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SNT Planning: A Family Plan

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Table of Contents

- I. Introduction
- II. Overview
- III. Special Needs Trust – Defined
- IV. Core Roles in a Special Needs Trust
- V. Ethical Duties – Drafting Attorney
- VI. Ethical Duties – Representing Trustee
- VII. Duties of the Trustee
- VIII. Practical Considerations
 - a. The Needs of the Beneficiary
 - b. The Goals of the Beneficiary
 - c. The Role of Family and Friends
 - d. Reliability of Trustee
 - e. Limitations of the public benefits programs and alternative means of meeting Beneficiary’s needs
 - f. Remaindermen(persons) and the rest
- IX. Tools to find balance
 - a. Flexibility
 - b. Purpose and Intent Statement
 - c. Consult and Inform Beneficiary
 - d. Annual Meeting
 - e. Waiving or limiting the duty of accounting
 - f. Providing for exhaustion of assets
 - g. Waiving duty to remaindermen(persons)

- h. Letter of Intent
- i. Trust Protector/Advisor

I. Introduction

In re Thompson¹ is a story of sibling rivalry and trust administration that highlights various issues including conflicts of interest, trustee duties, and the role of family members in trust administration. It is a great case study to highlight the issues this paper will explore.

Eleanor Thompson died on February 8, 2014, leaving a will that divided her estate in equal shares among her five children. Provided, however, that Gary Jones's, her son's, share go in trust. The trust provided the following HEMS and "well-being" distribution standard--"...provided that GARY has proven to the satisfaction of my Trustee, in my Trustee's sole and absolute discretion, that GARY is and remains alcohol and drug free, capable of holding employment, and capable of making responsible financial decisions."

His brother, James William Thomson Caliendo, was appointed trustee. The Orphan's Court was supplied with evidence of a "tumultuous relationship" between the brothers. In fact, James only provided a subsistence level of support for Gary. The Orphan's Court *did not* remove James because there was no one else willing to serve. Instead, the court ordered that James make certain distributions of which James complained abridged his discretion as trustee.

Gary acknowledged his substance dependency at trial but also provided testimony that he successfully completed a rehab program. In fact, in 2018, he submitted three UA tests for drug and alcohol that came back negative. The Orphan's Court made its decision based on Trustee's failure to inquire into beneficiary's "dire financial" circumstances and thought he could survive on less than \$24,000.00 per year. James challenged the Orphan's Court on several bases.

¹ In re Thompson, 2020 Pa. Super. Unpub. LEXIS 2032; 237 A.3d 1075; 2020 WL 3440529.

James complained that the court's order invaded his duty to the remaindermen of Gary's trust who were Gary's children. The court dismissed that argument saying that the state doctrine of impartiality and balance of successive interests did not apply because the trust was a purely discretionary trust per the Restatement Third of Trusts.

James further contended that the Orphan's Court's order impinged on his powers as trustee insofar as Gary was able to choose his own health insurance. The appellate court, however, pointed out that the trust imposed a duty to provide the same. Further, the court recognized that it was Gary's individual right to direct his healthcare. The Orphan's Court's order simply ordered that such be provided in compliance with trust terms.

James further challenged the Orphan's Court's order mandating that he pay, as trustee, Gary's outstanding IRS debt. He alleged that this order was worked against his discretion as trustee as provided under the trust. The court reasoned, however, that such distribution was reasonable, as the debt was incurred because of Gary's inheritance of an IRA and he had no other means to pay it. Further, withholding a distribution for payment of that debt would not help him attain financial responsibility as required by the trust.

Nevertheless, the appellate court found that the court ordered \$5,000 monthly payments to Gary from the trust upon his submission of a quarterly drug and alcohol test improperly encroached upon James' discretion as trustee to determine the appropriate distributions to provide for Gary's maintenance, support, and well-being—whether it be more or less— following a successful drug and alcohol test. The dissent, however, noted that it did not find it an abuse of discretion for a trial court to provide steps to bridge the gap between James and Gary.

