Special Needs Trusts for Persons with Disabilities and Chemical Dependence:

Presented by:

Stephen W. Dale, JD, LLM
Trustee , Golden State Pooled Trust
The Dale Law Firm, PC
www.dalelawfirm.com
steve@dalelawfirm.com

Presenter's Bio

Stephen W. Dale, Esq., LL.M
The Dale Law Firm,
Golden State Pooled Trust

- Stephen W. Dale, Esq., LL.M, is an attorney and disability rights advocate, serving on boards and committees of disability rights organizations.
- Received his JD from Armstrong Law School and his LL.M. in Taxation from Golden Gate University.
- Mr. Dale is a disability rights advocate and spends much of his time attending disability rights activities, including legislative hearings and serving on boards and committees of disability-rights organizations.
- He is a frequent speaker on a variety of disability related topics across the country, and is the recipient of the 2010 Theresa Foundation Award and the 2007 NAELA Powley Award.
- Additionally, Mr. Dale is a long-standing member of the Special Needs Alliance.
- Mr. Dale regularly teaches courses to the public, financial professionals, and other attorneys on special needs trusts and trust administration with a special emphasis on achieving independence while maintaining essential government benefits.
- Mr. Dale is also the trustee of the Golden State Pooled Trust.

Special Needs Trusts for Persons with Disabilities and Chemical Dependence

Stephen W. Dale, Esq., LL.M
The Dale Law Firm,
Golden State Pooled Trust

Special Needs Trusts for Persons with Disabilities and Chemical Dependence
Stephen W. Dale will discuss how to design a special needs trust tailored to the individual. Attendees will be presented with a variety of administrative models and case studies as examples of how a special needs trust can be designed to enhance the life of the beneficiary and serve as a behavioral incentive device for persons with mental health and chemical dependency challenges.

Golden State Pooled Trust

Imagine

- You have a daughter named Kathy who has schizophrenia.
- Kathy is likely to need some level of assistance for the rest of her life.
- You set up a 3rd party account with your local pooled trust to provide for her needs in the event of your incapacity or death.
- Kathy is otherwise healthy and is likely to live 70 years or longer.

The Challenge

- Benefit laws ~~may~~ will change
- Social service systems will change
- Her condition may change
- Her advocacy system may change
- Attitudes may change
- The amount of resources she needs may change

Golden State Pooled Trust

The Big Question

Financial Industry is providing services that traditionally have been provided by the government

Public benefits can be inadequate

SNT planning is not only poverty planning - planning is needed for affluent families too

Persons who need case management and oversight who might be subject to abuse and neglect.

The Big Question

Does the client need special needs planning if the benefits are of little value?

- Is SSI eligibility needed for long-term cash assistance?
- Is there health coverage eligible to replace Medicaid (Medi-Cal in CA)
- Are there needed services that are only available to public benefits recipients?
- Spending $1000's of $$ to preserve benefits of limited value doesn't make sense

Does the beneficiary need assistance to

- Manage or oversee assets?
- identify and advocate for services?
- protect against abuse or neglect?

Golden State Pooled Trust

The Big Question

Government likely will not provide adequate resources

Successful planning will include:

- Having the right team of advisors to advocate for needs
    - Team should include
        - Fiduciary and financial management
        - Inclusion of natural supports when appropriate
        - Care management to constantly be assessing needs, and advising on services

- The ideal plan will have the flexibility to deal with issues in a changing environment

The Big Question

Who may need a Special Needs Trust (SNT)?

- Persons unable to personally handle sums of money or those who may be vulnerable to exploitation.
- Persons who may receive benefits in the future.
- Persons who require oversight and could benefit from case management.

