

2018 ASAGA CONFERENCE

Sex, Drugs, and Rock & Roll

Atypical Beneficiary Requests

A review of uncommon beneficiary requests made to trustees, conservators, guardians and agents.

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I. Introduction

fi·du·ci·ar·y (fi-dōō-shē-ěr-ē): n. *“One, such as an agent of a principal or a company director, that stands in a special relation of trust, confidence, or responsibility in certain obligations to others.”*

Latin: fiduciarius, from fiducia – ‘trust’

All fiduciaries¹ and their counsel consider requests for distributions from multiple beneficiaries daily. The vast majority of such requests are standard and follow a semi-predictable pattern. However, just as quickly as the fiduciary believes that they have seen it all, they receive a request that puts them in uncharted waters, often outside of their comfort zone. When we couple unique requests with the evolving laws for items such as marijuana, a fiduciary can quickly become perplexed. Rash decisions by the fiduciary without proper forethought, inaction by the fiduciary, or action contrary to current case law are all avenues which can quickly subject the fiduciary and their ward (as well as the financial assets of both parties) to enhanced scrutiny and potential litigation.

It is especially important for all fiduciaries to have a standard for making distribution decisions, even in cases where guidance may be provided by a trust instrument. Many times a fiduciary must decide for themselves the definition of amorphous and vague trust discretionary

¹ For purposes of these materials, the authors use the terms “beneficiary” or “beneficiaries” consistently throughout the outline. For purposes of brevity, the authors have chosen not to add “protected person”, “ward,” or “principal” in every instance where the terms “beneficiary” or “beneficiaries” is used. It is noted this session and supporting materials are about atypical requests. Therefore, the case law and statutory authority pertaining to a request by a beneficiary, protected person, ward, or principal may differ slightly or greatly depending on the fiduciary relationship of Trustee/Beneficiary, Conservator/Protected Person, Guardian/Ward, and Principal/Agent.

distribution standards such as ‘emergency’ or ‘comfort’. Having a consistent policy and procedure in place ensures all beneficiaries are receiving fair and consistent treatment of their requests. This presentation will begin by looking at case law regarding expenditures from trusts, conservatorships, guardianships and by fiduciaries acting as agents under power of attorney as it relates to non-traditional beneficiary requests. Secondly, it will address the establishment of a framework for evaluating requests, including factors that must be considered by a fiduciary when making such decisions. Case studies will be reviewed throughout this presentation, highlighting real-life requests from beneficiaries such as firearms, fireworks, marijuana, companionship services, and sex change operations or cosmetic/elective surgery. Federal and state law for these atypical requests will be analyzed, different types of fiduciary structures will be considered, and drafting tips are provided. Finally, alternative solutions for opinions and advice will be addressed as well as guidelines for communicating the decision to the beneficiary or protected person. Please note that the word ‘beneficiary’ will be used throughout this discussion as a catch-all for beneficiary, protected person, ward, grantor, etc as applicable.

I. Case Law

Case law is inherently sparse with atypical distribution requests and rulings vary widely. However, the case law that does exist may prove invaluable for a professional fiduciary. For example, prior to a 2004 Minnesota Court of Appeals ruling (*In re Irrevocable Supplemental Needs Trust of Collins*, A04-1018, 2004 WL 2858079 (Minn. Ct. App. Dec. 14, 2004)), the State of Minnesota District Court had denied distributions for a snowmobile and Brittany Spears tickets from a Special Needs Trust while approving a bike and other outings. Trust beneficiary Jennifer Collins was then a teenager with Down Syndrome with a First Party Special Needs

Trust. Her father served as trustee. The Minnesota Court of Appeals reconsidered the District's opinion and wrote "whether Brittany Spears concert tickets are an appropriate expenditure for a 14 year old...requires an exercise of discretion: parents of disabled and non-disabled children are constantly faced with such discretionary decisions.... We conclude that [Mr. Collins] exercised, but did not abuse his 'sole discretion' in providing a child's snowmobile and concert tickets for Jennifer." Note that the "Abuse of Discretion" standard is widely used by courts and that this case may provide a standard to support a fiduciary's approval of unique requests for beneficiaries.

When dealing with distributions from a trust with a discretionary standard for a trustee, *Ewing v. Ruml*, 892 F.2d 168 (2d Cir. 1989) indicates that it is not unlawful for a trustee to distribute the entire remaining principal of a testamentary trust to the sole beneficiary of the trust so he could support his stepchildren (the remainder beneficiaries of the testamentary trust), and not himself because it was a "benefit" to the sole beneficiary to take the funds out of the testamentary trust for tax purposes rather than another inter vivos trust.

