

**SPECIAL NEEDS TRUST**  
**AND THE MARYLAND TRUST ACT**

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## Table of Contents

	Page
1.0	Supplemental Needs Trust and the Maryland Trust Act ..... 1
1.1	The MTA Preamble – A Questionable Beginning ..... 1
1.1.1	The Faulty Assumptions of the MTA Preamble ..... 1
2.0	Eliminating the Categories under the UTC and Restatement (Third) ..... 2
2.1	Beneficiary Right to Enforcement and the Supplemental Needs Trust..... 3
2.2	Pre-UTC Justification for SNTs..... 4
2.3	The UTC Approach ..... 6
2.4	The Maryland Trust Act ..... 8
2.5	Self-Settled Special Needs Trust ("SNTs"): The Statutory Safe-Harbor: (d)(4)(A) trusts. .... 9
2.5.1	The Link Between (d)(4)(A) trusts and the Supplemental Security Income (SSI) Rules ..... 10
2.5.2	POMS and Deference ..... 10
2.6	The "Establishment" Issue..... 10
2.6.1	The "Dry" Trust..... 11
2.6.2	The "Seed" Trust ..... 12

# Special Needs Trust and the Maryland Trust Act

by Fred Franke<sup>1</sup>

## 1.0 Supplemental Needs Trust and the Maryland Trust Act.

### 1.1 The MTA Preamble – A Questionable Beginning.

The Maryland Trust Act ("MTA") has a "preamble" which states in part:

The fact that a beneficiary cannot compel distribution from a discretionary trust has justified not counting trust assets in determining the beneficiary's eligibility for need-based programs such as Medicaid.

The preamble then goes on to say: "A trust with no enforceable rights for a beneficiary is a trust in name only" and: "The judiciary must be able to intervene aggressively to protect all trust beneficiaries.

#### 1.1.1 The Faulty Assumptions of the MTA Preamble.

The first proposition (beneficiaries cannot compel) is not, and never was, true under Maryland law or under the general Common Law. The second proposition (no enforceable rights means no trust) always has been, and continues to be, true under Maryland law and under the general Common Law. The third proposition (equity court enforcement) has been true, although whether the courts must be able to intervene "aggressively" is a puzzle.

The cardinal rule for statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature.<sup>2</sup> If a statute is clear and unambiguous, the courts need not dig further but may rely on its plain meaning. If such legislative intent is not clear, however, then the courts will look for legislative intent.<sup>3</sup> Preambles may be considered when determining legislative intentions.<sup>4</sup>

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<sup>2</sup> *Lockshin v. Semsler*, 412 Md. 257, 275, 487 A.2d 18 (2010).

<sup>3</sup> *Bonemann v. Bonemann*, 175 Md.App. 716, 931 A.2d 1154 (2007).

<sup>4</sup> *Georgia-Pacific Corp. v. Benjamin*, 394 Md. 50, 81, 904 A.2d 511 (2006) ("In an attempt to determine legislative intent, it is well settled that preambles to a statute may be considered."). But see *Comptroller v. Glenn Martin Co.*, 216 Md. 235, 249, 140 A.2d 288 (1958) ("Preambles are not operable parts of the statute.").

The proposition in the preamble that beneficiaries cannot compel a distribution from a discretionary trust is why third party special needs trusts are not counted as an available resource in determining the beneficiary's eligibility for public benefits. The shorthand for the proposition is that the creditor cannot reach those assets because the beneficiary cannot reach the assets. This was not true, in any regard, under the Common Law, under the Uniform Trust Code ("UTC") or the Maryland Trust Act ("MTA"). It was, however, the basis of an early objection to the UTC and the Restatement (Third) of Trust that served as the UTC's inspiration.

**2.0 Eliminating the Categories under the UTC and Restatement (Third).** The Restatement (Third) of Trusts and the UTC eliminated the distinction between support and discretionary trusts, generally treating a support trust "as a discretionary trust with a standard."<sup>5</sup>

This approach drew heated debate. Critics of the approach adopted by the Restatement (Third) and the UTC perceived that there was a change from the Common Law of trusts and that this change exposed trust assets to heightened exposure to the claims of the beneficiaries' creditors. Mark Merric & Steven J. Oshins, *Effect of the UTC on the Asset Protection of Spendthrift Trusts*, 31 Est. Plan. 375 (2004).

