

Modern Drafting for Third Party Supplemental Needs Trusts

Autonomy, Oversight and Structural Flexibility

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The sample provisions in this paper are illustrative and must be conformed to the settlor's intent, the beneficiary's circumstances, governing state law, federal and state public-benefit rules, tax objectives, and the identity and capabilities of the fiduciaries.

I. Introduction The Third Party SNT Has Outgrown Its Old Form

The traditional third-party supplemental needs trust was built around a clear and important objective: preserve the beneficiary's eligibility for means-tested public benefits. The drafter therefore emphasized absolute trustee discretion, prohibited the beneficiary from compelling distributions, and repeated that the trust was intended to supplement rather than supplant government assistance. Those features remain important. But they are no longer enough.

A third-party SNT may govern nearly every aspect of a beneficiary's financial life for decades. It may be asked to support housing, transportation, caregiving, technology, education, recreation, advocacy, and relationships. It may need to function after the parents who supplied judgment, context, and informal oversight are gone. It may cross state lines, encounter new benefit programs, survive multiple fiduciaries, and adapt to laws that did not exist when the instrument was signed. A document that preserves eligibility but fails to create a durable system for decision-making is not a complete plan.

That planning takes place against an increasingly unreliable service-delivery system. Eligibility for Medicaid home- and community-based services does not guarantee timely access to a provider, an adequate number of authorized hours, a stable direct-support workforce, meaningful care coordination, or an appropriate residential option. In 2025, 41 states maintained waiting or interest lists for Medicaid home care, more than 600,000 people appeared on those lists, and the average reported wait was 32 months. Those figures materially understate unmet need because they do not capture people whose state does not offer the necessary service, people whose services are capped below need, or people who are authorized for services but cannot find a provider with capacity.¹ MACPAC has likewise identified delays, administrative complexity, and limited state use of available expedited processes as continuing barriers to timely HCBS access.²

These are not merely policy failures occurring outside the trust. They change the work the trust may be required to perform. A beneficiary may technically qualify for services but have no worker available to deliver them. A residential program may exist but have no opening, may be geographically impractical, or may be unable to retain staff. A public care coordinator may carry too many cases to provide the individualized attention the beneficiary needs. A sibling who expected to

¹ Alice Burns, Abby Wolk & Molly O'Malley Watts, *A Look at Waiting Lists for Medicaid Home- and Community-Based Services from 2016 to 2025*, KFF (Nov. 20, 2025), <https://www.kff.org/medicaid/a-look-at-waiting-lists-for-medicaid-home-and-community-based-services-from-2016-to-2025/>. The authors caution that waiting-list data are an incomplete and nonuniform measure of unmet need.

² Medicaid & CHIP Payment & Access Comm'n, *Report to Congress on Medicaid and CHIP* 21-80 (Mar. 2025) (chs. 2-3, addressing timely access to HCBS and administrative complexity in Medicaid section 1915 authorities), https://www.macpac.gov/wp-content/uploads/2025/03/MACPAC_March-2025-WEB-Final-508.pdf.

provide informal oversight may move, become ill, or simply be unable to assume a second full-time responsibility.

Families often express the planning objective in much simpler terms: they want good people around the beneficiary and a safe place for the beneficiary to live. Those concerns are not separate from sophisticated drafting; they are the reason for it. A trust cannot manufacture a competent workforce or guarantee appropriate housing. It can, however, authorize the trustee to hire private care management, supplement inadequate services, compensate caregivers when appropriate, stabilize or create housing, respond to emergencies, relocate the trust or the beneficiary, and change fiduciaries when the existing structure is no longer working. Comprehensive and flexible drafting matters most precisely because the public and private delivery systems on which the beneficiary depends may be fragmented, delayed, or unavailable.

Modern drafting begins by separating two ideas that older forms often collapse. The beneficiary must not possess a legally enforceable right to reach trust assets if that right would make the trust an available resource. But the beneficiary need not be voiceless. The trustee must retain discretion, but discretion need not be unstructured or unreviewable. Public benefits should be considered, but their preservation need not defeat the beneficiary's health, dignity, independence, or quality of life. Remainder beneficiaries may receive what is left, but the trustee should not administer a lifetime trust as though preservation of their inheritance were a coequal purpose.