While dealing specifically with the treatment of distributions from Pooled Supplemental Needs Trusts, *Lewis v. Alexander*, 685 F.3d 325 (3rd Cir. 2012), may allow for extrapolation for fiduciaries administering disability trusts in general. In this case, the Department of Public Welfare of the Commonwealth of Pennsylvania (the "Department") attempted to require that a pooled trust must meet expenditure requirements supplementary to the federal statute in that "all distributions from the trust must be for the sole benefit of the beneficiary" and "must have a reasonable relationship to the needs of the beneficiary." Further, the Department defined special needs as "items, products or services...[that] assist in and are related to the treatment of the

beneficiary's disability." Thankfully in this case, the court found that pooled trusts cannot be limited solely to the treatment of the beneficiary's disability.

Dealing with a beneficiary's public benefits is a daunting task that all professional fiduciaries will face. It becomes an extremely more challenging task when taking into consideration that these public benefits qualification regulations not only differ from state to state but even from county to county within the same state, especially in the public housing arena. A recent 2015 Massachusetts federal case ruling further confounds this issue. The lengthy decision in *DeCambre v Brookline Housing Authority* (D.Mass, No. 14-13425-WGY, March 25, 2015) holds that, based on the wording of the Department of Housing and Urban Development (HUD) regulations, the Brookline Housing Authority's interpretation that all distributions from a trust are considered income (thus decreasing or eliminating any Section 8 rent subsidy for the beneficiary) is "not unreasonable" – the standard for overturning an agency policy. This case has since been appealed.

As discussed in greater detail later in this presentation, dealing with firearms is a complicated and delicate decision for any fiduciary. Any fiduciary contemplating a firearms purchase should be well versed in **18 U.S.C. § 922(d)**, the federal Firearm Possession Prohibition statute. The fiduciary should also consider "constructive possession" (*U.S. v Booth, et.al.* 111 F.3d 2 [1st Cir. September 1997]) or the availability of access to firearms by the beneficiary, potentially in an unmonitored or unsecured estate asset. Lives can be at stake when a firearms purchase for a beneficiary is weighed. Consider the current James Holmes Aurora Theater shooting case currently in the sentencing phase in Arapahoe County, Colorado. Sandy and Lonnie Phillips, the mother and stepfather of victim Jessica Ghawi, sued the companies that supplied Holmes with ammunition and body armor in 2014. The Phillipses claimed that the

suppliers sold the goods to Holmes over the internet, without ever seeing his face or addressing his state of mind, thus making them negligent. The suit did not ask for damages, but only for an injunction requiring dealers to stop their ‘negligent and dangerous business practices.’ Denver U.S. District Court sided with the dealers and dismissed the case. (*Phillips v. Lucky Gunner, LLC*, No. 14-CV-02822-RPM, 2015WL 1499382 (D. Colo. Mar. 27, 2015)). Of interest, the court also ruled that the dealers are entitled to fees and costs from the Phillipses. The fee award is still pending further judicial review.

Being from Colorado, we would be remiss not to review the use of marijuana (both medicinal and recreational) and its legal complexities. As discussed later in this presentation, marijuana has many positive benefits for beneficiaries and will certainly be a request with which a fiduciary will be faced. University of Denver Sturm College of Law’s Sam Kamin co-authored a review (*Cooperative Federalism and State Marijuana Regulation*, 85 U. Colo. L. Rev. 1105 (2014)) of the complications between state and federal law which is a priceless resource for fiduciaries. Just recently, Colorado’s Supreme Court has ruled that medical marijuana patient Brandon Coats, who was fired by Dish Network after testing positive for marijuana use, has no recourse for losing his job. While Dish Network agreed that Mr. Coats wasn’t “high” on the job, they stressed that they have a federally accepted zero-tolerance drug policy. (*Coats v. Dish Network, LLC*, 2015 CO 44, (June 15, 2015)). Similar such rulings have been decided in the States of California, Montana and Washington.

II. Framework Request Evaluation

Establishing and executing a framework for the evaluation of requests is critical in maintaining consistency and fairness to the beneficiary and to properly document the fiduciary’s

file in the event of discovery. Such framework does not necessarily mean that similar requests from different beneficiaries (or even from the same beneficiary at different times) will result in the same outcome. Each beneficiary or protected person and their unique circumstance and reasoning for the request must be evaluated.

a. Appropriateness for the Individual

With each beneficiary request, one of the first steps taken is the analysis of the appropriateness of the request for the individual. It is helpful if the fiduciary knows the beneficiary and their circumstance well. However, should the fiduciary not be able to personally evaluate the needs of the individual, a case/care manager, trust protector/advisor, investment advisor or CPA may be asked to do so. Oftentimes, a fiduciary may rely on the recommendations from a family member or close friend of the beneficiary. Extra care must be taken to maintain the confidentiality of the beneficiary's protected information and the fiduciary must be careful to never inadvertently violate attorney-client privilege. However there may be times when it is in the best interests of the beneficiary for the beneficiary to waive the attorney-client privilege so that the fiduciary can better do their job to ensure they are meeting the beneficiary's needs. Each of these situations should be evaluated on a case by case basis and, if the decision is made by the beneficiary to waive the attorney-client privilege, then the fiduciary should ensure the beneficiary has been fully advised on what it means to waive the attorney-client privilege and a written waiver should be signed.