II. Overview

As special needs trust practitioners, we often connect with clients and their love and concern for themselves² or their child, parent, sibling or other loved one. We are confronted with the realities of their lives, social networks, finances, physical and mental capabilities, and certainly their families. At the core of every special needs plan is the beneficiary's³ ability to either provide for their own care or have care be provided for them in the hopes to maximize the beneficiary's quality of life. Beyond the role family members play in an estate plan like trustee, trust protector, trust advisor, guardian, agent under powers of attorney, family members play a core role in caregiving generally. According to a 2020 AARP and National Alliance for Caregiving Report, having provided care to an adult or child with special needs in the last 12 months, more than 1 in 5 Americans (21.3 percent) are caregivers totaling 53 million adults in the United States.⁴

Figure 1. Prevalence of Caregiving by Age of Care Recipient, 2020 Compared to 2015

	2020 Prevalence	Estimated Number of U.S. Adults Who Are Caregivers	2015 Prevalence	Estimated Number of U.S. Adults Who Are Caregivers
Overall	21.3%*	53.0 million	18.2%	43.5 million
Caregivers of recipients ages 0-17	5.7%*	14.1 million	4.3%	10.2 million
Caregivers of recipients ages 18+	19.2%*	47.9 million	16.6%	39.8 million
Caregivers of recipients ages 18-49	2.5%	6.1 million	2.3%	5.6 million
Caregivers of recipients ages 50+	16.8%*	41.8 million	14.3%	34.2 million

* Significantly higher than in 2015.

Id. It is this author's proposition that special needs trust planning must assess the role family members will play in various phases of the plan and the beneficiary's life to ensure the beneficiary's quality of life and care. This paper, therefore, will explore core roles in a special

² 42 U.S.C. 1396p(d)(4)(A) was amended by "21st Century Cures Act" (P.L. 114-255) adding "the individual" or beneficiary as permissible settlor of a first-party special needs trust.

³ Throughout this paper, the term "beneficiary" will be used to refer to the beneficiary of a special needs trust.

⁴ AARP and National Alliance for Caregiving (NAC) (September 19, 2021), Caregiving in the U.S. 2020, available at <https://www.aarp.org/content/dam/aarp/ppi/2020/05/full-report-caregiving-in-the-united-states.doi.10.26419-2Fppi.00103.001.pdf>.

needs trust, duties of the drafting attorney, duties of the trustee, common concerns in trust drafting and administration, and tools to protect the goals important to the special needs trust's client (who may not be the beneficiary) and the beneficiary while navigating family dynamics.

III. Special Needs Trusts – Defined

Special Needs Trusts (SNTs) are tools used to maximize an individual's eligibility for public benefits programs like Supplemental Security Income (SSI) and Medicaid by placing assets and/or income into a trust that is treated as exempt resource or asset that is not counted—most often we are concerned about Medicaid and Supplemental Security Income (SSI) eligibility. Generally, the trustee will supplement and not supplant what public benefits provide. Knowing the means tested programs' rules and treatments of assets of a beneficiary is critical to providing a continuum of care for the trust beneficiary, as each program has its own specific rules and guidance.

a. D4A Self-Settled Trust (Remember - not a 3d Party)⁵

A D4A Self-Settled Special Needs Trust is a trust that establishes title to the **trust beneficiary's assets** and resources to create eligibility for means tested or needs-based benefits like SSI and Medicaid and provides for payback to Medicaid. To be a self-settled special needs trust, a trust must:

“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

⁵ This notation is key in SNT planning, as First Party SNTs require payback provisions to Medicaid. Significant time must be spent in learning trust drafting requirements, provisions, public benefits programs, and many other issues to competently draft and administer SNTs.

assistance paid on behalf of the individual under a State plan under this subchapter.” 42 USC 1396p(d)(4)(a).⁶

b. Third-Party Special Needs Trust

A third-party special needs trust uses **the assets and resources of an individual who is *not* the beneficiary of the trust**. A properly drafted third party special needs trust does not require the repayment or payback to Medicaid. Further, this kind of special needs trust may be an *inter vivos* trust or testamentary trust, allowing the testator or settlor the ability to craft trust terms, including distribution language, succession of management, and designation of remainder beneficiaries.

The distinction between a first-party and third-party special needs trust is critical to avoid unnecessary payback to the state or states that offered medical assistance to the beneficiary when such would not otherwise be required.