The central proposition is therefore straightforward: a modern third-party SNT should be drafted as a long-term governance instrument, not merely as a benefits-preservation device. That requires attention to purpose, beneficiary participation, distribution philosophy, ABLE coordination, fiduciary architecture, oversight, amendment authority, situs, information rights, privacy, and liability protections. The drafting must preserve the trustee's legal discretion while supplying enough direction to make that discretion useful.

For SSI purposes, the federal inquiry is principally one of legal availability: whether the beneficiary can revoke or terminate the trust and use the assets for support and maintenance, direct the use of principal for those purposes, or sell a right to receive payments. A trustee's discretionary authority to use principal for the beneficiary generally is not attributed to the beneficiary.³ This framework leaves meaningful room to draft for voice, consultation, and supported participation without giving the beneficiary ownership or control.

II. Begin with Purpose Not Prohibition

Many third-party SNTs begin by describing what the trust must not do. The trust must not disqualify the beneficiary. It must not replace public assistance. It must not permit the beneficiary to compel a distribution. All of that may be technically sound, but it produces an impoverished statement of purpose. It tells the trustee what to fear without adequately identifying what the trust is meant to accomplish.

The purpose clause matters because discretionary language does not operate in a vacuum. It informs how a trustee weighs competing considerations, how a successor fiduciary understands the settlor's priorities, and how a court evaluates an exercise or nonexercise of discretion. If the only articulated

³ Social Security Administration, Program Operations Manual System (POMS) SI 01120.200(D)(1)-(2), "Information on Trusts, Including Trusts Established Prior to January 01, 2000, Trusts Established with the Assets of Third Parties, and Trusts Not Subject to Section 1613(e) of the Social Security Act" (May 6, 2024). See also *id.* SI 01120.200(B)(16) (defining a third-party trust).

objective is benefits preservation, a cautious trustee may conclude that avoiding any reduction in SSI is the safest administration even when a distribution would materially improve the beneficiary's life.

A modern purpose clause should establish a hierarchy. The primary purpose is the beneficiary's welfare. Means-tested benefits are important resources to be preserved when doing so is consistent with that purpose. They are not necessarily the highest good in every circumstance. The trustee should have authority to make a distribution that reduces or eliminates a benefit when the expected value of the distribution exceeds the value of the benefit lost or when the distribution otherwise advances the beneficiary's interests.

State supplemental-needs-trust statutes and Medicaid rules vary. Some prescribe or suggest particular statements of intent; some distinguish sharply between third-party and self-settled trusts; and some expressly permit a trustee to make a benefits-impacting distribution when doing so better serves the beneficiary. The drafter should preserve any required local formulation but place it within a broader statement of beneficiary-centered purpose. Federal SSI analysis supplies the legal-availability baseline; it does not displace state trust law or state Medicaid administration.⁴

New York provides a useful example. EPTL 7-1.12 requires the instrument to evidence an intent to supplement rather than supplant government benefits and generally to prohibit distributions that impair them. At the same time, the statute expressly permits third-party payments for food, clothing, shelter, or health care when the trustee determines that the beneficiary's basic needs will be better met and that accepting the resulting effect on benefits is in the beneficiary's best interests.⁵ That statutory formulation does not control trusts governed by other states' laws, but it illustrates an important drafting point: benefits preservation and beneficiary-centered discretion need not be mutually exclusive.

Illustrative purpose provision

The Settlor creates this trust primarily to enhance the Beneficiary's health, safety, dignity, comfort, independence, relationships, opportunities, and overall quality of life. The Trustee shall consider the availability and value of governmental and private benefits, services, and resources, but preservation of any particular benefit is not the sole or overriding purpose of this trust. The Trustee may make a distribution that reduces, suspends, or eliminates a benefit if the Trustee reasonably determines that the distribution better serves the Beneficiary's interests. The interests of all remainder beneficiaries are subordinate to the lifetime interests of the Beneficiary.

This clause deliberately avoids converting broad aspirations into a judicially enforceable support standard. Words such as health and comfort can carry technical meaning under state trust law and federal tax law. The drafter should therefore coordinate the purpose clause with the operative distribution standard and applicable creditor, tax, and public-benefit rules. An expression of intent should guide discretion without giving the beneficiary an enforceable right to distributions.

The document should also state whether exhaustion of the trust during the beneficiary's lifetime is acceptable. If that is the settlor's intent, silence invites a trustee to preserve principal unnecessarily. A direct instruction is preferable:

⁴ SSA POMS SI 01120.200(D)(1)-(2); see also 42 U.S.C. §§ 1382b(e), 1396p(d). The drafter must separately review the governing state's trust law, Medicaid statutes, regulations, manuals, and agency practice.