Such criticism has drawn pronounced refutation. Kevin D. Millard, *Rights of Trust Beneficiaries Under the Uniform Trust Code*, 34 ACTEC L.J. 57, 63 (2008) ("[N]ote that the theory that a creditor could not reach the trust because the creditor stood in the shoes of the beneficiary and the beneficiary could not force distributions from the trust was flawed, because no matter how broadly worded the trustee's discretion was, it was always subject to review by a court for abuse."); Robert T. Danforth, *Article Five of the UTC and the Future of Creditors' Rights in Trusts*, 27 Cardozo L. Rev. 2551, 2581 (2006) ("Implicit in the critics' argument is the assertion that, by granting a trustee extended discretion, the trustee's exercise of that discretion becomes essentially

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<sup>5</sup> George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees* § 228 (2011).

unreviewable. But this has never been true at Common Law. An essential principle of the Common Law of trusts is that a trustee's exercise of discretion is always subject to judicial review, no matter how broadly the trustee's discretion may be described ... [T]hat will not be interpreted so as to relieve the trustee from an obligation to account for its discretionary judgments. Because a trustee is a fiduciary, it would be inconsistent with the concept of a trust to insulate a trustee's exercise of discretion from all judicial review."); also see Alan Newman, *Spendthrift and Discretionary Trusts: Alive and Well Under the Uniform Trust Code*, 40 Real Prop. Prob. & Tr. J. 567, 601-618 (2005). The relationship of the blurring of the distinctions between support and discretionary trusts as related to supplemental needs trusts is discussed below.

**2.1 Beneficiary Right to Enforcement and the Supplemental Needs Trust.** As noted, under the Common Law a beneficiary has the right to enforce his or her rights to a distribution from a discretionary trust. Historically (per Professor Scott), this right of enforcement was described as a right to force the trustee to act "in a state of mind which it was contemplated by the settlor that he should act."<sup>6</sup>

The Court of Appeals, in *First Nat. Bank of Md. v. Dept. Health and Mental Hygiene*, described the right to force a distribution from a discretionary trust upon a showing "that the trustees have acted arbitrarily, dishonestly, or from an improper motive in denying the beneficiary the funds sought," citing both Bogert and the Restatement (Second).<sup>7</sup> Elsewhere, the Maryland Court of Appeals has stated that the trustee's exercise, or non-exercise, of the power to distribute from a discretionary trust must be "honestly and reasonably exercised."<sup>8</sup>

Despite the position of the first two Restatements of Trusts, the Common Law always gave the Equity Court oversight of a trustee's exercise of discretion to assure that it was handled

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<sup>6</sup> Restatement (Second) of Trusts § 187.

<sup>7</sup> 284 Md. 720, 725, 399 A.2d 891, 894 (1979).

<sup>8</sup> *Waesche v. Rizzuto*, 224 Md. 573, 587, 168 A.2d 871, 877 (1961) (emphasis added.).

reasonably to implement the settlor's intent. That a trustee must act "reasonably" means that there is an objective standard by which the Court can judge the trustee's actions. This is the basis of the description of a beneficiary's rights to enforcement of a discretionary trust by the Restatement (Third) of Trusts.<sup>9</sup> It is not a departure from existing law; it is a clearer statement of existing law.