i. Identify the Need

Especially when it comes to a unique request, a fiduciary must document all facets of the request and decision making process. One of the most telling pieces of information

in any situation is *who* made the request. If a new “player” suddenly enters the life of the beneficiary, this could be one of the first signs of exploitation or undue influence. As we know, most fiduciaries are employed to prevent the exploitation of a vulnerable population - the aging, disabled or incapacitated. Note that as a fiduciary in Colorado you are a mandatory reporter for potential Elder Abuse (see **C.R.S. §18-6.5-108** in Colorado). The *what* and *why* are equally important factors. Consider this example from a local trust administrator:

A trust beneficiary calls the trustee and requests a sex change operation. Rather than simply denying the request, the trustee began to ask questions. She learned that the trust beneficiary wanted to become a female because he wanted to live on the main floor of his home. The trust officer was surprised to hear this because the trust beneficiary had always lived on the main floor of his trust-owned home. When she talked with him further she learned that he had recently taken in two roommates (both of whom were female) and that they had relegated the beneficiary to the basement. The female roommates told the beneficiary that he couldn't live on the main floor because he wasn't a woman. So, his solution was to have a sex change operation – points to the beneficiary for creative thinking. The trustee evicted the female roommates and the beneficiary was again allowed to live on the main floor of his home without needing an operation.

When the request is made, or how frequently it is made, is another important factor for consideration. One of the best tools a fiduciary has is time. Following an initial conversation regarding a request, a beneficiary may often call to change their mind or rescind the request. Further, there are some beneficiaries that, due to the nature of their disability or incapacity, make requests so frequently that the fiduciary learns to only follow up on the requests that are consistently reiterated. The consistently repeated request becomes the fiduciary's signal that the beneficiary is serious about the distribution.

ii. Relation to Disability

Thankfully, as noted above, *Lewis v. Alexander*, 685 F.3d 325 (3rd Cir. 2012) found that distributions from Special Needs Pooled Trusts cannot be limited to the treatment of one's disability. However, this decision does not mean that the disability of the individual should not be considered when making a decision from any type of fiduciary structure. Consider the following example:

When considering if firearms should be purchased for a beneficiary, a fiduciary should consider the disability or capacity of the beneficiary as applicable. A request from a beneficiary for a gun for "self-defense" who has a mental illness, is unstable and has recently filed a complaint against her mental health provider should be reviewed carefully. Conversely, when a young man with cerebral palsy asks his fiduciary to pay for a rifle so that he can do target shooting with his brother, father and uncle at a shooting range, the response will likely be different.

iii. Recommendation from a Professional

1. Medical professional
2. Social Worker
3. Mental Health Professional
4. Case Manager

An opinion from a professional working with the beneficiary can be a great resource. A medical professional, for instance, has a much different relationship with the beneficiary than a fiduciary and can provide insight into the person's needs. Further, an approval or denial in writing from a professional can go a long way in justifying any expenditure and is highly recommended to properly document the fiduciary's file. As

such, if appropriate, it is recommended that the fiduciary obtain a Health Insurance Portability and Accountability Act (HIPAA) Release so that all of the beneficiary's applicable medical records are available to the fiduciary.

iv. Impact on Public Benefits

A Supplemental Needs Trust's ("SNT") purpose is to protect a person's governmental benefits while still giving them access to the funds held in trust. A fiduciary often finds themselves administering an SNT, or a conservatorship for a person receiving public benefits, or even administering a traditional trust for a beneficiary on public benefits. As such, the primary focus of a fiduciary in these cases should be to maintain these critical benefits that provide income, food, shelter and medical care. As with any request, there must be a comparison of the request to the individual's governmental benefits. As we know, 'one size does not fit all' and 'prices and participation may vary' when it comes to Medicaid. Medicaid offers a multitude of programs, each with different income and resource limits which also vary state to state.

One of a fiduciary's greatest challenges with governmental benefits with atypical beneficiary requests is the differentiation between federal and state laws. For example, marijuana for recreational use is only legal in Colorado, Washington, Oregon and Alaska. At this time, medicinal marijuana is legal in the aforementioned states as well as California, Nevada, Montana, Arizona, New Mexico, Minnesota, Illinois, Michigan, New York, Vermont, New Hampshire, Maine, Massachusetts, Connecticut, Rhode Island, New Jersey, Maryland and Delaware, with many other states currently contemplating its legalization. However, marijuana use is not legal federally. A fiduciary must consider these rules and a beneficiary's reliance on federal benefits such as Section 8 housing or