⁵ N.Y. Est. Powers & Trusts Law § 7-1.12(a)(5)(i)-(iii), (b)(1)-(3), (e) (McKinney 2026).

The Trustee shall not withhold an otherwise appropriate distribution merely to preserve principal for future use or for remainder beneficiaries. The Trustee may expend all trust property during the Beneficiary's lifetime if the Trustee determines that doing so appropriately advances the purposes of this trust.

That direction does not require imprudent spending. The trustee still must consider duration, foreseeable needs, other resources, and the size of the fund. It simply makes clear that conservation is a means, not the mission.

III. Distribution Standards Preserve Discretion Supply Judgment

The distribution provision remains the legal center of the SNT. The beneficiary generally should not possess a right to compel payments for support or maintenance, demand principal, revoke or terminate the trust, or direct trust assets for the beneficiary's own benefit. A third-party SNT also ordinarily avoids the federal Medicaid payback provisions applicable to certain self-settled trusts because the assets never belonged to the beneficiary.⁶

But absolute discretion is only the beginning of the analysis. The document should tell the trustee how to exercise that discretion. Relevant considerations may include:

- the beneficiary's expressed preferences, values, and goals;
- the monetary and nonmonetary value of benefits that could be affected;
- the beneficiary's health, safety, housing stability, and community integration;
- the likelihood that an expenditure will increase independence or prevent a more restrictive placement;
- the availability, reliability, and quality of public services;
- the trust's size, anticipated duration, and foreseeable extraordinary needs;
- the availability of family support and whether reliance on unpaid family labor is realistic or equitable;
- tax consequences, including whether payment directly to a provider is preferable;
- the administrative burden and dignity costs of denying ordinary expenditures; and
- the interests of the beneficiary over those of remainder beneficiaries.

Illustrative discretionary distribution provision

The Trustee may distribute to or for the benefit of the Beneficiary as much or all of the net income and principal as the Trustee determines advisable in the Trustee's sole and absolute discretion. No distribution is required, and the Beneficiary shall have no power to compel a distribution, assign or anticipate an interest, direct the use of trust property, or revoke or terminate the trust. In exercising discretion, the Trustee shall be guided by the purposes stated in this instrument and may consider the Beneficiary's preferences, abilities, needs, other resources, public and private benefits, anticipated future requirements, and the size and expected duration of the trust.

The phrase "sole and absolute discretion" should not be treated as a substitute for careful design. State law ordinarily preserves some review for abuse of discretion, bad faith, or action inconsistent

⁶ 42 U.S.C. § 1396p(d)(4)(A), (C); 42 U.S.C. § 1382b(e)(5); SSA POMS SI 01120.200(B)(16), (D)(1)-(2). The federal statutory exceptions apply to specified trusts containing the individual's own assets; a true third-party trust is analyzed under its terms and applicable state law.

with the trust's purposes despite expansive language.⁷ The drafter should identify the law intended to govern construction and administration and should not assume that adjectives alone will answer questions of reviewability.

The more difficult failure is sometimes not an improvident distribution but the failure to exercise judgment at all. General trust principles require a trustee to exercise discretionary power in good faith, consistently with the trust's terms and purposes, and on the basis of information appropriate to the decision.⁸ A trustee cannot exercise informed discretion without an information system.

New York's *Matter of JP Morgan Chase Bank, N.A. (Marie H.)* is an especially useful illustration. The trustees of a well-funded discretionary trust made virtually no expenditures for a beneficiary with significant disabilities until court intervention led to the retention of a care manager. The court concluded that safeguarding and investing the corpus was not enough. The trustees had to remain informed about the beneficiary's condition, needs, residence, and services and use the trust for his actual benefit.⁹ Although the governing fiduciary standard must be determined state by state, the administrative lesson is national: discretion cannot be exercised responsibly from a file, an investment statement, or an annual distribution request alone.

A deliberate rule for benefits impacting distributions

The trustee should be authorized to distinguish among three different questions:

1. Is the beneficiary legally eligible for a benefit?
2. What is the actual value and reliability of that benefit?
3. Would a trust expenditure produce a better practical outcome?

Those questions may lead to different answers. Preserving a modest monthly cash benefit at the cost of stable housing, effective treatment, or meaningful community participation may be irrational. Conversely, using the trust for expenses already fully and reliably covered by a public program may unnecessarily shorten the life of the fund. Modern drafting should empower a fiduciary to make that comparison, document it, and revisit it.