IV. Core Roles in a Special Needs Trust⁷

a. Settlor

A settlor is a person “...including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution except to the extent another person has the power to revoke or withdraw that portion.”⁸ Put in more practical terms, frequently, the settlor is the client who comes into your firm hoping to confirm the wishes for themselves or their loved one who may be their child, parent, or other relative. How does your workflow address the settlor’s

⁶ This statute was amended by “21st Century Cures Act” (P.L. 114-255) adding “the individual” or beneficiary as permissible settlor of a first-party special needs trust.

⁷ While it may seem unnecessarily remedial, returning to these core concepts and roles in a special need trust plan are critical to providing a focus and coloring of the background surrounding the trusts we create. Also, this paper will use uniform and model sources of law as it is geared towards a national audience. Therefore, there will be citations to the Uniform Trust Code (UTC), ABA Model Rules, ACTEC Commentaries, and NAELA Aspirational Standards.

⁸ UTC § 103(15).

wishes? How does your drafting process dynamically capture the settlor's wishes? How does it build in safeguards when family member is appointed who did not know what the plan of care was or that it involved them? That they were also the trustee of what they will perceive as a complex trust? Did the beneficiary have a say in any of this? Does your plan address the trustee serving in multiple roles before and after the settlor's passing? Has your client truly contemplated the role family will play in the eventual administration of the trust as in In re Thompson?

b. Beneficiary

A beneficiary is a person that “(A) has a present or future beneficial interest in a trust, vested or contingent; or (B) in a capacity other than that of trustee, holds a power of appointment over trust property.”⁹ In a special needs trust context, certainly, a beneficiary is more than just a recipient of a beneficial interest in a trust? The beneficiary of a special needs trust may be a child who survived a birth injury who may have several other siblings, an adult who struggles with distinguishing reality from fiction, a parent who has aged and is need of increasing levels of care, a disabled spouse who may be negatively impacted by a divorce and much more. Where the beneficiary is in their development, life circumstances, and relationship to their family and others is critical to creating a plan that fits their needs to the greatest extent possible. Take for example the case of P.W. v. N.G. (Ex parte N.G.)¹⁰, which is a case about a legal guardian who petitions for a writ of mandamus directing the Russell Juvenile Court to vacate an order transferring a case to the Russell Circuit Court. A claim was asserted by the beneficiary's children's mother alleging fraudulent transfer of assets. In 2005, N.G. (also referred to as “the father”) was involved in an automobile accident and was rendered permanently disabled as result of that accident. His mother was

⁹ UTC § 103(3).

¹⁰ P.W. v. N.G. (Ex parte N.G.), 2020 Ala. LEXIS 119; 2020 WL 5268477

appointed as his legal guardian. By his legal guardian, N.G. brought a personal injury action in which he obtained a settlement in 2013. Those proceeds were placed into a special needs trust for N.G.'s benefit. It appeared from the face of the record, though on clear, that N.G.'s mother, B.J.U., was also the trustee of N.G.'s special needs trust.

In August 2019, the mother (presumably of children over which N.G. owed some obligation of support) filed a petition in the Russell Juvenile Court seeking to recover approximately \$70,000 in child support arrearages owed by N.G. Mother named B.J.U. individually and in her capacity as N.G.'s guardian as a defendant alleging that she had secreted N.G.'s money. B.J.U. moved to dismiss mother's petition as to the claim for fraudulent transfer because the juvenile court did not have subject-matter jurisdiction over it. The juvenile court agreed that it did not have jurisdiction, but rather than dismiss said claim, the juvenile court transferred it to the appropriate court. The court found that the applicable statute should be construed to promote judicial economy. As the mother's claim was not adjudicated on its merits, it seemed reasonable to the court that her claim be transferred to the court of appropriate jurisdiction.

c. Trustee

A trustee is "The person appointed, or required by law, to execute a trust; one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to the use of another."¹¹ Often, a trustee of a special needs trust is a position that is continuously scrutinized by the settlor. They are the individual who the parents of a special needs child will step into an effective oversight in their loved child's life. Frequently, those persons are family members like siblings or cousins. However, how frequently do we explore the dynamic of

¹¹ Black's Law Dictionary, 2d Ed. (September 19, 2021), <https://thelawdictionary.org/trustee/>.