**2.2 Pre-UTC Justification for SNTs.** Nationally, the cases involving supplemental needs trusts break down into three categories of approaching the trust to determine whether the assets of such a trust can be an available resource – (i) a traditional searching for settlor intent, (ii) a balancing of the competing interests, or (iii) an enforcement of a public policy restricting government benefits regardless of settlor intent:

The case law from the various states offers three quite different answers whether discretionary trusts can be held liable for the support costs of an institutionalized beneficiary. An apt analogy might be three parallel rivers each carving a distinct channel. First, some courts approach the issue as merely a standard problem in the interpretation of trust language in which the parties differ as to the degree of authority granted by the settlor to the trustee. For these courts, the path to "justice" is to carry out the intent of the settlor. Most courts that have used this analysis have held that the trust was not liable for the costs of institutionalization. If the court finds, however, that the settlor intended that the trust support the beneficiary, then the trust will be held liable even if the beneficiary resides in a state institution. If the settlor created a "discretionary trust" and yet intended the trust to provide minimum support, the court may require the trustee to assist the beneficiary even though state support is available. If courts choose to follow this rather narrow route and rely solely upon interpretation of the trust language, then over time discretionary trusts should have little trouble avoiding the costs of institutionalization.

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A second judicial approach is one of balancing the competing interests. These courts do not see the problem as a narrow one of mere interpretation of trust language since a finding of discretionary trustee power does not end the discussion. They are troubled by the prospect of an individual receiving state assistance while enjoying the status of being the beneficiary of a trust. To these courts, it is significant that the state is the creditor who must bear the burden of support if the

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<sup>9</sup> Restatement (Third) of Trusts § 50.

trustee fails to assist the beneficiary. The courts' solution is to balance the intent of the settlor against the legitimate state interest in reimbursement. While the outcome of this balancing is not altogether certain, in general, the courts have favored the right of the trustee to refuse to assist the beneficiary and to resist state attempts at reimbursement. Typical is the New York case of *Estate of Escher*, in which the court held that (a) the testator would prefer the state to support the beneficiary, and (b) to invade the trust would not benefit the beneficiary but only exhaust the trust assets and destroy the testator's intent. Hence, the trust could not be held liable.

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The third judicial approach has been to eschew any balancing of interests and to look solely to the anomaly (at least to these courts) of a trust beneficiary being supported by the state. If a resident of a state institution is the beneficiary of a trust, then the beneficiary "owns" something of value. Because state law requires reimbursement from institutional residents, the trust beneficiary is indebted to the state. Since the trust represents value that belongs to the beneficiary, the trust in turn is liable to reimburse the state.

The issue is not one of mere statutory interpretation, however. State statutes that require reimbursement speak of the "estate" of the recipient, which is not a self-defining term. The court's definition of an "estate" is therefore critically dependent upon the court's view about the propriety of a trust beneficiary receiving state services. The justification for holding a trust liable is the public policy argument that the state is a unique creditor since it is the provider of last resort. An individual's right to these state services arises out of poverty, not out of a mere desire for free support. As such, all other support sources ought to be exhausted prior to turning to the state. A discretionary trust is perceived, not as a legitimate manner of effecting the settlor's intent, but as an attempt to shirk the costs of institutionalization. As a policy matter, assets available to support the beneficiary cannot be hidden behind the mantle of a trustee's discretionary authority.<sup>10</sup>

Professor Frolik classifies the *First National* approach as fitting into the second category of balancing competing interests. But that is not really the Court's holding in *First National*. The trust in *First National* was a hybrid, somewhere between support and discretionary: distributions "in (the

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<sup>10</sup> Lawrence A. Folik, "Discretionary Trusts for a Disabled Beneficiary: A Solution or Trap for the Unwary?", 46 U. Pitt. L. Rev. 335, 363-4 (1985); also see Carol Ann Mooney, "Discretionary Trusts: An Estate Plan to Supplement Public Assistance for Disabled Persons," 25 Ariz. L. Rev. 939 (1983); Joseph A. Rosenberg, "Supplemental Needs Trusts for People with Disabilities: the Development of a Private Trust in the Public Interest," 10 B.U. Pub. Int. L. J. 91 (2000).

trustees') absolute and uncontrolled discretion ... for her maintenance, comfort and support."<sup>11</sup> The Court saw its task as determining settlor intent from the text set forth in the instrument. If the settlor intended a support trust, then the funds were available to reimburse the government for its assistance. On the other hand, if the settlor intended a discretionary trust, the funds were not able to be reached by the state. At base, the Court's role was to determine settlor intent: "[O]ur task becomes one of ascertaining, from the four corners of the will, which form of trust the testatrix-settlor intended to create."