Illustrative benefits impact provision

Before making a distribution reasonably expected to affect the Beneficiary's eligibility for or receipt of a material means-tested benefit, the Trustee may consult qualified public-benefits counsel or another knowledgeable adviser. The Trustee may nevertheless make the distribution if the Trustee reasonably concludes that its expected benefit to the Beneficiary outweighs the value of the benefit that may be reduced or lost. The Trustee shall not be liable solely because a distribution causes or contributes to a reduction, suspension, or loss of benefits if the Trustee acted in good faith and in a manner reasonably consistent with the purposes of this trust.

This is not a direction to ignore benefits. It is a direction to value them accurately.

⁷ Restatement (Third) of Trusts § 50 & cmts. b, c (Am. L. Inst. 2003); Uniform Trust Code § 814(a) (Unif. L. Comm'n 2000, last amended 2025).

⁸ Restatement (Third) of Trusts §§ 50 cmt. b, 77 (Am. L. Inst. 2003); Uniform Trust Code §§ 801-804, 814(a) (Unif. L. Comm'n 2000, last amended 2025).

⁹ *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, 38 Misc. 3d 363, 376-80, 956 N.Y.S.2d 856 (Sur. Ct. N.Y. Cnty. 2012); see also *Matter of Wallens*, 9 N.Y.3d 117, 122-23, 877 N.E.2d 960, 849 N.Y.S.2d 403 (2007) (broad discretion must be exercised reasonably and in good faith).

IV. Autonomy Without Ownership or Control

Older drafting sometimes treated the beneficiary's exclusion from legal control as a reason to exclude the beneficiary from the decision-making process altogether. That is neither legally required nor good administration. A beneficiary can have a voice without possessing a property right.

Current Social Security guidance focuses on legal access: whether the beneficiary can revoke or terminate the trust, compel or direct the use of principal for support and maintenance, or transfer the beneficiary's interest. A trustee's discretionary authority to use assets for the beneficiary does not, by itself, give the beneficiary ownership or control.¹⁰ Drafting can therefore require meaningful consultation while expressly preserving fiduciary discretion.

Autonomy will look different for different beneficiaries and may change over time. It can mean managing a modest spending account, choosing between two activities, selecting a service provider, identifying a preferred support person, participating in an annual planning meeting, or communicating a preference about housing. It does not require the fiction that every beneficiary can independently evaluate complex financial or benefits consequences.

Illustrative beneficiary participation provision

To the extent reasonably practicable and appropriate to the Beneficiary's abilities and circumstances, the Trustee shall seek and consider the Beneficiary's preferences, values, goals, priorities, and lived experience. The Trustee shall communicate in a manner reasonably accessible to the Beneficiary and shall support the Beneficiary's participation in decisions affecting the Beneficiary. The Beneficiary may request distributions and may identify preferred goods, services, providers, and supports. These rights of participation are advisory and procedural only; they do not give the Beneficiary a right to compel a distribution or to exercise dominion or control over trust property.

The distinction between "shall consider" and "shall follow" is important. The former creates a process; the latter may create an entitlement or improperly delegate fiduciary judgment. The trust can require the trustee to listen without requiring the trustee to agree.

Planning meetings and a written plan

Where the trust is large enough to justify the administration, the instrument may direct an annual beneficiary-centered planning process. The trustee can review present living arrangements, benefits, health, transportation, education, employment, social connection, recreation, technology, and anticipated transitions. The result should not be a rigid budget that becomes an enforceable distribution right. It should be a working plan that connects expenditures to the trust's purposes.

At reasonable intervals, and at least annually if practicable, the Trustee shall review the Beneficiary's circumstances and anticipated needs. The Trustee may invite the Beneficiary, a guardian or agent, members of the Beneficiary's support network, care managers, benefits advisers, and other appropriate persons to participate. Any plan or budget resulting from the review is advisory, may be revised, and does not create a right to distributions.

¹⁰ SSA POMS SI 01120.200(D)(1)-(2), especially SI 01120.200(D)(1)(b)(2) (the trustee generally is a third party, not the beneficiary's agent).

Building an information system around the trustee

A direction to consult the beneficiary is insufficient when the beneficiary cannot reliably identify or communicate an unmet need. The trustee may live hundreds of miles away. Family may be unavailable, conflicted, or exhausted. Medicaid-funded care coordination may be fragmented or overextended. The trust should therefore authorize the trustee to create a reliable channel for information rather than wait for a distribution request to arrive.