Food Stamps when deciding to purchase medicinal or recreational marijuana. While it may be legal in the state where the beneficiary lives, by approving the purchase of marijuana a fiduciary may inadvertently make the beneficiary ineligible for a federal benefit. Also of note is that some benefit programs such as Section 8 housing not only vary from state to state, but also from county to county within the same state. Lastly, treatment of trust distributions is further complicated due to the aforementioned ruling and appeal in *DeCambre v Brookline Housing Authority* (D.Mass, No. 14-13425-WGY, March 25, 2015).

v. Trust Language/Ascertainable Standards

Oftentimes a fiduciary encounters a trust document which does not properly define or denote Settlor intent in the discretionary distribution language. Ambiguous terms such as ‘comfort’, ‘manner in which the beneficiary is accustomed to living’, or ‘emergency’ may have widely variable interpretations. Also, how far must a fiduciary research and document when considering ‘outside resources’ before making a distribution? Most problematic can be ‘incentive’ trusts which reward the beneficiary for sobriety (how does a fiduciary test the beneficiary without privacy invasion?), marriage (just the first marriage or do subsequent marriages count?), the birth of a child (physical birth or adoption?), completion of college (trade school or university?), etc. Fortunately, there is some case law and guidance for some of these issues:

1) “Comfort”

- a. “A state of physical ease and freedom from pain or constraint” –

Merriam-Webster

- b. “As equivalent to the ‘station of life’ to which beneficiary is ‘accustomed’” - *Restatement (Third) of Trusts* § 50, American Law Institute, Restatement of the Law Trusts, Volume 2, As Adopted and Promulgated by The American Law Institute at Washington, D.C., May 16, 2001, © 2003 The American Law Institute
- c. *Rock Island Bank v. Rhoads*, supra at 141-142, 187 N.E. 139 (1933)

2) “Emergency”

- a. “An unexpected and usually dangerous situation that calls for immediate action” – *Merriam-Webster*
 - b. “Emergency” is restrictive terminology that “are construed as authorizing distributions only when the described conditions or circumstances arise, and then only to the extent appropriate to alleviate the emergency” *Restatement (Third) of Trusts* § 50 (2003) Comment d(4) on Subsection 2.
 - c. Emergencies fall outside the ascertainable standard as not sufficiently related to health, education support and maintenance. TAM 9044081 (IRS TAM), 1990 WL 700885. See *Restatement (Third) of Trusts* § 50 (2003) Comment d.
 - d. Emergencies are things such as prolonged illness (*Warner v. Trust Company Bank*, 250 Ga. 204, 296 S.E.2d 553 (1982)); but have been defined so far as to be the “general inadequacy of resources and earning capacity” *Application of Sabol*, 20 Misc.2d 112, 191 N.Y.S.2d
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773 (Sup.Ct.1959). See Restatement (Third) of Trusts § 50 (2003)
Comment d.

3) Outside Resources

- a. “It is important to ascertain whether a trustee, in determining the distributions to be made to a beneficiary under an objective standard (such as a support standard), (i) is *required* to take account of the beneficiary’s other resources, (ii) is *prohibited* from doing so, or (iii) is to consider other resources but *has some discretion* in the matter. If the trust provisions do not address the question, the general rule of construction presumes the last of these. Specifically, ...the presumption is that the trustee is to take the beneficiary’s other resources into account in determining whether and in what amounts distributions are to be made, except insofar as, in the trustee’s discretionary judgment, the settlor’s intended treatment of the beneficiary or the purposes of the trust will in some respect be better accomplished by not doing so.” *Restatement of the Law Third*, American Law Institute, Restatement of the Law Trusts, Volume 2, As Adopted and Promulgated by The American Law Institute at Washington, D.C., May 16, 2001, © 2003 The American Law Institute

4) “Manner In Which They Are Accustomed To Living”

- a. *Matter of Estate of McCart* 847 P.2d 184 (Colo.App.1992) – directed the trustee “to maintain, not ascertain, a standard of living calculated

upon a *non-variable* factor”, using financial information cataloging the beneficiary’s expenditures for years prior

Many of these ambiguities, however, may be solved more eloquently by the drafting attorney either in the document itself or via a Settlor Letter of Intent. Fiduciaries often find these Letters of Intent quite helpful in defining not only the discretionary distribution standards in the trust instrument, but also in the true intent and desires of the Settlor. Although precatory, a Settlor Letter of Intent or inclusion of intent into the trust instrument itself will arm the fiduciary (as well as the courts, should their involvement become necessary for reformation or interpretation) with a better understanding of the settlor’s goals. See Appendix, Section 1 for a sample Settlor Letter of Intent.