In Maryland, whether a supplemental needs trust will be reached to pay for governmentally supplied services to a disabled beneficiary depends on whether the settlor intended to create a support trust or a discretionary trust – it depends, in other words, on ascertaining, then following settlor intent. Presumably, a trust instrument giving extended discretion to the trustee ("absolute" or "unlimited" discretion) that also states that the trust is intended to supplement, but not replace, governmental assistance meets the *First National* test.<sup>12</sup> Whether a trustee is bound to follow that direction "reasonably" ought not change the character of the trust.

**2.3 The UTC Approach.** The UTC does not categorize trusts as either mandatory or discretionary, and its lack of distinction does not alter present law so to jeopardize supplemental needs trusts:

Many supplemental needs trusts are drafted specifically to enable the beneficiary to qualify for Medicaid or other public assistance and to provide the beneficiary with amounts other than for the beneficiary's basic support. Such a trust would typically preclude the trustee from making distributions for the beneficiary's basic support needs and authorize the trustee to make distributions for the beneficiary's supplemental needs--that is, to make distributions for non-essentials such as travel, vacations, cultural activities, private (as opposed to shared) institutional housing, elective medical care, etc. There is substantial and consistent case law holding that the assets of such

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<sup>11</sup> *First Nat. Bank of Md. v. Dept. Health and Mental Hygiene*, 284 Md. 720, 722, 399 A.2d 891, 892 (1979).

<sup>12</sup> The proposed Maryland Trust Act would define a trust like the one in the *First National* case as involving discretionary, not mandatory, distribution provisions. Md. Trust Act § 14.5-103(F), (M) and (W).



trusts are not considered available resources for Medicaid qualification purposes; moreover, the result is codified by statute in many jurisdictions. The UTC will have no effect on the continued effectiveness of such trusts for this purpose. Under section 814(a), the trustee is required to carry out the terms of the trust in good faith; if the trust terms prohibit distributions for the beneficiary's basic support needs, the UTC will require adherence to this prohibition.

Next, consider a trust expressly intended to be a supplemental needs trust. To what extent will such a trust be considered an available resource for Medicaid purposes, and what effect, if any, will the UTC have on that result? In general, a trust under which the trustee is required to make distribution for the beneficiary's basic support needs will be considered an available resource for Medicaid qualification purposes. The UTC will have no bearing on the treatment of such trusts. On the other hand, in general a wholly discretionary trust without a support standard will not be considered an available resource for Medicaid purposes. As discussed earlier, the UTC should not enhance a beneficiary's ability to compel distributions from such trusts; thus the UTC should not adversely affect the effectiveness of wholly discretionary trusts for purposes of Medicaid qualification.

A more difficult issue is the Medicaid treatment of third-party trusts in which the trustee is granted discretion in making distributions for the beneficiary's support. Putting aside the effect that the UTC may have on this question, the case law concerning such trusts is inconsistent, with some cases holding that the trust assets are an available resource for Medicaid qualification purposes, and others holding that they are not. The cases turn on the court's interpretation of the settlor's intent and thus the outcome of any particular case is largely fact-driven. The UTC should have little, if any, effect on the outcome of these cases, although for several reasons it may help somewhat for those seeking to qualify for public assistance. First, as earlier discussed, the UTC treats support trusts as discretionary, thereby limiting a beneficiary's ability to compel distributions. Second, under a 2005 amendment, the comment to section 814 cites with approval language from the Restatement (Third) to the effect that, in exercising its discretion, a trustee should do so in a manner that avoids disqualifying the beneficiary for public benefits. In a borderline case, the comment to section 814 may help produce a favorable interpretation of the language of a discretionary trust that also includes a support standard.<sup>13</sup>

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<sup>13</sup> Robert T. Danforth, "Article Five of the UTC and the Future of Creditors' Rights in Trusts," 27 *Cardozo L. Rev.* 2551, 2589-90 (2006); also see Richard E. Davis, "Uniform Trust Code and SNTs: Should UTC Be Feared, Embraced or Ignored?," 5 *NAELA J.* 13 (2009).