Golden State Pooled Trust

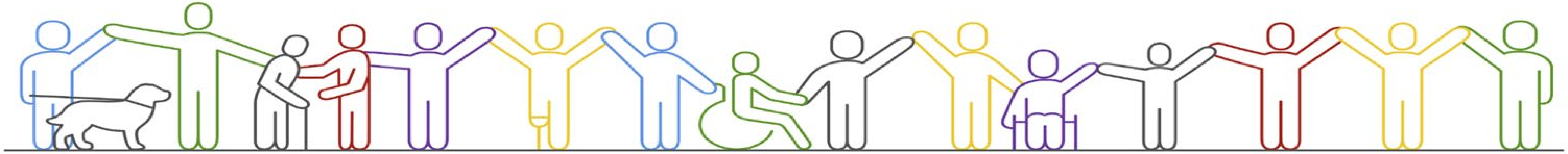
The Disability Community

Diverse

- Every beneficiary is different
- Flexible planning is needed to adjust to good and bad times
- Often the Trust must last for the lifetime of the beneficiary
- Opportunity to provide the assurance of lifelong advocacy to clients that have disabled

Types of Disability

- Cognitive
  - Developmental
  - Mental Health
- Physical
  - Developmental
  - Accident or illness
- Seniors



Public Benefits: SSI Test and Definition of Disability

3 Part SSI Test

- Meet SSA definition of disability
- Income test determines how much is received.
- Resource test determines eligibility

Social Security Definition of Disability

A benefits recipient must be:

- Under the age of 65
- Not able to engage in substantial gainful activity (SGA) because of a physical or mental impairment(s) that is expected to last a year or longer or end in death.
- 2023 monthly SGA amount for non-blind individuals is $1,470.

Golden State Pooled Trust

CALIFORNIA SSI Benefit Rates (2024)

Individual	FBR	$ 943.00
	SSP	$ 238.62*
		$1,182.62
	PMV Max	$ 334.33
		$ 848.29
Couple	FBR	$1,415.00
	SSP	$ 604.49*
		$2,019.49
	PMV Max	$ 491.66
		$1,527.83

Public Benefits: SSI Eligibility Resources

Golden State Pooled Trust

- Anything that can be converted to cash
  - Including items held for intrinsic value
- If resources exceed $2,000 on the **first day of a calendar month**, the beneficiary's public benefits will be lost until resources are reduced.
- Exclusions:
  - Beneficiary occupied residence
  - Household goods of any value
  - One automobile
  - Items related to the disability
  - Life insurance with cash surrender value less than $1,500
    - All term life insurance
  - Burial plot
  - Up to $1,500 set aside for burial expenses


SPECIAL NEEDS TRUST

Special Needs Trust (SNT) Basics

Elements of an SNT

- A Trust is a contract to control property to meet some objective for the benefit of a beneficiary
- A SNT is drafted specifically so trust assets are considered to <u>not</u> be "available resources" in determining a disabled person's eligibility for needs based benefits
- <u>The funds in the SNT may be used to meet the beneficiary's needs that are not covered by public benefits</u>

Special Needs Trust (SNT) Basics

Elements of an SNT

- A special needs trust is basically a form of a spendthrift trust
  - The trustee (or trust team) has sole and absolute discretion over all distributions
  - The beneficiary has no demand rights

Common Issues

Golden State Pooled Trust

Housing:

- Housing is the single greatest concern that disabled persons and their families face

Golden State Pooled Trust

Ownership or Purchase of a Home by a Special Needs Trust

Home as a Resource
(see POMS SI 01120.200)

- "If the Trustee of a *Special Needs Trust* holds title to a house as a home for the Beneficiary, the house would not be a resource to the Beneficiary."

- It would also not be a resource "if the Beneficiary moved from the house."

Golden State Pooled Trust

Ownership or Purchase of a Home by a Special Needs Trust

The Trust holds legal title to the house, therefore the eligible individual would be considered to be living in his/her own home based on having an "equitable ownership under a Trust."