vi. Financial Plan/Budget

No matter what the request, a fiduciary must always consider the corpus of the beneficiary’s estate or trust, other expenditures (ongoing or otherwise contemplated) of the beneficiary, the request at hand, the overall goals and desires of the beneficiary, and the beneficiary’s estate’s projected longevity. SNTs, for example, are by their very nature meant to be wasting trusts - to be used to enhance the quality of life of their beneficiaries. However, this is not an excuse for a fiduciary to be frivolous about expenditures. Focusing on ‘optimal outcomes’ or long-term financial goals of the beneficiary is imperative for any discretionary decision made by a fiduciary. ‘Optimal outcomes’ are the end results or driving factors desired by the beneficiary as it comes to the management of their funds. Oftentimes these desired outcomes are long term goals such as college tuition, a home purchase or a comfortable retirement. However,

sometimes the desired outcomes are simply annual vacations, material goods or the continued preservation of public benefits. It is highly recommended that that fiduciary know and record these desires at the onset of the relationship with the beneficiary. A sample Beneficiary Profile Form may be found in the Appendix, Section 2. When the fiduciary must deny a beneficiary's request, having these 'optimal outcomes' recorded in the fiduciary's file can serve as a great reminder to the beneficiary of their overall goals long-term versus a potentially frivolous immediate desire. Additionally, by utilizing an estate longevity projection a fiduciary may be able to "let the numbers do the talking" when explaining the reason for denying a particular beneficiary request. Lastly, the tax implications of any distribution must be considered.

b. Sole vs. 3rd Party Benefit

Oftentimes, fiduciaries are required to administer vehicles that are for the sole benefit of their beneficiary. Due to the nature of the individuals served by fiduciaries, our clients are often vulnerable to exploitation. Again, as with any request, the fiduciary has a duty to evaluate *who* is actually benefitting from the request at hand. See *Matter of Estate of McCart*, 847 P.2d 184, 186-87 (Colo. App. 1992) (trustee, who was also a remainder beneficiary, breached his fiduciary duty and abused his discretion by refusing to distribute funds to the current beneficiary so that his share as a remainder beneficiary would be greater).

c. Federal/State Law

Certainly federal and state law must be evaluated with any beneficiary request, but enhanced due diligence by the fiduciary is particularly important when evaluating an atypical beneficiary request. The law surrounding the requests of marijuana, firearms,

fireworks, prostitution and sex change operations vary from state to state. In addition to this variance, many of these areas of the law are constantly in flux.

d. Fiduciary “Values Check”

- i. Personal Experience
- ii. Religious or Moral Context
- iii. Paternalism

Fiduciaries are human; prone to biases and prejudices tempered by their own life experience. As such, every fiduciary must to be aware of their own bias in making a decision, especially when it comes to controversial issues. For example, a fiduciary may come from a background or belief that any sexual activity outside of marriage is immoral. The fiduciary can also easily slip into a paternalistic position of approving or denying a request simply on what *they* think is best. However, the fiduciary has a duty of impartiality not only between beneficiaries (such as in a family trust with multiple beneficiaries), but also to separate their own personal partiality from the decision making process. One option is to have at least two parties involved with every beneficiary request. A case manager or family member may make the request and advocate the desires of the beneficiary. The independent fiduciary can then make the decision based on the information presented and the other components of the framework discussed above. Finally, an opinion of outside counsel is always available when a fiduciary is perplexed or the beneficiary has appealed a denial by the fiduciary and asks that it be reconsidered.

Please refer to Appendix, Section 3 for a sample Beneficiary Distribution Request Form for internal use by the fiduciary.

III. Atypical Requests/Case Studies

Each of the atypical requests below is considered to be a current “hot topic” amongst professional fiduciaries. Public benefits, state and federal laws and possible consequences or liability (i.e. potential litigation) for each atypical request follows.

a. Firearms

Firearms can be beneficial to the owner for many reasons including hunting and personal protection. Hunting may be a source of food or may be a social or familial activity. Many proponents of firearms argue the importance of possession for personal security and individual liberty. Because a beneficiary who needs a fiduciary often feels physically vulnerable, firearm possession may be of utmost importance to them.

That said, the consideration of a firearm for a person with a mental illness or diminished capacity must be considered thoroughly. The ownership of a firearm by a person with mental illness is illegal under federal law. Under 18 U.S.C. § 922(d), it is unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person “has been adjudicated as a mental defective or has been committed to any mental institution.” In addition, 45 of 50 States have laws in re: Possession of Firearms by People with Mental Illness. Not surprisingly, the definition of ‘Mental Illness’ is quite varied from state to

state. When defining ‘Mental Illness’, some states disallow possession of firearms for those who have been adjudicated incapacitated, others look at the adjudication of mental illness or court ordered mental health treatment, and some look at the admittance to a treatment facility for drugs and alcohol. Also, a few states look at the person being found not-guilty of a crime due to reason of insanity.