The authority to retain a private care manager, social worker, benefits specialist, housing advocate, or other local professional should be express. The document should also state whether those costs are ordinary expenses of administration, confirm that their payment does not reduce the trustee's otherwise allowable compensation, and preserve the trustee's responsibility for discretionary decisions. A care manager supplies facts and recommendations; the care manager should not silently become the distribution trustee.

The Trustee may employ and compensate from the trust a care manager, social worker, public-benefits specialist, housing advocate, daily money manager, or other professional to assess the Beneficiary's circumstances, identify unmet needs, obtain and evaluate information, coordinate services, facilitate communication, and make recommendations to the Trustee. The reasonable cost of those services shall be an expense of administration and shall not reduce compensation otherwise payable to the Trustee. Unless separately appointed to a fiduciary office under this instrument, an adviser shall not have authority to compel or direct a distribution, and the Trustee shall retain responsibility for the exercise of the Trustee's discretion.

The drafting should authorize the trustee to receive information from any credible source while limiting disclosure of trust information to persons legally entitled to receive it. Receiving information from residential staff or a family friend is different from disclosing account balances or distribution history to that person. HIPAA authorizations, releases, and secure communication protocols ordinarily belong in the surrounding planning package rather than in the trust itself.

Letters of intent and expressions of preference

The trust should authorize the trustee to consider a settlor's letter of intent and the beneficiary's later statements of preference without incorporating either into the dispositive terms. A letter of intent can explain routines, relationships, communication methods, medical history, religious practices, sensory needs, and what a good day looks like. But a forty-year-old letter should not override the adult beneficiary's present wishes or freeze obsolete assumptions.

The better provision establishes priority and flexibility: current beneficiary preferences should ordinarily carry substantial weight; the settlor's letter supplies context; neither creates an enforceable distribution standard; and the trustee may disregard information that is outdated, impracticable, or contrary to the beneficiary's welfare.

Removal and appointment powers

Some settlors wish to give the beneficiary a role in trustee succession. That can be valuable, but the power must be carefully limited. Depending on the tax and benefits objectives, the beneficiary might be permitted to remove a trustee and appoint a successor who is independent and not related or subordinate within the meaning of applicable tax law. The instrument should address frequency, cause, notice, minimum qualifications, and whether a trust protector must consent. There is no

universal safe harbor for a beneficiary-held removal power; the provision must be tested under the estate, gift, grantor-trust, and benefits rules applicable to the particular plan.¹¹

V. ABLE Accounts as a Bridge to Everyday Autonomy

ABLE accounts are not merely another benefits-preservation technique. Used properly, they can bridge the gap between fiduciary control and ordinary adult autonomy. A trustee can fund an ABLE account for qualified disability expenses, while the beneficiary or authorized individual uses the account for day-to-day transactions that would otherwise require repeated requests to a trustee.

Beginning January 1, 2026, federal law expanded ABLE eligibility to individuals whose blindness or disability began before age forty-six. The ordinary annual contribution ceiling is tied to the federal gift-tax annual exclusion and is \$20,000 for 2026. An employed beneficiary may in some circumstances contribute an additional amount subject to statutory limitations. For SSI purposes, ABLE funds up to \$100,000 are excluded from countable resources, although excess balances can suspend SSI cash benefits.¹²

Social Security guidance also recognizes that a transfer from a trust to an ABLE account owned by the trust beneficiary is excluded from income to the beneficiary.¹³ That makes ABLE coordination particularly useful for third-party SNT administration.

Illustrative ABLE provision

The Trustee may establish, contribute to, and coordinate distributions with one or more accounts maintained for the Beneficiary under Internal Revenue Code section 529A. The Trustee may pay amounts directly to an ABLE account if the Trustee determines that doing so will promote the Beneficiary's independence, facilitate payment of qualified disability expenses, improve administrative efficiency, or advance another purpose of this trust. The Trustee may consider applicable contribution limits, account balances, Medicaid recovery provisions, qualified-expense rules, and the effect of distributions on means-tested benefits. The Trustee is not responsible for the administration of an ABLE account not controlled by the Trustee, but may require information reasonably necessary to coordinate distributions.