Golden State Pooled Trust

California Issue Prop 19

Golden State Pooled Trust

What is Considered a Child?

from https://www.boe.ca.gov/proptaxes/faqs/propositions58.htm

A “child” for purposes of Proposition 58 includes:

1. Any child born of the parent(s).
2. Any stepchild while the relationship of stepparent and stepchild exists.
3. Any son-in-law or daughter-in-law of the parent(s).
4. Any adopted child who was adopted before the age of 18.

What is Considered a Child?

from https://www.boe.ca.gov/proptaxes/faqs/propositions58.htm

- Spouses of eligible children are also eligible until divorce or, if terminated by death, until the remarriage of the surviving spouse, stepparent, or parent-in-law.
- A person adopted after reaching the age of 18 is not considered a “child” for purposes of the parent-child exclusion.

Golden State Pooled Trust

Can an Irrevocable Special Needs Trust Qualify for the Parent to Child Exclusion?

<u>625.0203</u> Trusts.

- The parent-child exclusion applies to transfers of real property interests into irrevocable trusts that are for the sole benefit of one or more children of the eligible transferor parent, even though the trustee has the discretion to accumulate trust income and principal. C 11/21/1990; C 1/3/1991.

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
PROPERTY AND SPECIAL TAXES DEPARTMENT
450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0064
916 445-4982 FAX 916 323-8765
www.boe.ca.gov

February 29, 2008

No. 2008/018

TO COUNTY ASSESSORS:

<u>REVENUE AND TAXATION CODE SECTION 63.1:</u>
<u>PARENT-CHILD AND GRANDPARENT-GRANDCHILD EXCLUSION</u>
<u>QUESTIONS AND ANSWERS</u>

Since Proposition 58 (in 1986) and Proposition 193 (in 1996) were adopted, the Board of Equalization (Board) has issued several Letters To Assessors containing questions and answers regarding these two propositions (LTAs No. 87/72, dated September 11, 1987; No. 88/10, dated February 11, 1988; and No. 98/23, dated April 22, 1998). This letter supersedes these previous letters as changes in the law have occurred since the issuance of those letters.

HISTORY. On November 4, 1986, the voters of California adopted Proposition 58, which added subdivision (h) to section 2 of article XIII A of the California Constitution to provide that "purchase" and "change in ownership" do not include the purchase or transfer of (1) principal residences between parents and children, and (2) the first $1 million of the full cash value of all other real property (other than principal residences) between parents and children. Section 63.1 was added to the Revenue and Taxation Code[1] to implement the parent-child exclusion provisions of Proposition 58 and applies to any purchases or transfers between parents and children that occur on or after November 6, 1986.

On March 26, 1996, the voters of California adopted Proposition 193, which further amended section 2, subdivision (h) of article XIII A to exclude from the definition of change in ownership certain transfers from grandparents to their grandchildren. Section 63.1 was amended to reflect the grandparent-grandchild provisions.

DEFINITIONS

Section 63.1 provides various definitions, which are described briefly as follows:

1. *Principal residence* – a dwelling for which a transferor was eligible for either the homeowners' exemption or a disabled veterans' exemption as a result of the transferor's ownership and occupation of the residence. A principal residence includes only that portion of the land that consists of an area of reasonable size that is used as a site for the residence.

[1] All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

Qualified Plans and Special Needs Trusts

SECURE Act

IRA Beneficiary Types (con't.)

Eligible Designated Beneficiaries (EDBs)

Withdrawal rules: life expectancy of beneficiary

Special Needs Trust Improvement Act

- **Page 915 of 1,653-page Consolidated Appropriations Act, 2023**
  - **a/k/a Section 337 of SECURE Act 2.0**

(a) In General.--Section 401(a)(9)(H)(iv)(II) is amended by **striking "no individual" and inserting "no beneficiary".**
(b) Conforming Amendment.--Section 401(a)(9)(H)(v) is amended by **adding** at the end the following flush sentence:
"For purposes of the preceding sentence, in the case of a trust the terms of which are described in clause (iv)(II), any beneficiary which is an organization described in section 408(d)(8)(B)(i) shall be treated as a designated beneficiary described in subclause (II).". (c) Effective Date.--The amendments made by this section shall apply to calendar years beginning after the date of the enactment of this Act."

