Special Needs Trusts

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Updates on Special Needs Trust Administration

Michelle Lapointe, Esq., Partner

LaPointe & Days LLC

with

PLAN of MA & RI

Joan McGrath, Executive Director

Kathy Vitello, Director of Operations

of MASSACHUSETTS and RHODE ISLAND, INC.

Presenter

Attorney Michelle B. LaPointe graduated from Boston University and Northeastern University School of Law. She was admitted to the Massachusetts bar and joined the firm of Wade Horowitz in December 2004. In January 2011, Attorney LaPointe was named partner of Wade Horowitz LaPointe LLC.

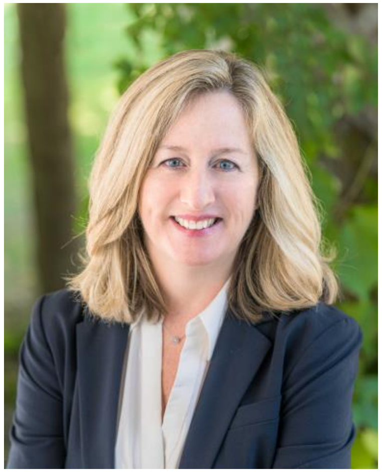
Before attending law school, Attorney LaPointe worked on several local, state, and federal political campaigns, served on the board of the LGBT Political Alliance of Massachusetts, and she worked at the Massachusetts chapter of the Alzheimer's Association.

Attorney LaPointe is a member of the National Academy of Elder Law Attorneys and speaks regularly on issues surrounding long term care planning with a focus on special needs trusts. Attorney LaPointe wrote the chapter dedicated to Estate Planning and Elder Law in GLAD's 2012 publication TRANSGENDER FAMILY LAW.

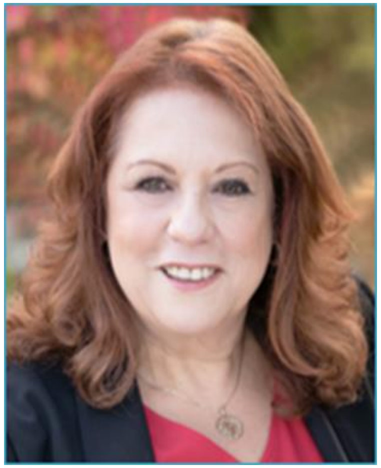
Attorney LaPointe was named a Rising Star in Boston Magazine's annual SuperLawyers issue in 2013, 2014, 2015 and 2016. She serves on the Board of Directors of Central Boston Elder Services, a non-profit agency providing services to help seniors throughout Boston remain in their homes.

In 2019, Attorney LaPointe was appointed by the Governor to serve on the Massachusetts Commission on LGBT Aging. In her free time, Attorney LaPointe volunteers for Community Servings, delivering meals to individuals and families in Boston who suffer from life-threatening illnesses.