the family? Do we consider the impact of the other roles family trustees are asked to play—e.g., conservator, agent under a power of attorney, executor, care provider, etc.? Do we factor in the longstanding discord between family in how the trustee may execute their role? Consider these issues in light of cases like In re Thompson where sibling rivalry likely impacted how one brother viewed his role as trustee that may not have been the same issue had it been a non-family member beneficiary.

d. Remaindermen(persons)

The Uniform Trust Code provides in its comment to the Section 103 that remainder beneficiaries can be difficult to determine. Therefore, it uses the concept of “qualified beneficiaries”. Qualified beneficiaries are used to “...to limit the class of beneficiaries to whom certain notices must be given or consents received.”¹² In that same comment, the UTC further develops this concept of qualified beneficiaries by saying “...qualified beneficiaries consist of the beneficiaries currently eligible to receive a distribution from the trust together with those who might be termed the first-line remaindermen. These are the beneficiaries who would become eligible to receive distributions were the event triggering the termination of a beneficiary’s interest or of the trust itself to occur on the date in question.”¹³ In the trust drafting and administration, how frequently do you assess the relationship of the special trusts beneficiary to other qualified beneficiaries? Does that shape the provisions you include, exclude, or modify? Do you provide the trustee’s ability to exhaust trust assets or no duty to consider remainder qualified beneficiaries?

V. Ethical Duties – Drafting Attorney

¹² Comment to UTC § 103.

¹³ Id.

As with any representation, it is critical to remember—who’s your client? In fact, NAELA Aspirational Standards impel the elder law and special needs law attorney to identify their client early and communicate it to all necessary parties:

“The elder and special needs law attorney:

1. Identifies the client and the individuals who will assist the client at the earliest stage of the representation, obtains the client’s agreement on these identifications, and communicates this information to the persons involved.
2. Recognizes the unique challenges of identifying the client when a fiduciary is acting on behalf of a protected individual.
3. Meets with the prospective client in private at the earliest practicable time to help the attorney identify the client and assess the prospective client’s capacity and wishes as well as the presence of any undue influence.”¹⁴

VI. Ethical Duties – Representing Trustee

As to the client-lawyer relationship, a lawyer shall “...abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”¹⁵ However, evolving commentary and case law indicates that a lawyer representing a fiduciary may extend the beneficiaries of the trust. ACTEC commentaries to MPRC 1.2 suggest that the attorney representing the fiduciary owes duties to the beneficiaries:

¹⁴ NAELA Aspirational Standards Preamble (B).

¹⁵ MRPC 1.2(a).

“Representation of Client in Fiduciary, Not Individual, Capacity. If a lawyer is retained to represent a fiduciary generally with respect to an estate, the lawyer’s services are in furtherance of the fulfillment of the client’s fiduciary responsibilities and not the client’s individual goals. The ultimate objective of the engagement is to assist the client in properly administering the fiduciary estate for the benefit of the beneficiaries. Confirmation of the fiduciary capacity in which the client is engaging the lawyer is appropriate because of the priority of the client’s duties to the beneficiaries. The nature of the relationship is also suggested by the fact that the fiduciary and the lawyer for the fiduciary are both compensated from the fiduciary estate. Under some circumstances it is acceptable for the lawyer also to represent one or more of the beneficiaries of the fiduciary estate, subject to the fiduciary client’s overriding fiduciary obligations. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients) and Example 1.7-2.”¹⁶ In fact, some jurisdictions who don’t apply the strict privity rule have found that the attorney representing the fiduciary owe a duty of care to the beneficiaries.¹⁷ Some courts going farther to find that there is a “fiduciary exception” to attorney-client privilege.¹⁸

VII. Duties of the Trustee

As a fiduciary, a trustee in the majority of jurisdictions has one of the highest duties owed in law. In fact, it is not just one “duty” but several. A trustee has a duty to administer the trust,¹⁹ duty of loyalty,²⁰ impartiality,²¹ prudent administration,²² control and protection of trust property,²³

¹⁶ ACTEC Commentaries on the Model Rules of Professional Conduct (Fifth Edition) at P. 39.

¹⁷ See, Charleson v. Hardesty, 839 P.2d 1303, 1307 (Nev. 1992).