Advantages for EDBs:

- **Continued qualification for means-tested public benefits**
- **More time for inherited IRA assets to grow tax-deferred**
- **Less likely to push beneficiaries into higher income tax bracket vs. 5-year or 10-year rule**

Golden State Pooled Trust

SECURE Act

IRA Beneficiary Types (con't.)

Eligible Designated Beneficiaries (EDBs)
"See-Through Trust" / "Qualified Trust"

Conduit Trust:

- Must require trustee to distribute all withdrawals from the IRA in the same calendar year in which they are received to the lifetime beneficiary (e.g., "shall" not "may" - mandatory)
- 26 CFR § 1.401(a)(9)-4(f)(1)(ii)(A)

Accumulation Trust:

- Any trust that is not a conduit trust
- Trustee may accumulate income and only distribute such income in their discretion
- 26 CFR § 1.401(a)(9)-4(f)(1)(ii)(B)
- May lead to "trapped" income at the trust level (DNI)

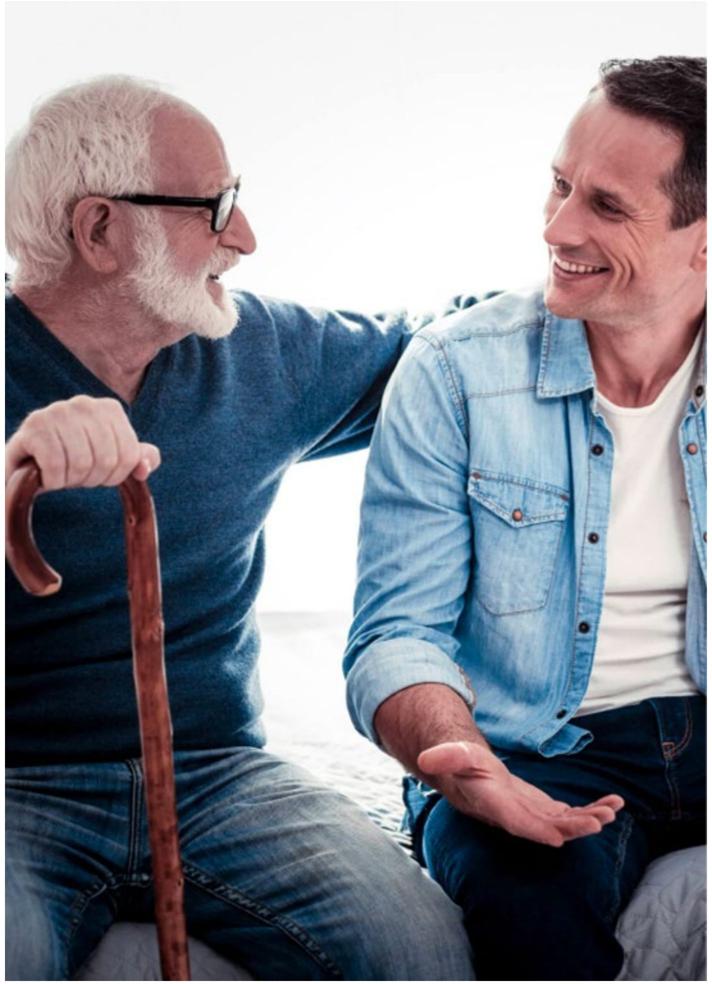
2023 Simplified Federal Trust Income Tax Rates

Trust Taxable Income	Trust Tax Rate
$2,900 or less	10%
$2,901 - $10,550	$290 + 24% of excess over $2,900
$10,551 - $14,450	$2,126 + 35% of excess over $10,550
$14,451+	$3,491 + 37% of excess over $13,450