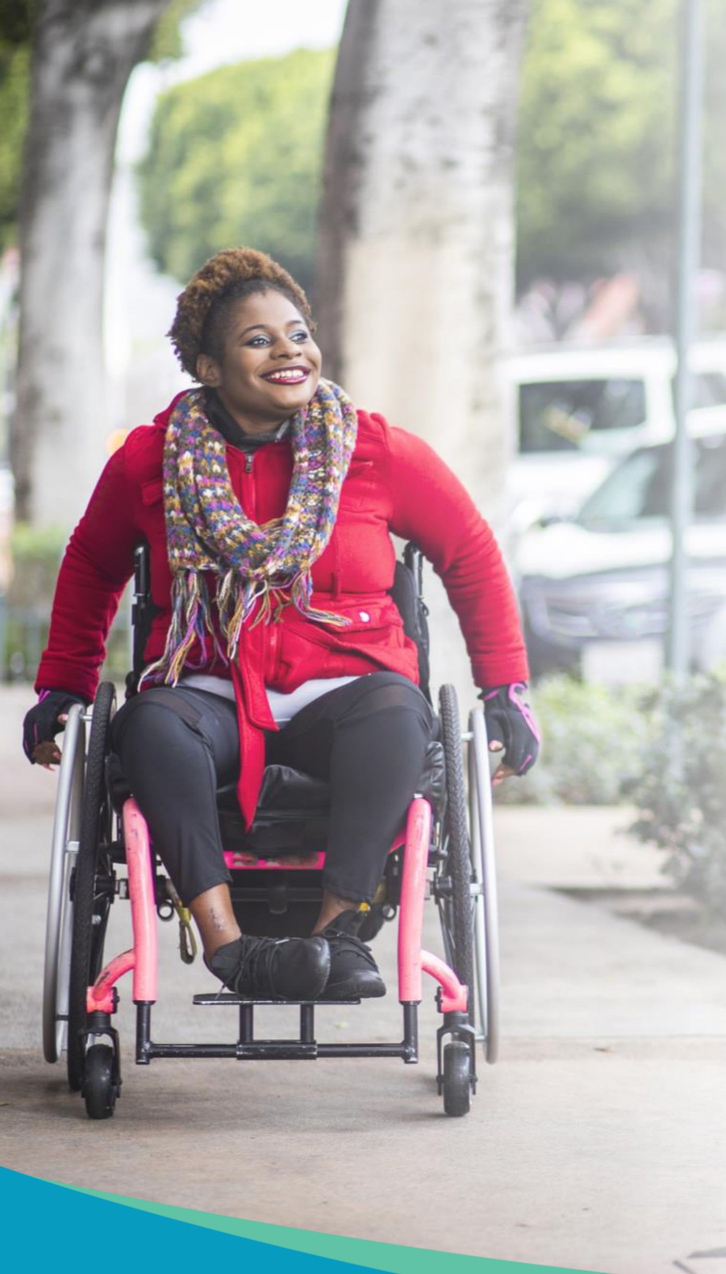
Presenters



Joan McGrath, Executive Director, has more than 25 years of experience in professional accounting and finance, and has been with PLAN since 2009. Prior to assuming the role of executive director, Joan's was Director of Finance and Administration for PLAN. She has been an auditor with a "big four" public accounting firm, where she focused on high growth, emerging business clients. She also led her own private consulting practice, where she worked with nonprofits, service organizations, and venture capital startups. Joan earned her Bachelor's degree in Accounting from Boston University's Questrom School of Business.



Kathy Vitello PLAN, Director of Operations, has been with PLAN since 2013. Prior to assuming the role of Director of Operations in February 2020, Kathy was Director of Beneficiary Services from 2018-2020 and has been a PLAN Service Coordinator since 2013. Kathy earned her Bachelor's degree in Applied Mental Health from UMASS, Amherst and her Associate's degree in Mental Health from Northern Essex Community College. Kathy is certified in Suicide Prevention in Older Adults, Mental Health and Aging from Institute for Geriatric Social Work, BU and Thanatology (scientific study of death and dying).



Topics Covered

- 65 and Over Update
- Reduced Timeline for Trust Windups/Closings
- Standalone Third Party & (d)(4)(A)
- Inherited IRAs and the Secure Act
- HOTMA

What's New at PLAN

- **65 and Over Update**
  - March 1, 2024: New Deadline for individuals 65 and over to set up a Special Needs Pooled Trust.

- **Reduced Timeline for Trust Windups/Closings**

- **Standalone Third Party & (d)(4)(A)**
  - PLAN offers Trust Administration and Social Services for **both** Standalone Third Party and (d)(4)(A).

Standalone Third Party and (d)(4)(A) Trusts

- PLAN has developed a criteria and process for taking on more Standalone Third Party and (d)(4)(A) Trusts
  - We will review the trust to be sure that it is drafted in a way that will be appropriate for PLAN to administer.
  - The primary goal is to ensure that all trusts can be administered efficiently by PLAN.
  - For example, it would be too difficult for PLAN to submit every proposed distribution to a committee of friends and family for a particular beneficiary.
  - Efficiency and uniformity among trusts.
  - We have a list of preferred trust terms that we can share.
  - Can work with you to make amendment

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Standalone Third Party and (d)(4)(A) Trusts (continued)

- PLAN will also screen the beneficiary to be sure that they have a firm understanding of the beneficiary's needs and that the case management can step in as soon as PLAN becomes trustee without any gap in care and attention.
- Finally, PLAN will review the trust assets with their fiduciary, Webster Bank, to be sure all assets either fit Webster's management portfolio, or can be migrated into appropriate investment vehicles in their portfolio.