The drafting should avoid promising that every transfer or expenditure will be protected. ABLE rules contain annual limits, documentation requirements, state-plan terms, and Medicaid-recovery consequences. The trustee should also decide whether an expense is better paid directly from the trust. Funding an ABLE account is not automatically preferable; it is a tool for circumstances in which beneficiary access and qualified-expense treatment justify it.

A practical policy can authorize periodic transfers for agreed categories of spending, coupled with periodic review rather than transaction-by-transaction approval. This reduces administrative friction and allows the beneficiary to exercise judgment within a safe structure.

¹¹ See I.R.C. §§ 2036, 2038, 2041, 2514, 672(c), 674; Rev. Rul. 95-58, 1995-2 C.B. 191. Revenue Ruling 95-58 addresses a grantor's power to remove and replace a trustee and should not be treated as a universal safe harbor for a beneficiary-held power.

¹² I.R.C. § 529A(b)(2), (b)(6); Stephen Beck, Jr., ABLE Act of 2014, Pub. L. No. 113-295, div. B, tit. I, § 101, 128 Stat. 4010; ABLE Age Adjustment Act, Pub. L. No. 117-328, div. T, tit. I, § 124, 136 Stat. 4459, 5291 (2022); SSA POMS SI 01130.740(A)(1), (B)(2), (B)(4), (D)(1)-(2) (Feb. 26, 2026).

¹³ SSA POMS SI 01120.200(E)(1)(h); see also SSA POMS SI 01130.740(C)(1).

VI. The Primary Beneficiary and the Problem of Remainder Interests

A third-party SNT necessarily identifies who receives property at the primary beneficiary's death. That does not mean the remainder beneficiaries should influence lifetime administration. Yet trustees, particularly family trustees, may consciously or unconsciously conserve assets for themselves, siblings, nieces, nephews, or charities.

The document should make the hierarchy unmistakable. The primary beneficiary's lifetime interests are paramount. A remainder beneficiary has only the interest granted under governing law and should not be treated as a present co-beneficiary whose expectation limits proper distributions. The precise effect of language limiting notice, accountings, or standing will depend on state law and cannot be established by declaration alone. New York again provides a useful example: in a trustee's judicial accounting, SCPA 2210 generally requires process to issue to persons entitled absolutely or contingently to share in the trust estate, subject to the representation rules in SCPA 315.¹⁴ Those procedural rights do not make preservation of the remainder a coequal distribution objective. The instrument can respect the rights state law gives remainder beneficiaries while directing the trustee to exercise lifetime distribution discretion in favor of the beneficiary with a disability.

Illustrative priority provision

During the Beneficiary's lifetime, the Settlor's paramount concern is the Beneficiary. The Trustee shall administer the trust without regard to the desire of any remainder beneficiary to preserve trust property. No remainder beneficiary may object to a distribution properly made for the Beneficiary solely because the distribution reduces or exhausts the trust estate. Nothing in this paragraph limits any nonwaivable right under applicable law to challenge a breach of trust.

That final sentence is not ornamental. A clause should not purport to immunize misconduct or eliminate rights that state law makes mandatory.

Limited testamentary power of appointment

A limited testamentary power of appointment can give the beneficiary meaningful control over the ultimate destination of property without providing current access. It also permits the remainder plan to respond to relationships and circumstances that could not be known when the trust was created. The permissible appointees might exclude the beneficiary, the beneficiary's estate, creditors, and creditors of the estate, while including descendants, siblings, charities, or a defined class.

The power requires careful tax and benefits analysis. The drafter should address the method of exercise, default takers, any prohibition on appointment to disqualified persons, and whether exercise in favor of another trust is permitted. The attorney should also consider whether the beneficiary is realistically able to execute a will and whether an agent or guardian could exercise the power under applicable law.¹⁵

VII. Governance One Trustee Should Not Be Expected to Do Everything

Third-party SNTs demand several distinct competencies: investment management, tax reporting, public-benefits analysis, discretionary judgment, disability knowledge, care coordination, family

¹⁴ N.Y. Surr. Ct. Proc. Act §§ 2210(9), 315(1)-(3), (7)-(8).

¹⁵ I.R.C. §§ 2041(b)(1), 2514(c); Treas. Reg. §§ 20.2041-1(c)(1), 25.2514-1(c)(1). State law governs creation, exercise, and delegation of a power of appointment and must be separately reviewed.

diplomacy, and communication with the beneficiary. Few individuals or institutions excel at all of them. Modern drafting should separate roles when separation improves administration, while avoiding an architecture so elaborate that it becomes unaffordable or unworkable.