Scenario - Equal Treatment

IRA ANALYSIS

	1st Tier Beneficiary	2nd Tier Beneficiary	Life Expectancy	RMD*	Taxes Due
3rd Party SNT	3rd Party SNT	Daughter w/o a disability	36.2 35.3 34.3 33.4 32.5 etc.	$13,812 $13,773 $13,773 $13,732 $13,688 etc.	$1,657 $1,652 $1,652 $1,648 $1,643 etc.
Daughter w/o a disability	Daughter w/o a disability	3rd Party SNT	n/a - 10 years	$50,000 each year**	$16,000 each year

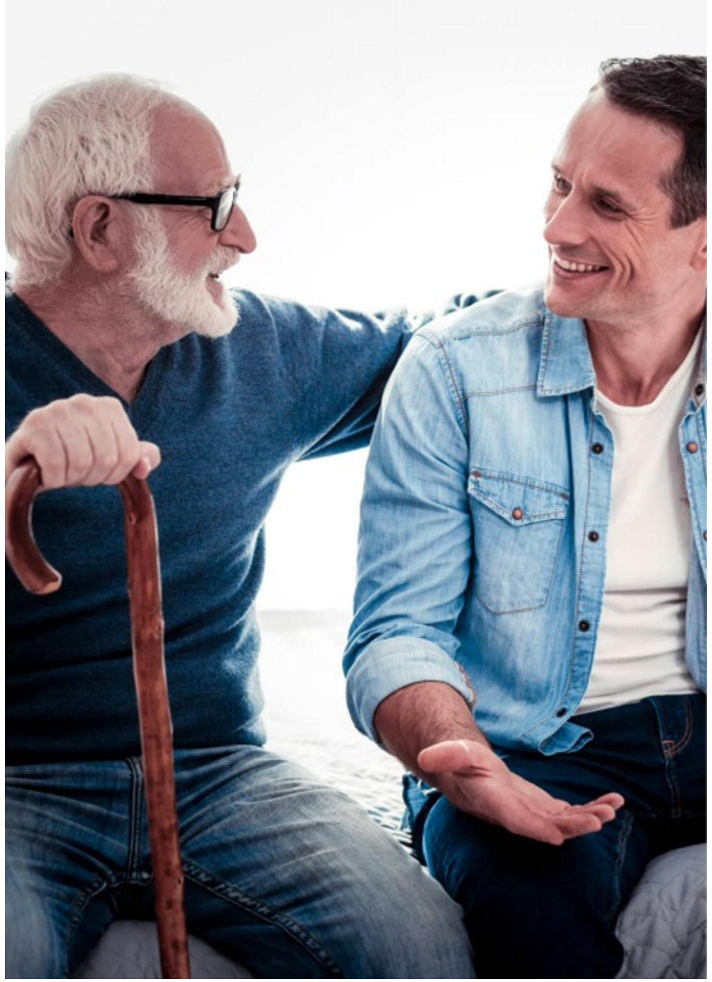


*assumes no investment growth
**assumes equal payments

Golden State Pooled Trust

Scenario - Equal Treatment

	3rd Party SNT	Daughter w/o a disability
IRA	Taken over EDB life expectancy	10-year rule
	Income passes out of trust to be taxed at lower personal income tax rate	Income taxed at higher personal income tax rate
	Income may be offset by medical deductions + standard/itemized deductions	Income may be standard/itemized deductions
	Allowed to grow longer tax-deferred	10-year rule
Life Insurance	Tax free	Tax free
Investments	Tax free (step-up)	Tax free (step-up)
Taxes	QDT Exemption	No QDT Exemption



PLANNING FOR BENEFICIARIES WITH BEHAVIORAL HEALTH OF CHEMICAL DEPENDENCE ISSUES

Planning for Beneficiaries with Behavioral Health of Chemical Dependence Issues

- A special needs trust is merely a glorified spendthrift trust.
- In many instances when the beneficiary is has a mental health diagnosis or suffers from chemical dependence – might be best to not call is a discretionary trust.
- In essence – it is still a special needs trust.