HOTMA Treatment of Trust Distributions

Old Rule:

- Came from DeCambre decision.
- Which was overturned on appeal, but HUD rules were not updated.
- All distributions from an SNT were countable income except certain exclusions, including:
  - Distributions for medical expenses
  - Nonrecurring expenses

HOTMA Treatment of Trust Distributions

New Rule:

- Effective January 1, 2024
- Codified at 24 CFR 5.609(b)(2)
- Income does not include distributions of principal from a Special Needs Trust

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HOTMA

- Effective date is January 1, 2024
- Rule change to income countability at 24 CFR 5.609(b)(2)
- Rule change will clarify that countable income does not include distributions of principal from a trust.
- PLAN will be amending the trusts to make clear that all distributions are of principal only. This will relieve beneficiaries of having to provide complex trust accounting information to demonstrate that a distributed dollar is from principal, not income.
- Next, I hope that the HUD manual will be updated to reflect this change, as we know most housing authorities rely on the manual and do not refer to the regs.
- In the meantime, it will fall on us elder law attorneys to educate housing providers on the new rules.

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Why consider naming Third Party Special Needs Trust as a beneficiary of your IRA or Qualified Retirement Plan?

Often, retirement assets represent a major portion of an individual's wealth. As such, you want some or all of these moneys to be allocated to your beneficiary with special needs to ensure that their care will continue and their needs will be met during their lifetime.

What are the benefits of naming a Third Party Special Needs Trust as beneficiary of your IRA or Qualified Retirement Plan?

If you name the special needs child as the direct beneficiary, this could compromise access to needs-based benefits for the beneficiary. Naming the Trust allows your beneficiary to maintain eligibility for needs-based benefits while allowing the Trustee to use the funds solely for items and services that enhance the quality of the beneficiary's life. Naming the Trust as beneficiary may also protect against Medicaid claims.

What are the tax considerations of naming a Third Party Special Needs Trust as beneficiary of your IRA or Qualified Retirement Plan?

By naming the Third Party Special Needs Trust as beneficiary of your IRA or Qualified Retirement Plan, you are able to spread out the taxation of these moneys over the lifetime of the special needs beneficiary. This could reduce the overall tax burden of the IRA or Qualified Retirement Plan, as those assets are typically taxed as ordinary income.

Thank You

Highlights of
Final Rule Implementing Sections 102, 103, 104 of HOTMA

The Final Rule implementing Sections 102, 103, and 104 of the Housing Opportunity Through Modernization Act of 2016 (HOTMA) delivers important benefits to tenants and reduces administrative burdens for public housing agencies (PHAs), multifamily housing owners (MFH owners), and participating jurisdictions. The highlights of the Final Rule are outlined below.

Section 102: Income Reviews

- *Fewer Interim Reexaminations*: HOTMA creates a 10% adjusted income increase/decrease threshold for conducting Interim Reexaminations, and in most cases requires that increases in earned income are not processed until the next Annual Reexamination, allowing families to keep more of their earnings before receiving a rent increase. The new requirements should lead to fewer Interim Reexaminations overall, alleviating burden for both participants and PHAs.
- *Streamlined Verifications*: Several provisions will streamline the verification process for housing providers.
  - *Adults Only Need to Sign Consent Form Once*: HOTMA revises the required consent form that all adult household members sign, allowing them to sign the form only once instead of annually.
  - *Use of Income Determinations from Other Programs*: HOTMA allows PHAs to use income determinations made under other federal benefits programs for reexaminations.
  - *Review of EIV Not Required at Interim Reexamination*: HOTMA eliminates the requirement for PHAs to use EIV to verify tenant employment and income information during an interim reexamination, significantly reducing administrative burden.
- *Increased Standard Deduction for Elderly/Disabled Households*: HOTMA increases standard deductions for families with a head, co-head, or spouse who is elderly or a person with a disability.
- *Additional Income Exclusions:* The rule codifies additional income and asset exclusions, including:
  - Amounts received from Medicaid or other state/local programs meant to keep a family member with a disability living at home
  - Veterans' aide and attendant care
  - Distributions of principal from non-revocable trusts, including Special Needs Trusts.
- *Threshold for Claiming Medical/Disability Expenses Increased*: HOTMA increases the allowance for unreimbursed health and medical care expenses from 3% of annual income to 10%, phased-in over two years.
- *Higher Threshold for Imputing Asset Income*: HOTMA raises the imputed asset threshold from $5,000 to $50,000, incentivizing families to build wealth without imputing income on those assets.