Possible roles include:

- a general or administrative trustee;
- an investment adviser or directed investment trustee;
- a distribution adviser or distribution trustee;
- a trust protector or trust director;
- a public-benefits adviser;
- a care manager or social-services consultant;
- a beneficiary advocate; and
- a committee combining family knowledge and professional independence.

The title matters less than the authority attached to it. Merely declaring that a trust protector exists creates ambiguity. The instrument should identify each power, whether it is held in a fiduciary or nonfiduciary capacity, the standard governing its exercise, information-sharing duties, succession, compensation, conflicts, and liability.

The Uniform Directed Trust Act supplies a useful framework for allocating power between trustees and trust directors and for addressing duties, powers to direct, and information sharing, but it is not universally enacted and local variations matter.¹⁶

Trustee selection and succession

The drafting process should answer the practical questions before selecting names:

- Who knows the beneficiary?
- Who understands benefits?
- Who can say no without destroying a family relationship?
- Who can manage investments and reporting?
- Who will still be available in twenty years?
- What happens if an institution will not accept a modest trust?
- Can a family member serve with a professional, and how are disagreements resolved?

The succession provision should be operational. It should specify who may remove a trustee, with or without cause; who appoints the successor; qualification standards; whether an individual must appoint an institutional successor at a stated asset level; how incapacity is determined; and whether a resigning trustee must secure acceptance by a successor.

Resignation and transition

Trustee succession is not complete when the document merely names the next person in line. A named successor may be unwilling, unable, unqualified, geographically impractical, or uninterested when the vacancy arises. The instrument should contain a cascading appointment mechanism and an

¹⁶ Uniform Directed Trust Act §§ 6-12 (Unif. L. Comm'n 2017, amended 2019) (trust director powers, duties, limitations on a directed trustee, and information sharing). The governing jurisdiction's enactment and local variations must be reviewed.

emergency backstop that prevents a vacancy from interrupting rent, caregivers, insurance, tax compliance, or recurring distributions.

The transition provision should address notice, the effective date of resignation, appointment when no named successor accepts, transfer of assets and records, interim authority, delivery of an accounting, and the means by which the departing trustee may obtain a release. The Uniform Trust Code supplies default rules for vacancies, successor appointments, and resignation, but enactments vary and careful private drafting may reduce the need for a proceeding when applicable law permits a nonjudicial transition.¹⁷ In New York (where there is no enacted Uniform Trust Code provisions), EPTL 7-2.6 authorizes the court to accept a resignation and appoint a successor; the statutory backstop reinforces the value of drafting a workable private transition mechanism before a vacancy occurs.¹⁸

A Trustee may resign by written and acknowledged notice delivered at least thirty days before the effective date to each cotrustee, the person authorized to appoint a successor, the Beneficiary or the Beneficiary's legal representative, and the Beneficiary Representative. Before the resignation becomes effective, the resigning Trustee shall deliver to the successor all trust property and reasonably complete records, including current asset statements, tax returns, accountings, material contracts, recurring-payment information, benefits correspondence, and information reasonably necessary to avoid disruption of the Beneficiary's supports. If no designated successor accepts within the notice period, the person holding the appointment power may appoint a qualified individual or corporate fiduciary. The resigning Trustee remains responsible for administration before the effective date and is not released except by a judicial settlement or a binding nonjudicial settlement executed by all persons whose consent is required under applicable law.

The last sentence matters. A clause declaring the trustee “released” upon delivering records may not bind a beneficiary under a disability, an unrepresented remainder interest, or another person whose consent is required. State rules on representation, nonjudicial settlement, accountings, and court approval must be applied before treating a release as binding.¹⁹ New York’s SCPA 315 addresses representation and the binding effect of certain nonjudicial settlements, while SCPA 2208 permits a trustee to seek voluntary judicial settlement.²⁰

Trust protector powers

A protector may be given some or all of the following powers:

- remove and appoint trustees, advisers, or committee members;
- resolve deadlocks or allocate authority among fiduciaries;
- change situs, principal place of administration, or governing law;
- add an administrative trustee in another jurisdiction;
- amend administrative provisions to respond to changes in law;
- modify provisions to preserve or improve eligibility for public benefits;

¹⁷ Uniform Trust Code §§ 704-705 (Unif. L. Comm’n 2000, last amended 2025).