Golden State Pooled Trust

How To Create a Trust that Can Adjust

- Be flexible
- Don’t lock yourself into a corner
- Be realistic
- It is essential that the trust lay out measurables
- Protect family or natural supports fron taking on responsibilities they are not prepared for

Golden State Pooled Trust

Sample Language

Article Seven
Provisions in the Event of Changed Circumstances

Section 7.01 Early Termination Upon Substantial Gainful Employment

If the Advocate shall determine, in his or her sole and absolute discretion, that John Smith is no longer dependent on public benefits and has been gainfully employed for 36 months over a period of 36 months, my Trustee is authorized (but not required) to distribute an amount equal to 6% of the trust principal annually to John Smith free of trust.

In making such a determination, the Trustee should consider the following factors including but not limited to:

- The availability of medical insurance as a replacement to Medi-Cal;
- The likelihood of John Smith requiring needs-based public benefits in the future;
- Protection from current or future creditors of John Smith; and
- John Smith's ability to manage his assets.

"Substantial gainful employment" means when John Smith is able to provide for his food, clothing, shelter and medical needs through employment without being dependent on others or on needs-based public benefits.

My Trustee shall incur no liability provided that the determination of substantial gainful employment was made in good faith.

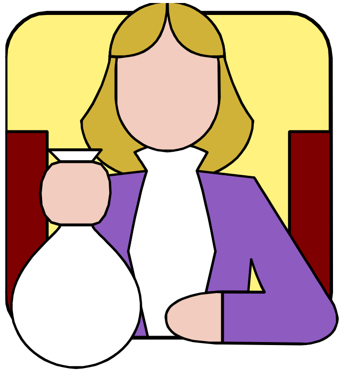
Planning for Beneficiaries with Behavioral Health of Chemical Dependence Issues

- There is seldom a situation where family should be the trustee of this sort of trust.
  - Best to serve as a trust protector or on an advisory committee and provide oversight
- Care managers are the key to success

Golden State Pooled Trust

USING A CARE MANAGER WITH A DISTRIBUTION PLAN

Model 1
The Trustee Directed by a Trust Advisory Committee



Trustee

Care Manager

- The Trustee manages funds, makes distributions, does taxes, keeps records
- The Trustee is directed by a Trust Advisory Committee which gives guidance on distributions, can amend the trust or replace the Trustee
- Can include a care manager to access the needs of the beneficiary to guide the management team.

