered by one of the authors. Although Nathaniel’s guardian gave permission to share his story, Nathaniel’s name and certain substantive facts have been changed to protect his privacy.

weight. The near-strangulation caused a significant, irreversible traumatic brain injury. Now 8 years old, Nathaniel is incapacitated, has no gait strength or swallowing reflexes, has frequent seizures, and requires 24-hour supervised care. Nathaniel's parents sued the day care provider and parking lot owner, securing an \$8 million cash settlement, which includes a 40-year guaranteed structured annuity payment of \$4,500 per month, adjusted 3 percent annually. The court that approved the settlement ordered the establishment of a first-party SNT for Nathaniel's benefit that included, in part, the following language:

Art. 1.1 — Trust Company, N.A., shall serve as the initial Corporate Trustee. Distribution Directors, Inc., shall serve as the initial Distribution Director under this Agreement. Each of the entities shall serve as fiduciaries but shall only be responsible for the decisions that fall within their respective authorities as defined hereunder. Both may rely conclusively on the other if that instruction relates to a matter under the other's purview, and neither shall have a duty nor obligation to review the underlying actions of the other.

Art. 1.2 — During the lifetime of Nathaniel, Distribution Director may direct Corporate Trustee to distribute, from income, principal, or both of this Trust, such amounts as the Distribution Director, in its sole, absolute, and unfettered discretion, may from time to time deem advisable or reasonable for Nathaniel's special needs.

Art. 9.1 — Nathaniel's mother is appointed as Trust Protector. The Trust Protector shall not be entitled to compensation for services rendered but shall be entitled to reimbursement of reasonable expenses in the exercise of her services. The Trust Protector is authorized, in her sole and absolute discretion, to remove from office, without Court approval, any Corporate Trustee or Distribution Director appointed herein, with or without cause and for any reason

whatsoever, and may replace such Corporate Trustee or Distribution Director with another Corporate Trustee or Distribution Director who is not related to or subordinate to the Beneficiary (within the meaning of Internal Revenue Code § 672(c)) to act in place of the Corporate Trustee or Distribution Director so removed.⁹

In Nathaniel's case, by ordering a trust with bifurcated duties among various parties, the court followed the advice of the guardian ad litem, who recommended a multiparty directed trust arrangement to best address the investment management and discretionary decision-making complexities that will likely last the length of the trust's administration.

A. The Confluence of Multiparty and Directed Trusts

A directed trust, similar to Nathaniel's SNT, includes individuals or entities with a power to direct the trustee on some aspect of the trust, such as investment management, administration, and distribution decisions, powers historically reserved to the trustee.¹⁰ In Nathaniel's case, the distribution director is the directing party (the powerholder) on matters pertaining to discretionary distribution decisions; therefore, the traditional trustee is a "directed trustee"¹¹ insofar as the distribution director holds the power to direct and compel the trustee to act (or not act) in this regard.

9 This sample language is a consolidation of various trust provisions from governing instruments spanning multiple jurisdictions. This language is being offered for example only and should not be construed as language suggested for use.

10 Unif. Directed Trust Act § 2 cmt (5).

11 Unif. Directed Trust Act § 2(3) defines "directed trustee" as a "trustee that is subject to a trust director's power of direction."

Also available as part of the eCourse

[2021 Special Needs Trusts eConference](#)

First appeared as part of the conference materials for the
17th Annual Changes and Trends Affecting Special Needs Trusts session
"How to Reduce Fiduciary Litigation Risks"