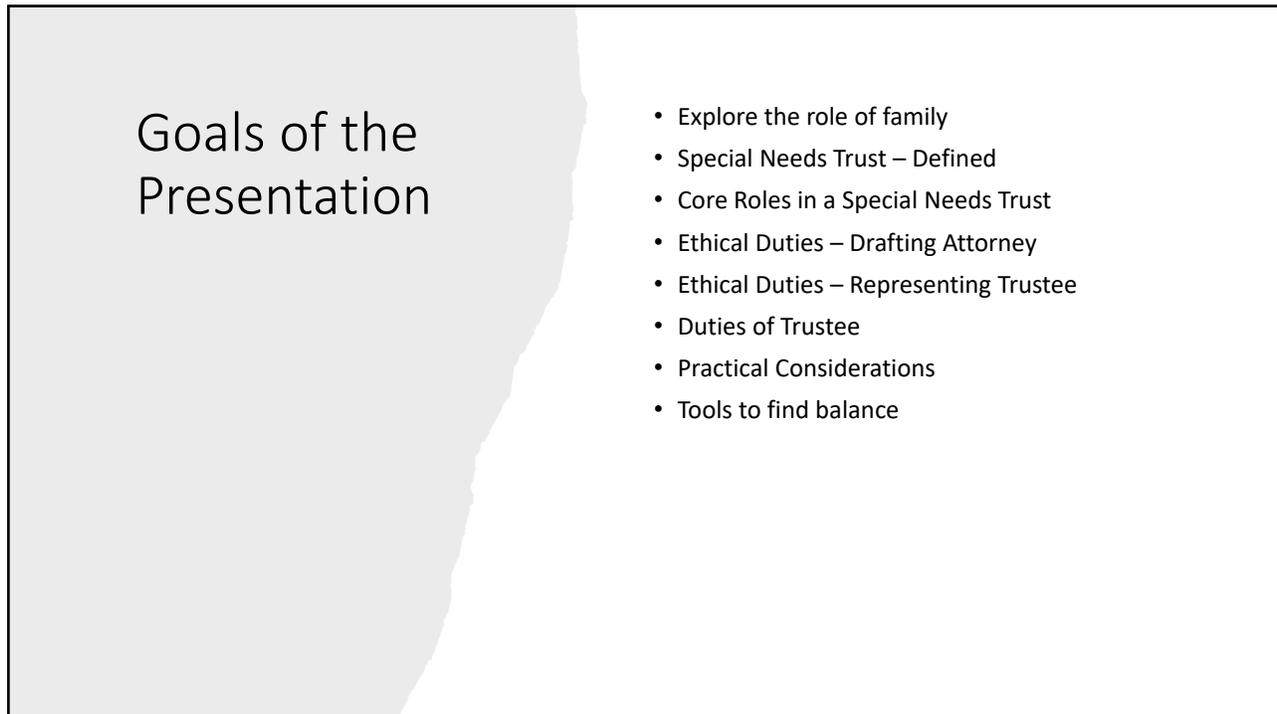




SNT: A Family Plan

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1



Goals of the Presentation

- Explore the role of family
- Special Needs Trust – Defined
- Core Roles in a Special Needs Trust
- Ethical Duties – Drafting Attorney
- Ethical Duties – Representing Trustee
- Duties of Trustee
- Practical Considerations
- Tools to find balance

2

The Role(s) Family Play(s)

- At the core of every special needs plan is the beneficiary's 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.

3

In re Thompson 237 A.3d 1075

- Sibling rivalry resulting in judicial intervention to increase support to trust beneficiary.
- Eleanor Thompson died on February 8, 2014 leaving a will that divided her estate in equal shares among her five children providing her son, Gary Jones, with HEMS and well-being distributions subject to successful alcohol and drug tests.
- Gary's brother, James William Thomson Caliendo, was appointed trustee.
- The Orphan's Court was supplied with evidence of a "tumultuous relationship" between the brothers.
- 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.

4

Special Needs Trust – Defined

- Trusts designed to maximize public benefits eligibility to ensure a continuum of care throughout the lifetime of the beneficiary by supplementing but not supplanting the benefits afforded by needs-based public benefits programs.
- May be funded with individual's own money or property (first-party) or the money or property of another (third-party).

5

D(4)(a) Self-Settled SNT (First Party)

- 42USC§1396p(d)(4)(a)
- 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 the individual, a parent, grandparent, legal guardian of the individual, or a court
- ***Payback Provision Required***: Requires the State(s) to receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State(s) plan under this subchapter.

6

3rd Party SNT

- 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 grantor the ability to craft trust terms, including distribution language, succession of management, and designation of remainder beneficiaries.

7

Core Roles in a Special Needs Trust

8

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.” UTC § 103(15).

9

Settlor – Expanded

- 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 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?

10

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.” UTC § 103(3).

11

Beneficiary – Expanded

- 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.

12

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

- Legal guardian petitions for a writ of mandamus directing the Russell Juvenile Court to vacate an order transferring a case to the Russell Circuit Court.
- 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.
- N.G.’s mother, B.J.U., his guardian and trustee, created a special needs trust.
- The mother of N.G.’s children brought an action in the Russell Juvenile Court for \$70,000.00 owed in child support arrears, alleging fraud in the creation of the trust.
- N.G. argued that the juvenile court had no jurisdiction, which the court agreed with but it transferred the case to a court of appropriate jurisdiction rather than dismiss the case.

13

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

14

Trustee – Expanded

- 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 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?

15

Remaindermen(persons)

- 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." See, Comment to UTC § 103.

16

Remaindermen(persons) – Expanded

- In the trust drafting and administration, how frequently do you assess the relationship of the special needs trust 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?

17

Ethical Duties

18

Ethical Duties – Drafting Attorney

- 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.

19

Ethical Duties – Representing Trustee

- Generally, a lawyer must abide by client objectives of a representation and shall consult with client about the same. MPRC 1.2(a).
- 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 that an attorney's engagement may be in furtherance of the "client's fiduciary responsibilities and not the client's individual goals."
- 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. *Charleston v. Hardesty*, 839 P.2d 1303, 1307 (Nev. 1992).

20

Duties of the Trustee

21

Duties of 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, duty of loyalty, impartiality, prudent administration, control and protection of trust property, recordkeeping and identification of trust property, enforcement and defense of claims, collecting trust property, duty to inform and report, and other administrative powers.
- 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.

22

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

- 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.
- Upon her death and settlement of final expenses, her assets were to be divided into separate descendants trusts, including a special needs trust for her daughter, Andrea Dalton.
- After Mrs. Dalton's death in 1998, David P. Oetting, Ms. Dalton's former attorney, and Wells Fargo Bank served as co-trustees, until Wells Fargo resigned in 2018.

23

In re Joyce Dalton (cont.)

- 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.
- 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 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 that alleged similar causes of action.

24

In re Joyce Dalton (cont.)

- 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.

25

Practical Considerations

26

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.

27

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.

28

The Role of Family and Friends

- As illustrated by the statistics 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.

29

Reliability of Trustee

- 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.

30

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

- 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.

31

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?

32

Tools to find balance

- Flexibility
- Purpose and Intent Statement
- Consult and Inform Beneficiary
- Annual Meeting
- Waiving or limiting the duty of accounting
- Providing for exhaustion of assets
- Waiving duty to remaindermen(persons)
- Letter of Intent
- Trust Protector/Advisor