¹⁸ See, Riggs National Bank of Washington, D.C. v. Zimmer, 355 A.2d 709 (Del. Ch. 1976)

¹⁹ UTC § 801.

²⁰ UTC § 802.

²¹ UTC § 803.

²² UTC § 804.

²³ UTC § 809.

recordkeeping and identification of trust property,²⁴ enforcement and defense of claims,²⁵ collecting trust property,²⁶ duty to inform and report,²⁷ and other administrative powers.²⁸ In addition to these duties, a special needs trust may require a trustee to assist or seek available public benefits on behalf of the beneficiary and may incur liability for not doing so.

In fact, such liability in some jurisdiction may extend to other fiduciaries such as guardians. In re Joyce C. Dalton Trust v. Wells Fargo Bank, N.A.²⁹ is a case about several fiduciaries could be liable for failure to seek all available benefits for which the Beneficiary was eligible. In or about 1988, Joyce C. Dalton established a revocable living trust and later restated said trust on January 19, 1988. Mrs. Dalton's children recognized by the trust included Andrea Dalton and Arthur R. Dalton, Jr. Mrs. Dalton named co-trustees, A.G. Edwards Trust Company (succeeded interest by Wells Fargo Bank, N.A.) and David P. Oetting, her attorney, to serve in the event of her death, incapacity or resignation. Upon her death and settlement of final expenses, her assets were to be divided into separate descendants trusts. Andrea's trust provided that "ANDREA who is an adult qualifies to receive government assistance because of her above condition. Without limiting the Trustees' discretion, I want the Trustees to know that, to the extent consistent with the foregoing, it would not be contrary to my intent for the Trustees to make available to ANDREA or for her benefit such income and thereafter principal from this trust as will not disqualify her from benefits available to her, unless in the sole discretion of a "Disinterested Trustee", such Trustee determines that for her overall benefit additional income and/or principal should be paid out for her benefit."

²⁴ UTC § 810.

²⁵ UTC § 811.

²⁶ UTC § 812.

²⁷ UTC § 813.

²⁸ See generally, UTC Article 8.

²⁹ In re Joyce C. Dalton Trust v. Wells Fargo Bank, N.A., 2020 U.S. Dist. LEXIS 241672

After Mrs. Dalton's death in 1998, Mr. Oetting and Wells Fargo Bank served as co-trustees, until Wells Fargo resigned in 2018. Since that time, Oetting served as sole trustee. Colleen Barringer and her husband, David, have served as Andrea's guardians since May 5, 2008.

According to Mrs. Barringer, in or around 2014, she learned that Wells Fargo was paying expenses for Andrea, including her housing and medical care at Emmaus Homes. Allegedly, Mr. Oetting disputed such disbursements because they could interfere with Andrea's benefits. After Emmaus Homes advised the parties that Andrea would be moved to a new facility, Mr. Oetting asked Wells Fargo for information regarding management of Andrea's trust assets. Though he was provided with monthly statements, plaintiff alleged that Mr. Oetting did not receive sufficient information to determine efforts of Andrea's eligibility for benefits. After concerted efforts in 2015, Mr. Oetting along with Ms. Barringer and Emmaus Homes, Andrea became eligible for public benefits, which they estimated a savings of \$60,000 to \$350,000 per year to her trust.

On November 9, 2017, Wells Fargo provided notice that it intended to resign as the trustee. It filed a Petition for Approval of Trustee Accounts in the Circuit Court of St. Louis, Missouri, Probate Division naming Andrea, Plaintiff and David Barringer, Arthur Rex Dalton, Jr. and Tresa Dalton, as contingent beneficiaries, and Mr. Oetting, as trustee, all as defendants, though it was voluntarily dismissed by Wells Fargo. Later, on January 24, 2020, Mr. Oetting, as trustee of Andrea's trust, filed a petition to recover approximately \$800,000.00 he maintained that Wells Fargo spent, unnecessarily, from Andrea's trust. Mr. Oetting's suit was combined with Mrs. Barringer's action. The court found that Mr. Oetting was not qualified to stand as a plaintiff due to his own conflict of interests in resisting incriminating evidence against him. Also, the court noted Mrs. Barringer's had looming conflict of interest because she had a duty under Missouri law

as a guardian of the person to seek all available benefits to which Andrea was eligible. Rather than dismiss the complaint as Wells Fargo requested, the court intends to appoint a guardian ad litem to represent Andrea's interest in the suit.