- *Hardship Relief*: HOTMA provides hardship relief for expense deductions, lessening the impact of the increased threshold for medical expenses. HOTMA permits PHAs to grant hardship relief to families unable to pay rent because of unanticipated medical/disability expenses and families who are no longer eligible for the childcare expense deduction.

Section 103: Public Housing Income Limit

- Public Housing Income Limitation: HOTMA imposes continued program participation limits for families exceeding the statutory income limitation in the Public Housing program, also known as the "over-income" provision.

Section 104: Asset Limits

- *Asset Limitation*: HOTMA imposes a $100,000 asset limit for eligibility and continued assistance. Families are also ineligible for assistance if they own real property suitable for occupancy. PHAs have the option of delaying enforcement/termination for up to six months if the family is over the asset threshold at the time of annual reexamination.
- *Exclusion of Retirement and Educational Savings Accounts*: Retirement accounts and educational savings accounts will not be considered a net family asset. This is a major benefit to families, incentivizing savings for important life milestones and opportunities. This will also provide significant administrative relief to PHAs by allowing them to stop verifying and calculating these assets altogether.
- *Self-Certification of Assets under $50,000*: HOTMA allows self-certification of net assets if estimated to be at or below $50,000. This will be a time-savings for families and lower administrative burden for PHAs recertifying income.

Cross-Cutting

- *Adjustments for Inflation*: Deductions and the asset limitation will be adjusted for inflation annually, ensuring that deductions do not lose value over time and that families are able to build more wealth without losing program assistance. The current deduction amounts have never been adjusted.

OFFICE OF HOUSING

Office of Multifamily Housing Programs

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Background and Implementation of the Housing Opportunity Through Modernization Act of 2016 (HOTMA) Final Rule

Background

The Housing Opportunity Through Modernization Act (HOTMA) was signed into law on July 29, 2016, amending many aspects of Multifamily Housing programs (as well as programs administered through the Offices of Public and Indian Housing and Community Planning and Development). HOTMA was intended to streamline processes and reduce burdens on housing providers. On September 17, 2019, HUD issued a proposed rule to update its regulations according to HOTMA's statutory mandate. The final rule, published on January 9, 2023, considers public comment received on the proposed rule and provides additional guidance for implementing Sections 102, 103, and 104 of HOTMA.

Section 102: Changes requirements related to income reviews for the Public Housing, Housing Choice Voucher (HCV), and Section 8 Project-Based Rental Assistance (PBRA) programs.

Section 103: Modifies the continued occupancy standards of Public Housing residents (***does not apply to Multifamily Housing programs***).

Section 104: Sets maximum asset limits for eligibility and continued assistance in the Public Housing, HCV, Section 8 PBRA programs.[1]

Which Programs Will Be Affected by the Final Rule?

The Section 8 PBRA (including RAD), Section 202/811 PRAC, 202/8, 202/162 PAC, Senior Preservation Rental Assistance Contract (SPRAC), and Section 811 Project Rental Assistance (811 PRA) programs will see changes due to HOTMA.

Questions?

For more resources and information about this final rule, please visit the MFH HOTMA Webpage or reach out to MFH_HOTMA@hud.gov with specific questions

What Are Some Key Changes to Multifamily Housing Programs?[2]

- ***Definitions*** – HOTMA amends the definitions of family and earned income.
- ***Enterprise Income Verification (EIV)*** – HOTMA states that owners are no longer required to use EIV to verify tenant employment and income information during an interim reexamination.
- ***Hardship Relief*** – HOTMA creates hardship relief provisions for childcare, health & medical care, and attendant care & auxiliary apparatus expense deductions.
- ***Imputed Asset Income*** - HOTMA raises the imputed asset threshold from $5,000 to $50,000 (adjusted annually for inflation).
- ***Income & Asset Exclusions*** – HOTMA codifies additional income and asset exclusions.
- ***Income Reviews*** – HOTMA creates a 10% adjusted income increase/decrease threshold for conducting Interim Reexaminations.
- ***Mandatory Deductions*** – HOTMA increases the elderly/disabled family deduction to $525. The dependent deduction *and* the elderly/disabled family deduction will be adjusted for inflation on an annual basis.
- ***Self-certification of Assets*** – HOTMA permits owners to accept self-certification of net assets if estimated to be equal to $50,000 (adjusted for inflation on an annual basis) or less.