Again, to the extent that settlor intent drives the outcome, careful drafting will immunize a supplemental needs trust.

**2.4 The Maryland Trust Act.** Unlike the UTC, the MTA distinguishes between support and discretionary trusts. Almost any discretionary provision, however, sweeps the trust into the discretionary trust category under the Maryland law.<sup>14</sup>

Discretionary trusts are subject to Court oversight for trustee abuse of discretion (including the failure to act reasonably in exercising discretion) and the claims creditors can make on discretionary trusts are severely limited:<sup>15</sup>

(a) (1) A beneficiary of a discretionary distribution provision has no property right in a trust interest that is subject to a discretionary distribution provision.

(2) A beneficial interest that is subject to a discretionary distribution provision may not be judicially foreclosed, attached by a creditor, or transferred by the beneficiary.

(b) (1) The creditor of the beneficiary of a discretionary distribution provision created by someone other than that beneficiary has no enforceable right to trust income or principal that may be distributed only in the exercise of the discretion of the trustee.

(2) Trust property that is subject to a discretionary distribution provision is not subject to the enforcement of a judgment until income or principal or both is distributed directly to the beneficiary.

(c) A creditor of a beneficiary may not compel a distribution that is subject to a discretionary distribution provision created by someone other than that beneficiary.

(d) A trust may contain a discretionary distribution provision with respect to one or more but less than all beneficiaries.

(e) If a beneficiary of a discretionary distribution provision has a power of withdrawal created by someone other than that beneficiary:

(1) During the period the power may be exercised, the portion of the trust the beneficiary may withdraw may not be deemed to be subject to the discretionary distribution provision with respect to that beneficiary;

(2) During the period the power may be exercised, the portion of the trust the beneficiary may not withdraw shall be deemed to be subject to the discretionary distribution provision with respect to that beneficiary; and

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<sup>14</sup> Maryland Trust Act § 14.5-103(f)(1) and (w)(2) ("Discretionary Distribution Provision"); § 14.5-103(m)(2) ("Mandatory Distribution Provision"); § 14.5-103(w)(2) ("Support Provision").

<sup>15</sup> Maryland Trust Act § 14.5-203.

(3) During periods in which the beneficiary does not have a power of withdrawal, the trust interest of the beneficiary shall be deemed to be subject to the discretionary distribution provision with respect to that beneficiary.

(f) If a beneficiary and one or more others have made contributions to a trust subject to a discretionary distribution provision, the portion of the trust attributable to the contributions of the beneficiary may not be deemed to be subject to that discretionary distribution provision with respect to that beneficiary, but the portion of the trust attributable to the contributions of others shall be deemed to be subject to the discretionary distribution provision with respect to that beneficiary.

(g) The interest of a beneficiary who is blind or disabled as defined in 42 U.S.C. § 1382c(a)(3) may be subject to a discretionary distribution provision notwithstanding:

(1) Precatory language in the trust instrument regarding the intended purpose of the trust of providing supplemental goods and services to or for the benefit of the beneficiary, and not to supplant benefits from public assistance programs; or

(2) A prohibition against providing food, clothing, and shelter to the beneficiary.<sup>16</sup>

Thus, by the statute – which parallels the *First National* case – a creditor does not reach a discretionary trust in Maryland.

## **2.5 Self-Settled Special Needs Trusts ("SNTs"): The Statutory Safe-Harbor:**

**(d)(4)(A) trusts.** The Omnibus Budget Reconciliation Action of 1993 ("OBRA '93") provides a safe-harbor for a trust without disqualifying beneficiaries for public benefits. 42 U.S.C. § 1396p(d)(4)(A) states:

A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

The most common use of the (d)(4)(A) trust is, of course, to hold a medical injury or other tort recovery awarded to a disabled person. Other possible uses are to hold inheritance, equitable distributions, alimony or child support.<sup>17</sup>

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<sup>16</sup> Maryland Trust Act § 14.5-502. Subsection (g) specifically addresses special needs trusts.