VIII. Practical Considerations

a. The Needs of the Beneficiary

The needs of a beneficiary are an essential part of a special needs trust plan and administration. Those needs, however, are not static. Further, a beneficiary's view of what their needs are may vary from that of the trustee. Indeed, over time, the needs of any given beneficiary may change and a trustee's ability to address the evolving needs of a trust beneficiary are a core obligation of the trustee of a special needs trust.

b. The Goals of the Beneficiary

Like the needs of a beneficiary, the goals of a beneficiary change over time. Those goals may be independence, housing, entertainment, job training, and much more.

c. The Role of Family and Friends

As illustrated by the statistics cited above and further documented in the Caregiver in the U.S. 2020 report, family plays a statistically significant role in the continuum of care for most Americans. Beyond the role that family members have as caregivers, more often than not family and friends serve as fiduciaries in various roles like agents under powers of attorney, conservator, trustee, and sometimes simultaneously. From a broader perspective, those caregiver/fiduciary family members have their own lives, families, careers, goals, experiences, and needs, including possible caregiving and fiduciaries. The role family members play in a plan is only singular through lens of the need to fill roles for a beneficiary. From that view, then, investigating potential

fiduciaries is key to understand how a family and friends network may fit into a special needs plan. What if the family or friends are in financial need? Have you advised them of the purposes of the trust and limitations on providing for compensation from the trust outside?

d. Reliability of Trustee

In a special needs trust administration, the reliability of the trustee is not confined to proper administration of the trust to prevent unintended ineligibility, though this is a critical consideration for the viability of any choice of trustee. Indeed, the reliability of the trust extends to their ability to function as a trust, dedication to the complexity of the trust, knowledge or willingness to gain knowledge of public benefits, care and attention to the beneficiary, and more practically speaking for family caregivers, their knowledge of the beneficiary and any animosity that may prevent due administration of the trust. Can I brother overcome his animus for his sibling like In re Thompson? Will a cousin twice removed become the trustee of a special needs trust with no prior knowledge related to special needs trusts or the disabling condition(s) affecting the beneficiary? Did the settlor include the beneficiary in any discussions of their appointment or nomination prior the need arising? Reliability may very well be affected by a failure to communicate. As it relates to caregiving, "...nearly half of caregivers who had no choice in providing care feel a high amount of emotional stress (48 percent vs. 23 percent who had a choice)."³⁰

e. Limitations of the public benefits programs and alternative means of meeting
Beneficiary's needs

³⁰ AARP and National Alliance for Caregiving (NAC) (September 19, 2021), Caregiving in the U.S. 2020, available at <https://www.aarp.org/content/dam/aarp/ppi/2020/05/full-report-caregiving-in-the-united-states.doi.10.26419-2Fppi.00103.001.pdf>.

As special needs trust practitioners, we should be well acquainted with the limitations of public benefits programs. Frequently, family members as caregivers provide the gap filling and supportive roles for hours and services not covered by public benefits programs, which may exacerbate the compassion fatigue they may encounter. That being said, it is not uncommon for parents of children with special needs to forego available Supplemental Security Income and/or Medicaid benefits in lieu of their ability to meet their child's needs. In addition, parents may forego transitional and other programming for their children who have aged out of high school programs. What happens later when their child must live with another child of theirs or cousin? Will those benefits that could have accumulated in an ABLE account been of assistance in paying needed expenses? Will the day program participation have helped with social skills and coping skills needed in a new social environment? Shouldn't the lawyer who helps to create, modify or advise in the administration of the trust delve into these choices and their impact on family or friends later asked to contribute to the care plan?

f. Remaindermen(persons) and the rest

What happens to trust assets after the beneficiaries passing? Have you advised the client on the rights of remaindermen(persons) or first line qualified beneficiaries? Have you discussed the advisability of limiting remaindermen(persons)'s rights to accountings or inspection of records? Have you provided for exhaustion of the trust assets to the exclusion of remaindermen? Have you provided in exculpation provisions to disincentivize malcontent first line qualified beneficiaries from filing lawsuits for distributions or distributions patterns that were for the benefit of the special needs trust beneficiary?