Though to the best of our knowledge and research, there has not yet been a case brought against a fiduciary for purchasing a firearm for a beneficiary who then committed a crime, one may hypothesize similar circumstances into potential litigation. Please refer again to Section II above for (*Phillips v. Lucky Gunner, LLC*, No. 14-CV-02822-RPM, 2015WL 1499382 (D. Colo. Mar. 27, 2015)).

b. Fireworks

Fireworks have been a long-standing tradition for entertainment on the 4th of July and at many sporting and other recreational events. They can be used as part of a large community event or a small family gathering. They vary from sparklers to large, explosive devices with costs ranging from nominal to very expensive. The state laws of fireworks vary greatly. In fact, they often vary from county to county, especially for rural and suburban residents. One may find the American Pyrotechnics Association (www.americanpyro.com) a useful resource for the laws of each community.

As with firearms, a fiduciary must consider their liability in potential harm to the beneficiary or one of the operators or spectators of the fireworks. A fiduciary must also evaluate the laws in the beneficiary’s community to determine their legality and as the potentiality of the beneficiary’s ineligibility for public benefits (Ex: fireworks displayed

in the yard of a home that is owned by a Public Housing Authority). Lastly, Sole Benefit versus Third Party Benefit must be evaluated as well.

c. Marijuana

Marijuana continues to receive a great amount of attention nationally and locally for the benefits of its use and the changing laws surrounding both medicinal and recreational marijuana. Many sources cite the following benefits of Marijuana:

- Treatment of glaucoma.
- Reversal of the carcinogenic effects of tobacco and improvement of lung health.
- Epileptic seizure control.
- Decreased symptoms of a severe seizure disorder known as Dravet's Syndrome.
- Potential cancer abatement.
- Decrease of anxiety.
- Reduced progression of Alzheimer's disease.
- Easement of multiple sclerosis pain.
- Easement of pain, severity and recurrence of muscle spasms.
- Lessened side effects and increased effectiveness of hepatitis C treatment.
- Treatment of inflammatory bowel diseases.
- Relief from arthritis discomfort.
- Boosted metabolism.
- Improvement in the symptoms of Lupus, an autoimmune disorder.
- Increased creativity in the brain.

It is likely that some of the people served by professional fiduciaries would benefit from the use of marijuana based on the above benefits.

There is growing conflict between how marijuana is treated federally versus the states. To date, only Colorado, Washington, Oregon, Nevada, Maine, Massachusetts and

Alaska have legalized marijuana for both medicinal and recreational purposes. On August 27, 2013, United States Deputy Attorney General James Cole issued a memorandum that announced that the Department of Justice would not be making any moves in Colorado or Washington to prevent the implementation of the laws there to legalize recreational marijuana (Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. Colo. L. Rev. 1105 (2014)). The current practice of the US Department of Justice is to allow the states to enforce their own laws regarding marijuana.

While the direction from the US Department of Justice is helpful to the states that have legalized marijuana in some form, there are still consequences for marijuana users in those states. These consequences need to be carefully considered by the fiduciary when deciding whether or not to approve marijuana expenditures. As noted in Section II above, Sam Kamin, in his essay “Cooperative Federalism and State Marijuana Regulation”, carefully examines the consequences of differing federal and state rules. Employment is one of the most common examples of the collision of federal and state rules - (*Coats v. Dish Network, LLC*, 2015 CO 44, (June 15, 2015)).

Mr. Kamin also considers probation/parole consequences as it relates to this clash between the federal and state rules when it comes to marijuana. If a defendant uses marijuana while on probation/parole it is a cause for re-arrest, and the courts have upheld this outcome. This will continue to be the case until states make specific rules regarding marijuana use for parolees.

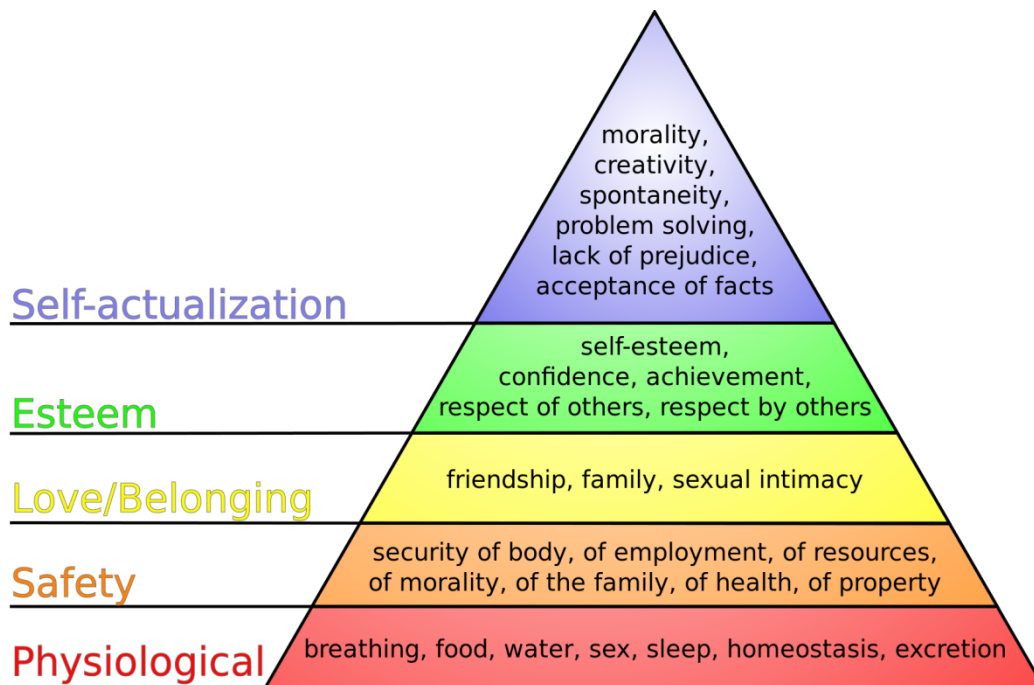
The final consequence Mr. Kamin examines is the eligibility for federal government benefits by recipients in states where marijuana is legal. Public Housing Authorities (the program traditionally known as Section 8) follow the federal regulations and do not allow marijuana use by their recipients regardless of the rules in the individual states. Food stamps eligibility also follows these same guidelines. Couple this with the fact that some states are now moving towards drug testing for welfare recipients and a fiduciary soon realizes how easily their beneficiaries may lose eligibility for government benefits while using marijuana.