<sup>17</sup> Thomas D. Begley, Jr. and Angela E. Canellos, Special Needs Trusts Handbook, (2010 Aspen Publishers), § 6.02 at 6-18.

### **2.5.1 The Link Between (d)(4)(A) trusts and the Supplemental Security**

**Income (SSI) Rules.** Most states, including Maryland, provide that any individual who qualifies for SSI automatically qualifies for Medicaid. Also, Medicaid is not permitted to have eligibility rules more restrictive than SSI qualification rules. 42 U.S.C. § 1396a(a)(10)(C)(i)(III).

The Social Security Administration publishes the Program Operations Manual System (POMS) which establish the rules for when special needs trusts are or are not counted as an available resource. Consequently, POMS must be taken into consideration when drafting SNTs.

**2.5.2 POMS and Deference.** Courts have held the POMS to have no legal authority but only to be "persuasive."<sup>18</sup> It has been argued that the Social Security Administration and the administrative handbook for its employees have no expertise in trust law and should therefore not be afforded deference.<sup>19</sup> One thing is clear: POMS, or for that matter OBRA '93, was not written by, or for, trust lawyers. This makes drafting difficult.

**2.6 The "Establishment" Issue.** OBRA '93 mandates that a (d)(4)(A) trust is "established for the benefit of such individual (the disabled person) by a parent, grandparent, legal guardian of the individual or a court ..." POMS declares that therefore a (d)(4)(A) trust is ineffective if established by the disabled individual himself or herself or by the person's agent acting under a power of attorney.<sup>20</sup> Given that (d)(4)(A) trusts are designed to hold and administer the disabled person's property, this restriction (arguably from OBRA '93 itself) creates a drafting hurdle. Either a "dry" or "seeded" mechanism must be employed.<sup>21</sup>

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<sup>18</sup> *Davis v. Security of Health and Human Services*, 867 F.2d 336 (1989).

<sup>19</sup> Ron M. Landsman, When Worlds Collide: State Trust Law and Federal Welfare Programs, 10 NAELA J. 25, 39 (2014); Mary F. Radford and Clarissa Bryan, Irrevocability of Special Needs Trusts: The Tangled Web That is Woven When English Federal Law is Imported into Modern Determinations of Medicaid Eligibility, 8 NAELA J. 1, 9 (2012). Mr. Landsman alerted the author of the position of SSA regarding "dry" trusts and the appeal of the South Dakota case. See Footnote 27.

<sup>20</sup> POMS SI 01120.203B(g).

<sup>21</sup> *Id.*

**2.6.1 The "Dry" Trust.** That begs the question of whether Maryland law permits a valid trust to be formed without being funded. The Social Security Administration apparently believes it does.<sup>22</sup> The basis for this holding is because settlor intent controls trust interpretation, including whether a trust exists.<sup>23</sup> Whether this actually reflects Maryland law has been questioned.<sup>24</sup> By statute, of course, unfunded trusts are recognized as valid to receive a legacy.<sup>25</sup> That statute was not abrogated by the MTA. Under the MTA, however, the existence of a trust may be created by the act of funding a trust:

A trust may be created by:

- (1) Transfer of property to another person as trustee during the lifetime of the settlor or by will or other disposition taking effect on the death of the settlor;
- (2) Declaration by the owner of property that the owner holds identifiable property as trustee; or
- (3) Exercise of a power of appointment in favor of a trustee.

This provision is taken verbatim from the UTC. These are permissive ways a trust "may" be created. The Comments for UTC § 401 state that this section tracks the Restatement (Third) approach that a trust is not created until it receives property. Those Comments also state that the methods of creating a trust contained in § 401 are not exclusive.