IX. Tools to find balance

a. Flexibility

To the extent possible and available, a trust should provide for flexibility to respond to the changing environment of the beneficiary and social circumstances surrounding them in providing for facility of payment to conservators or responsible parties, use of True Link cards to facilitate beneficiary independence and permitting reduction benefits or suspension of benefits where in the best interests of the beneficiary, and funding of ABLE accounts for broader use of funds including qualified disability expenses and avoidance of reduction of benefits for housing expenses. Flexibility encourages family involvement by providing tools that can ease the fear of ineligibility and alleviate pressure from beneficiaries. Also, flexibility can discourage bad actors by creating alternative means for trustee to meet beneficiary needs.

b. Purpose and Intent Statement

Use of a purpose and intent statement is critical for any trust. A well worded and considered purpose and intent statement provides guidance to future trustees, trust advisors, and trust protectors by explaining the settlors' goals and direction for trust assets. Purpose and intent statements can also be a useful tool to providing guidance to family members about why a trust operates the way it does and why it can or cannot make distributions that would appear permissible or reasonable.

c. Consult and Inform the Beneficiary

Though for technical procedural limitations of trustee needing to retain absolute discretion, a special needs trust will likely not contain language requiring a duty to consult a beneficiary. Best practices and simple notions of human dignity would demand that a beneficiary of a special needs trust should remain informed about the actions of trustee as required.³¹ From a practical

³¹ See, UTC § 813.

perspective, to maintain a respectful and productive relationship with a beneficiary, a trustee should remain in contact with the beneficiary and talk to them about their goals and needs. Unfortunately, family members (and corporate trustees) can be guilty of leaning on the absolute discretion powers of the trustee in lieu of effective communication and person-centered dialogue.

d. Annual Meeting

An annual meeting required by the trust agreement can bring all stakeholders together to discuss the needs and goals of the beneficiary, but it also can be a status update on the other stakeholders' ability to continue in their role. An annual meeting also provides a means for other stakeholders to check in with each other and ensure all members of the team are performing their duties.

e. Waiving or limiting the duty of accounting

Dependent on the language of the trust and state statute, a trustee may be required to account someone other than the beneficiary. Such accountings may cause friction with qualified beneficiaries. Alternatively, a duty to provide accountings to a trust advisor or protector may provide a check against a trustee gone rogue.

f. Providing for exhaustion of assets

Permitting a trustee to exhaust trust assets and income is a fundamental provision and consideration for a special needs trust. If a trustee cannot exhaust trust assets, then they may be confronted with otherwise applicable fiduciary considerations that wouldn't add more value to the administration or discourage a corporate trustee from appointment.

g. Waiving duty to remaindermen(persons)

In states like Texas, a trustee, by default, may have duties owed to remainderman including the use of trust assets. A special needs trust is funded for the purpose of ensuring the needs and care of the beneficiary are met to the degree possible. A conflict of interest can arise where a trustee must navigate the interests of remaindermen versus the vested interest of the special needs trust beneficiaries. Therefore, waiving duties to remaindermen should be considered and are often advisable.

h. Letter of Intent

A letter of intent is a dynamic playbook on the life, needs, goals, providers, and other key players and information on the special needs trust beneficiary. A letter of intent can provide the trustee with guidance on how to administer the trust and what roles various people including family have played in the life of the beneficiary.

i. Trust Protector/Advisor

A trust protector/advisor is an increasingly popular role in trust administration, including special needs trusts. Common powers include removal of trustee, trust amendment, review accountings, and terminating agents of the trust. The role of trust protector/advisor can be used as an alternative to naming family members as trustee, or it can be used as a check against abuses or neglect of a family member trustee who should be questioned and ultimately removed.

In sum, the various roles family play in a special needs trust plan are necessary and at times, from some perspectives, unfortunately unavoidable. Looking at the special needs trust in isolation as a planning tool for eligibility will limit the view of the broader issues surrounding the use and benefit of the trust, fiduciaries involved, and the realities of life. Inquiring into what can be unfamiliar and uncomfortable territory is important to create a plan that makes practical sense and attempts

to avoid or plan for foreseeable realities involving duties, obligations, rewards and hardships that may occur in a special needs trust plan.