Of all of the considerations that a fiduciary must contemplate when weighing the costs and benefits of marijuana for their beneficiaries, the most significant are the consequences for employees and beneficiaries of federal programs. A fiduciary may approve marijuana with the best of intentions and then later learn they have unintentionally rendered the beneficiary ineligible for government benefits or caused the beneficiary to be terminated from their place of employment. Lastly, particular care and consideration must be taken by fiduciaries who are federally regulated (banks/trust companies with national, federally granted trust powers). While their beneficiary may live in a state wherein marijuana use is legal, these fiduciaries are governed by federal law. In such situations, it is not uncommon to contemplate having both a trust administered by a federally chartered trust company, but also a conservatorship for the beneficiary administered by a state-governed fiduciary. Such a structure allows for more flexibility in the approval of certain requests by the conservator, while protecting the trustee against violation of federal law. This structure is also very useful when

considering paying creditors of the beneficiary from the conservatorship while preserving the spendthrift or creditor protection significance of a trust.

d. Companionship Services

Abraham Maslow compiled his ‘Maslow’s Hierarchy of Needs’ in his 1943 paper “A Theory of Human Motivation”. Put simply, this hierarchy of needs is a psychological theory that identifies basic human needs and ranks them from most basic (bottom of the pyramid) to most elevated (top of the pyramid). His theories parallel many other such theories of human developmental psychology. When examining Maslow’s hierarchy of needs below, sex is considered to be as basic a need as breathing, sleeping, food or water. In addition, we all have a desire for touch and companionship. There may be a time when a beneficiary desires the very human need of sexual activity and seeks to find it by hiring a prostitute or visiting a strip club.



Note that prostitution is only legal in a few rural counties in Nevada. For most fiduciaries, the request for prostitution in their state almost always results in a denial of the request as illegal. If a beneficiary requests to go to Nevada or lives in Nevada, the trustee then must examine the consequences of paying for the prostitution, including the vulnerability of the individual and the possibility of sexually transmitted diseases. In our survey of other fiduciaries' practices and our independent research, no known fiduciaries have approved any distributions for prostitution.

Due to the need identified needs and benefits of sexual activity and companionship and the nearly complete prohibition of prostitution, this atypical request certainly deserves the exploration of alternatives. Many people with disabilities are single, lonely and desperate for human touch that is not clinical or medical. Our research indicates that there are online monthly-fee-based services equivalent to Netflix for pornography. Such services may be considered as a cheaper alternative to paying for movie rentals from cable companies at \$8.00-\$10.00/movie. There is another service in which one can pay either for a snuggle consultant (individual service) or to attend a snuggle party (group event). Two such services are The Snuggery and Cuddle Therapy. Each service claims to provide a safe environment to cuddle or touch in a non-sexual way. Finally, other alternative therapies such as massage or adaptive exercise provide an outlet for beneficiaries for touch and interaction with others and have similar positive benefits.

e. Sex Change Operations or Cosmetic/Elective Surgeries

Both sex change operations and cosmetic surgeries can have benefits for those who receive them. In fact, disallowing a sex change operation to someone with gender

dysphoria can cause depression, low self-esteem and difficulty forming social relationships. One of the most recent and famous cases of gender dysphoria may be found in the copious amounts of news coverage surrounding Bruce, now Caitlyn, Jenner. Further, elective surgery such as a breast reduction can eliminate skin irritation and back pain.