Final Rule Effective Date & HOTMA Implementation

All provisions for Multifamily Housing programs will become effective on January 1, 2024. **Owners must implement the revised regulations for all tenant certifications of income effective January 1, 2024 and after. Additional guidance will be forthcoming about the timing of submitting January 1, 2024 certifications to TRACS.**

Additional stakeholder guidance in the form of a joint PIH/MFH housing notice, webinars, and other implementation assistance will be published in the coming months. Please refer to the HOTMA MFH Webpage for all new information or if you would like to join the Office of Housing's mailing list.

[1] Does not apply to Section 202/8, 202/811 PRAC, 202/162 PAC, 811 PRA, or SPRAC programs

[2] Refer to the HOTMA final rule for all programmatic changes.

HOTMA Final Rule Published in the Federal Register in February 2023 (http://www.govinfo.gov/content/pkg/FR-2023-02-14/pdf/2023-01617.pdf)

HOUSING OPPORTUNITY THROUGH MODERNIZATION ACT (HOTMA) RESOURCES

HUD finalized HOTMA rulemaking in 2023 (https://www.govinfo.gov/content/pkg/FR-2023-02-14/pdf/2023-01617.pdf) to put Sections 102, 103, and 104 into effect through revisions to HUD's regulations found in 24 CFR Part 5 and 24 CFR Part 891.

- **Section 102** addresses income reviews, including the frequency of income reviews and revises the definitions of income and assets.
- **Section 103** is not applicable to multifamily housing programs.

- **Section 104** sets asset limits for the Section 8 and Public Housing programs. Asset limits do not apply to the Section 202/8, Section 202/162 Project Assistance Contract (PAC), 202/811 Project Rental Assistance Contract (PRAC), Senior Rental Preservation Assistance Contract (SPRAC), or the Section 811 Project Rental Assistance (PRA) programs.

Fact Sheet

A one-page summary of the key HOTMA changes to Multifamily Housing programs can be found **here** (https://www.hud.gov/sites/dfiles/Housing/documents/HOTMA_One_pager.pdf).

HOTMA Talking Points and Q&A for Multifamily Programs can be found **here** (https://www.hud.gov/sites/dfiles/Housing/documents/HOTMA_Talking_Points_Multi

Get Ready!

The effective date of the HOTMA provisions will be **January 1, 2024**. Owners may not implement these provisions prior to their effective dates.

Implementation Notice *(Coming Spring/Summer 2023!)*

The Offices of Multifamily Housing and Public and Indian Housing will publish a joint supplemental notice in Spring/Summer 2023 to provide comprehensive implementation instructions to Multifamily Owners and Public Housing Agencies (PHAs).

For more information about the applicability of HOTMA to PHAs, click here (https://www.hud.gov/program_offices/public_indian_housing/hotmaresources).

HOTMA Webinars

The Office of Multifamily Housing will publish a pre-recorded webinar to this page introducing stakeholders to

Background

Updates to TRACS and HUD Forms

The Office of Multifamily Housing will be updating the Tenant Rental Assistance Certification System (TRACS) and HUD forms frequently used by owners/agents and HUD (e.g., Form HUD-50059, Form HUD-50059A, Form HUD-9887/9887A, Form HUD-9834, Model Leases, etc.) to conform with HOTMA's requirements.

Check the **TRACS webpage** (https://www.hud.gov/program_offices/housing/mfh/trx/trxsum) for additional details on systems updates.

Want to Stay Informed?

Please subscribe to the **Office of Housing's mailing list** (https://public.govdelivery.com/accounts/USHUDFHA/subscriber/new).

Have a Question?

Please send your questions to MFH_HOTMA@hud.gov (mailto:MFH_HOTMA@hud.gov)

Agency

Resources

U.S. Department of
Housing and Urban Development

451 7th Street, S.W., Washington, DC 20410
T: 202-708-1112
TTY: 202-708-1455

Find a HUD office near you (/localoffices)