MTA § 14.5-402 contains the requirements for trust creation. This likewise tracks the UTC (§ 402). MTA § 14.5-402 does not state that a trust is only created upon receiving property:

- (a) A trust is created only if:
  - (1) The settlor has capacity to create a trust;
  - (2) The settlor indicates an intention to create the trust;
  - (3) The trust has a definite beneficiary or is:
    - (i) A charitable trust;

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<sup>22</sup> POMS PS 01825.023 (8/27/03). This is listed on the SSA website as current. This is a regional directive.

<sup>23</sup> *Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church*, 370 Md. 152, 181-82, 803 A.2d 548, 516 (2002).

<sup>24</sup> Landsman, at Note 122, (The POMS state that Maryland does authorize such trusts, citing and relying on *From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church*, 370 Md. 152, 167, 803 A.2d 528, 557-558 (2002), although the court states the opposite: 'A trust [only] exists where the legal title to property is held by one or more persons. "' ) This supports Mr. Landsman's point that the Social Security Administration should not be afforded deference in its opinions.

<sup>25</sup> Est. & Trusts § 4-411(a), *Trusch v. Md. Nat'l Bank*, 32 Md.App. 249, 359 A.2d 564 (1976).

- (ii) A trust for the care of an animal, as provided in § 14.5–407 of this subtitle; or
- (iii) A trust for a noncharitable purpose, as provided in § 14.5–408 of this subtitle; and
- (4) The trustee has duties to perform.

Arguably, a "dry" trust is permitted under the MTA.<sup>26</sup>

The issue of whether a (d)(4)(A) trust may be created "dry" has serious consequences. In a South Dakota case, the SSA determined a trust was not a (d)(4)(A) trust because it was established upon the funding with the settlement proceeds awarded the disabled person. The SSA held, and the U.S. District Court upheld, that the parents were not acting as parents but under their daughter's power of attorney in establishing the trust.<sup>27</sup>

**2.6.2 The "Seed" Trust.** A "seed" trust is authorized by SSA<sup>28</sup>: "A parent, or grandparent may establish a 'seed' trust using a nominal amount of his or her own money ... After that trust is established, the legally competent disabled adult may transfer his or her own assets to the trust or another individual with legal authority (e.g., power of attorney) may transfer the individual's assets into the trust."

Although explicitly permitted by the POMS, does the funding after nominal funding cause any other issue under MTA § 14.5-103(t)? It states:

- (1) "Settlor" means a person, including a testator, that creates or contributes property to a trust.
- (2) "Settlor" includes a person that, with other settlors, creates or contributes property to a trust in which case each such person is a settlor of the portion of the trust property attributable to the contribution of that person except to the extent another person has the power to revoke or withdraw that portion.

In this regard, the MTA definition tracks the UTC definition. Settlor, of course, has meaning to a trust lawyer. POMS defines settlor in a similar fashion: "A grantor (also called a settlor or trustor)

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<sup>26</sup> "Arguably" because it requires that the trustee has duties to perform. Whether a trustee can be said to have "duties" without corpus is problematic.

<sup>27</sup> *Draper v. Colvin*, \_\_\_ F.Supp. \_\_\_, 2013 WL 34772 (D. S.Dakota 2013). It is on appeal. Ron Landsman, of Maryland, is on the amicus brief for NAELA in that case.

<sup>28</sup> POMS SI 01120.203 Bf.

is the individual who provides the trust principal (or corpus).<sup>29</sup> For SSI purposes, and under OBRA'93, the requirement is that the trust must "be established" by certain people or by a court.<sup>30</sup> The SSI rules do not require the person deemed the grantor or settlor to be someone other than the disabled person, it only requires that the person "establishing" the trust be the parent or grandparent. The fact that the disabled individual may be the settlor as to his or her funding does not seem to be an issue.

The formation of a (d)(4)(A) trust may be problematic due to the mismatch of the law of trusts (whether under the MTA, the UTC, or the Common Law), and OBRA '93 and the POMS. Nevertheless, the safest course would seem to be creating a seeded trust in Maryland.

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<sup>29</sup> POMS SI 01120.200B(2).

<sup>30</sup> POMS SI 01120.203. This contemplates that one step is "establishing" the trust and that another step is its funding with the disabled person's assets.