In May, 2014, the Obama administration lifted Medicare's ban on sex change operations. And in June, 2014, Massachusetts became the third state (behind California and Vermont) to pay for gender reassignment surgery for Medicaid recipients. If gender reassignment surgery follows the course of many other approved medical procedures, it will likely spread to other states and we will see more and more Medicaid beneficiaries eligible for the surgery as a paid benefit. If a fiduciary is considering such a request, it is important to seek a Medicare and/or Medicaid (as applicable) denial before making the decision to approve or deny a request. Also, the fiduciary should certainly obtain a medical opinion letter advocating for the surgery in order to properly document their files and defend against future potential litigation.

IV. The Decision and its Implementation

- a. If as a fiduciary you're waffling about a decision, consider the following:
 - i. Use of cross discipline advisors or care/case managers to review the request

Fellow fiduciaries often have a similar background and experience and may not be a viable sounding board for atypical beneficiary requests. The use of cross discipline advisors, medical professionals, care/case managers, or even the beneficiary's family members, can be very helpful in doing a 'values check', exploring alternatives and

reviewing legal implications. Again, particular care must be taken so as not divulge any of the beneficiary's non-applicable protected information, thus avoiding the violation of attorney-client privilege. A prudent fiduciary will thoroughly document their files with such opinions in writing.

- ii. Use of outside advisors such as counsel well-versed in SNTs or other areas of the law.

Asking for an opinion letter from outside counsel can be extremely helpful. Separate from a professional already working with the beneficiary, a fiduciary may want to enlist the help of a criminal law attorney, a professor who has studied the area or another independent, third party opinion. As above in (i), a properly documented beneficiary file is crucial.

- iii. Use of court intervention.

For a particularly adversarial beneficiary or difficult decision for a protected person, ward or agent, a fiduciary may want to seek court intervention or instruction from the court. This could include, but not be limited to, utilizing such statutes as the Fiduciary Oversight Act, C.R.S. 15-10-501, et. seq. (in Colorado) or in certain instances (for example in a conservatorship decision), perhaps petitioning the court for “...instructions concerning fiduciary responsibility”. Another option is seeking a Guardian Ad Litem appointment to make recommendations to the Court in a protective proceeding to opine on an atypical request. A Guardian Ad Litem may also be sought where there is a civil action based on the denial of, or seeking approval of, an atypical

request or a request of the court may be made under to “*make such order as it deems proper for the protection of the infant or incompetent person*”(C.R.C.P. 17(c) in Colorado). A Guardian Ad Litem may be able to further research the request, the needs of the party (protected person, ward, beneficiary, etc.) and the implications in the law for the approval or denial of a request. Employing the opinion of another professional such as a Guardian Ad Litem. also puts some distance between the fiduciary and the beneficiary in a particularly difficult situation or may in fact assist the court with a request for instruction. The utilization of court intervention may be able to settle the matter between the fiduciary and the beneficiary, but it also could relieve the fiduciary of most liability of that particular decision and further reduce the chance of, if not totally, avoid potential future litigation surrounding the denial or approval of atypical requests.

- iv. Use of a disinterested party (mediator, etc) to review the situation and give an opinion.

A fiduciary may decide to hire the professional based on the specific nature of the request to give an objective opinion or alternative solution regarding the request. (Ex: Require a hunter’s safety course and recommendation from the instructor that the beneficiary can safely handle a firearm.)

- v. Use of a Trust Protector/Trust Advisor.

A fiduciary may always rely on the advice and input of a Trust Advisor or Trust Protector. Having such fiduciary or non-fiduciary appointments in trust documents can prove very useful in the fiduciary’s decision making process. Individuals acting as Trust Protectors/Advisors are typically advocates for the beneficiary and know the

beneficiary and their ideals and desires better than the professional fiduciary. However, it must be noted that the advice or recommendation of the Trust Protector/Advisor does not typically relieve the fiduciary of any liability for the approval or denial of any distribution request. Please refer to Appendix, Section 4 for sample Trust Protector/Advisor language.

b. If the decision is “no”, practice the “no, but”

There are always alternatives to saying “no” outright when it comes to beneficiary requests. A fiduciary may consider the following options:

- i. Approve a separate expenditure to free up additional personal income for the beneficiary.
- ii. ALWAYS document your decision (as well as the due diligence performed) in writing.
- iii. Give a thorough explanation for the ‘why’ of the denial. Cite the law or trust document if applicable.
- iv. Educate the beneficiary about your appeal process.

V. Summary

Fiduciaries face a daunting task when considering unusual expenditures. We must balance the needs of the beneficiary with state and federal law as well as the liability and legal consequences for both the beneficiary and the fiduciary themselves. The equilibrium of these differing interests and risks can create a challenge that must be approached with creativity, understanding, discretion and thorough due diligence. In the end, our beneficiaries have the right

to access Sex, Drugs, and Rock & Roll; but as fiduciaries, we must proceed with proper vigilance and care when considering such distributions.