Advisory Committee

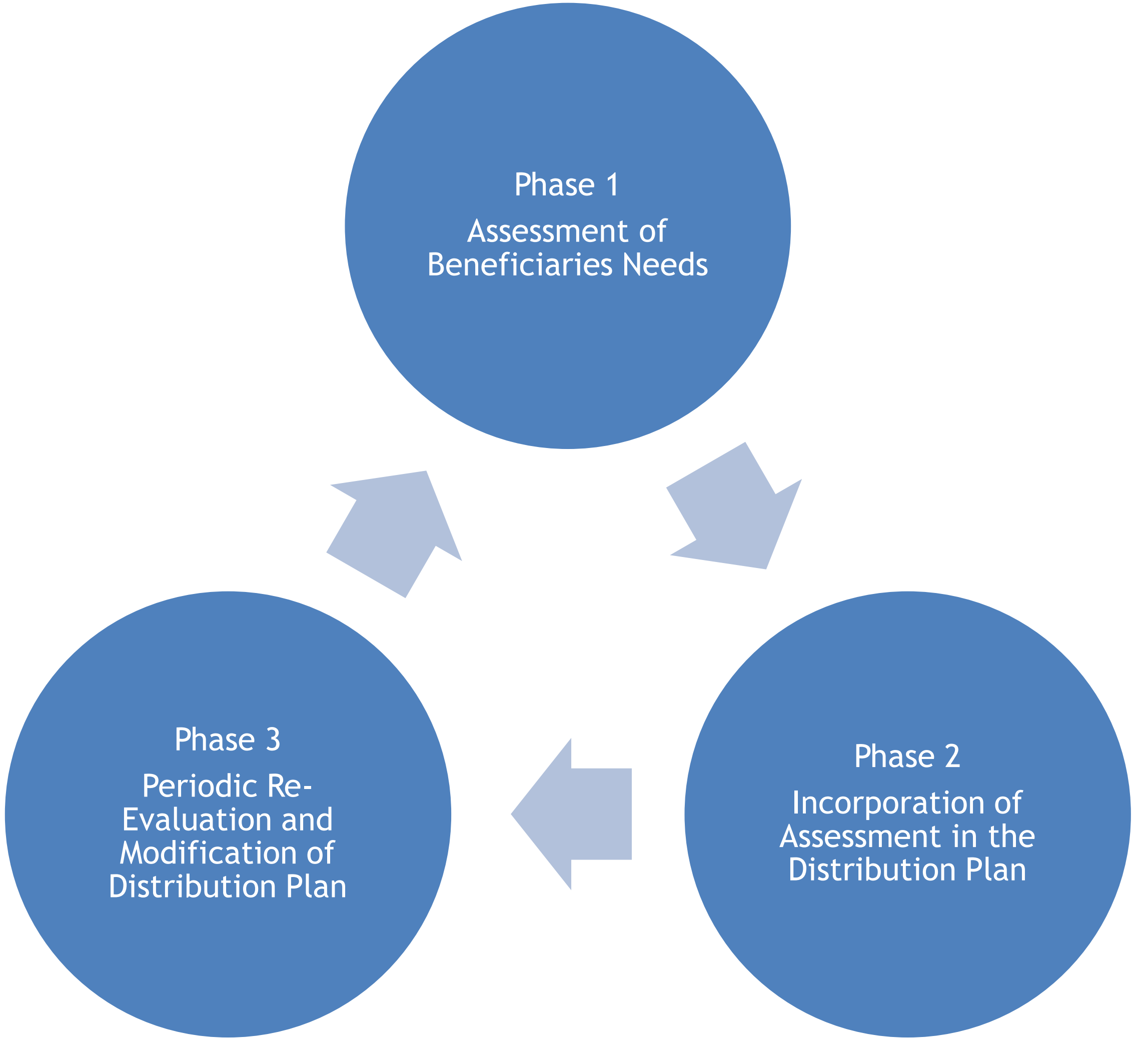
Golden State Pooled Trust

Breaking Down the Distribution Plan into Phases

- 1. An assessment of the beneficiary's needs.
- 2. Incorporating that information within the distribution plan.
  - Based on the distributions that will be necessary to meet beneficiary needs, along with an evaluation of the trust's investment portfolio and other available resources, the distribution plan should project the trust's long-term performance.
- 3. Periodic re-evaluation to measure the trust's actual performance against expectations and to make necessary adjustments.
- Let's review the process, step by step.

Golden State Pooled Trust

A Three-Step Process of Developing a Distribution Plan



Golden State Pooled Trust

Phase 1 – Assessment

- In cases where the beneficiary has significant needs, it's usually preferable to have a professional care manager perform the assessment.
- We routinely ask the care managers to work with the beneficiary, family, support system and medical providers to provide a written report to help shape the distribution plan and to guide other persons involved with the trust.

Phase 1 – Assessment

- These reports include:
  - observations concerning the beneficiary and the circle of support in their environment;
  - recommendations of services that might assist the beneficiary and the family, and
  - recommendations for the safety of the beneficiary and caregivers.

Golden State Pooled Trust

Phase 2 -- Development of the Distribution Plan

- The plan should include both short and long-term objectives for assisting the beneficiary.
- It should also include information about the resources available to fulfill that objective, including assets both inside and outside the trust.
- The distribution plan should include projections of how trust investments will perform and when the trust is likely to be exhausted.