EIV Enterprise Income Verification

PBRA Project Based Rental Assistance

SPRAC Senior Preservation Assistance Contract

PHA Public Housing Authority

RAD Rental Assistance Demonstration

PIA Privacy Impact Assessment

TRACS Tenant Rental Assistance Certification System

PLAN OF MASSACHUSETTS AND RHODE ISLAND
STAND ALONE TRUST GUIDELINES

Trust Provision	Preferred Components of Provision
Trustee Authority to Make Administrative Amendments	Includes authority to make amendments to modify trust to meet objectives of supporting the beneficiary. Includes authority to make amendments to conform to benefits laws, regulations and sub-regulatory guidelines. **Note: Broad trustee amendment powers can, in most cases, be used to cure trusts that do not meet the below preferences.**
Payment of Professional Trustee's Fees	Allows payment of trustee's fees for services provide, either subject to a published fee schedule or not. Permits trustee discretion to pay fees to tax advisors and investment advisors for investment services, subject to a published fee schedule or not.
Trustee Authority to Hire Professionals	Specifically to allow for services to beneficiary, both from PLAN staff and external support services (including, but not limited to social workers, care/companionship providers, therapy and medical providers). Specifically to allow for advisors and support services to trustee (including, but not limited to accountants, attorneys).
Trustee Authority to Resign or Appoint Successor	Trustee must be able to resign without assent of beneficiary or any third party. Trustee must be able to appoint an appropriate successor in the event of resignation.
Trustee to Serve Alone	No requirement for a co-trustee. Trustee does not need to rely on obtaining the resignation or declination by a named trustee or co-trustee.
Trustee Liability Protection	Trustee shall be protected from liability for any action or omission made in good faith. PLAN shall be fully released of liability for actions and omissions of past trustees. Outgoing trustee shall provide accounting of trust administration through the end of trustee's service.

Trustee Authority to Decant	Explicit authority to decant to a (d)(4)(A) trust or other appropriate special needs trust for the sole benefit of the beneficiary. Trust is in conformity with SSA POMS rule SI 01120.199 regarding early termination or any state law related to decanting. Massachusetts first party trusts must include decanting language conforming to requirement to report to MassHealth pursuant to early termination rules.
Trustee Not Subject to Oversight of Trust Protector or Trust Advisors	No beneficiary or third party shall have the authority to remove the trustee. Trustee shall have sole discretion with regard to investments and distributions, without oversight or direction from beneficiary or third parties.
First Party Trust Taxed as Grantor Trust	If trust is already funded and administered, must have been taxed to beneficiary as grantor trust. Explicit language identifying trust as a grantor trust. Trust language shall include authority of trustee to distribute income, accumulate income and/or other grantor trust powers in conformity with Internal Revenue Code s. 672 that do not disrupt benefits (regardless of whether the trustee will intend to exercise these powers).
Third Party Trust Taxed as Non-Grantor Trust	If trust is already funded and administered, must have been taxed to beneficiary as a non-grantor trust. Explicit language identifying trust as non-grantor trust.
Trustee Discretion to Accumulate Income	Trustee must have explicit authority to accumulate undistributed income.
Trustee Discretion to Characterize Distributions as Income or Principal	Trustee must have explicit authority to exercise discretion as to whether to characterize trust property as income or principal for income tax and investment purposes.
Trust With Inherited IRA to Allow Maximum Stretch Out of Minimum Required Distributions	Trust shall conform to any guidelines or regulations related to required minimum distributions (including the SECURE Act).
Broad Trustee Investment Powers	Trustee must have broad investment powers. Trust should include explicit language referencing statutory powers, where appropriate.
Trust Situs	Trust must specify situs under Massachusetts or Rhode Island governing law.

	Trustee should have authority to change trust situs, if appropriate.
Trustee Authority to Make Distributions that May Interrupt Public Benefits	Trustee shall not be explicitly restricted from making distributions for housing or food. Trustee shall have the authority to make a distribution that will interrupt benefits, if the trustee determines in their sole and absolute discretion that such distribution is in the best interest of the beneficiary.
Trust Shall Not Hold Any Interest in Real Property	Trust shall not be current owner or future grantee of any interest in real property.
Robust Spendthrift Provision	Prohibits voluntary and involuntary transfer of beneficiary's interest. Makes explicit reference to "spendthrift" restrictions.
Required Accountings to Appropriate Parties	Accountings shall not be required more frequently than annually. Trustee should not be required to provide an accounting to any party other than the beneficiary and/or their legal representative (eg for third party trust, accountings to donor are not required). Massachusetts first party trusts should include language requiring accountings to MassHealth, if appropriate, pursuant to regulations.
Identifiable Remaindermen	If a second trust is an ultimate beneficiary of trust assets, that trust must be provided for review. If remaindermen are identified by class (eg donor's issue by right of representation), names, addresses and relationship of all class members must be provided by separate attachment or appendix.