Golden State Pooled Trust

Phase 3 – Periodic Reassessment

- The third phase consists of periodic evaluations of the trust's performance and updating both the assessments and distribution plan, as needed.
- It's common for caregiving family members to eventually suffer a back injury, especially as a child's weight increases.
- A care manager can monitor the safety needs of both the caregiver and beneficiary and recommend precautions.

Golden State Pooled Trust

Phase 3 – Periodic Reassessment

- Providing for the care and quality of life of a person with disabilities has many variables, and the process doesn't end until the beneficiary dies or the special needs trust is exhausted.
- It's almost impossible to anticipate every contingency.
- That's why an interdisciplinary team of family members, advocates and professional advisors is needed.

Golden State Pooled Trust

Keeping the Distribution Plan Up-to-Date

- The process of assessing the beneficiary's needs and then balancing them against available resources in order to establish a budget isn't a one-time process.
- The value of investment portfolios will fluctuate, and many states are reducing assistance to persons with disabilities.

Golden State Pooled Trust

Projecting the Longevity of the Special Needs Trust

- The budget portion of the distribution plan should ideally utilize a projected rate of return and rate of distributions in order to determine how long the trust will last.
- In most cases, the objective of the trust would be to ensure that these funds last for the beneficiary's lifetime.
- We have found that having the distribution plan reviewed by the trust advisory committee and the trustee greatly helps all parties make rational recommendations, based on available resources.

Using Distribution Plans in Trusts with Advisory Committees or Trust Protectors

- Many of the trusts that we draft incorporate an advisory committee or a trust protector to have a checks and balance system to ensure that the needs of the beneficiary are fulfilled.
- This also can allow for a system to make changes in the document as laws and policies change, and replacement of the trustee if needed.
- We have found that the utilization of a distribution plan as the primary focus of the trust advisory committee/trust protector allows all parties to give their input, basically preapproving all distributions and giving the trustee, and later as we will discuss the distribution advisor, a clear path to follow.

Sample Language

Annual Distribution Plan

The trustee shall produce a written distribution plan to be reviewed by the Trust Advisory Committee annually. The primary purpose of the distribution plan is to provide specific recommendations of services likely to be provided to Kathy for the upcoming year, the cost of those services, and a good faith estimation of how those expenditures will affect the longevity of the trust.

The Trustee may/shall specifically employ a qualified Care Manager to assess Kathy's medical, social and direct care needs and incorporate those assessments in the distribution plan. The Care Manager shall be a qualified professional who is familiar with services in Kathy's community as well as the developmental needs of persons with disabilities similar to Kathy's.

The distribution plan shall provide guidance and advisement concerning Kathy's needs, rights, and entitlement to public benefits, and what discretionary distributions should be made for needs not covered by public benefits, as well as recommendations concerning distributions otherwise covered by public benefits, including, but not limited to, payment for supplemental medical and therapeutic care, education and habilitation services, attendant care services whenever the need arises, residential services, and daily support services. Whenever possible the distribution plan shall make a good faith estimate of the likely cost of each recommendation to be incorporated in an annual budget.

The distribution plan shall be made available to members of the Trust Advisory Committee for their review at least <15 days> prior to implementation. The distribution plan shall include a projection of longevity of the special needs trusts based on the assumed depletion of the trust as well as a reasonable rate of return on the investments of the trust.

The Care Manager shall be entitled to fair and reasonable compensation for services rendered. The amount of compensation shall be equal to the customary and prevailing charges for services of a similar nature during the same period of time and in the same geographic locale. The Care Manager shall be reimbursed for the reasonable costs and expenses incurred carrying out its fiduciary duties under this agreement.

Golden State Pooled Trust

Special Needs Trusts for Persons with Disabilities and Chemical Dependence:

Presented by:

Stephen W. Dale, JD, LLM
Trustee , Golden State Pooled Trust
The Dale Law Firm, PC
www.dalelawfirm.com
steve@dalelawfirm.com