¹⁸ N.Y. Est. Powers & Trusts Law § 7-2.6; see also N.Y. Surr. Ct. Proc. Act §§ 706, 715-716 when the fiduciary serves under Surrogate’s Court authority.

¹⁹ See Uniform Trust Code §§ 111, 301-305, 813 (Unif. L. Comm’n 2000, last amended 2025). Each state’s enactment, representation rules, and procedures for approval or settlement must be reviewed.

²⁰ N.Y. Surr. Ct. Proc. Act §§ 315(8), 2208(3).

- correct ambiguities, scrivener's errors, or drafting defects;
- approve or direct decanting, merger, division, or nonjudicial modification;
- convert the trust to or from a directed structure;
- approve extraordinary transactions or trustee compensation; and
- restrict or remove a power when its exercise could cause adverse tax or benefits consequences.

The drafter should distinguish powers that preserve the plan from powers that rewrite it. Authority to update administrative provisions or respond to benefits law is different from authority to add beneficiaries or redirect the remainder. If dispositive amendment power is granted, the instrument should define boundaries and consider tax consequences.

Illustrative protector framework

The Trust Protector may exercise only the powers expressly granted by this instrument. Each power granted to the Trust Protector is intended to be a personal and nonfiduciary power, to the fullest extent permitted by applicable law. The Trust Protector shall not be a trustee, shall have no duty to monitor the Trustee's administration, and shall have no duty to exercise any power. If the Trust Protector elects to act, the Trust Protector shall act honestly, within the scope of the power granted, and consistently with the Settlor's stated purposes. The Trust Protector may rely on information supplied by a Trustee or qualified adviser without independent investigation unless the Trust Protector has actual knowledge that the information is materially incorrect. Nothing in this provision relieves the Trustee of any fiduciary duty that applicable law assigns to the Trustee.

To the fullest extent permitted by applicable law, the Trust Protector may remove any Trustee, with or without cause, by a signed written instrument delivered to the Trustee and each other acting fiduciary. The Trust Protector may appoint a successor or additional Trustee and may specify the effective date and reasonable terms of the transition. Any appointee must satisfy the qualifications stated in this instrument and, when necessary to preserve the intended tax or public-benefit treatment, must be independent of the Settlor and the Beneficiary and must not be related or subordinate to either within the meaning of Internal Revenue Code section 672(c). Removal does not eliminate the departing Trustee's right to compensation or reimbursement properly earned, duty to transfer trust property and records, or responsibility for administration before the effective date of removal. The Trust Protector has no duty to exercise this power and need not determine that a breach has occurred before removing a Trustee without cause.

The Trust Protector may amend administrative provisions of this trust to respond to changes in tax law, public-benefit law, trust law, or the Beneficiary's circumstances; correct an ambiguity or drafting error; facilitate a change of situs or governing law; or preserve the trust's intended treatment. The Trust Protector may not add a beneficiary, revest trust property in the Settlor, or materially alter the Beneficiary's lifetime beneficial interest except as expressly authorized elsewhere in this instrument.

This formulation reflects a deliberate choice: the protector or monitor is not intended to be another fiduciary. The role is episodic and structural, not an invitation to co-administer the trust. But state statutes differ materially. Uniform Trust Code section 808 treats a nonbeneficiary power holder as presumptively fiduciary unless the trust terms provide otherwise, while the Uniform Directed Trust Act generally assigns a trust director the duties and liability of a similarly situated trustee and

permits variation only to the extent trustee duties and liability could be varied.²¹ The drafting should therefore avoid trustee-like control over routine distributions or investments, disclaim an ongoing monitoring duty, state the intended nonfiduciary character, and preserve the trustee's own accountability. The clause must be conformed to the governing jurisdiction, and the analysis should be repeated whenever situs changes. New York has no comprehensive trust-protector statute prescribing a single default standard, but *Matter of Allen v. Annalett* confirms the practical importance of the document: the Appellate Division affirmed a declaration that a protector possessed the authority granted by the instrument to remove an independent trustee.²²

Information sharing in a divided structure

Dividing authority can create gaps. The administrative trustee may not know what the distribution adviser promised; the investment adviser may not know that a housing purchase is anticipated; the benefits adviser may not learn of a recurring cash payment. The instrument should require each officeholder to provide information reasonably related to another's function and should protect a fiduciary who acts in reasonable reliance on information within another officeholder's assigned responsibility, to the extent permitted by law.

VIII. Drafting for Change Amendment Modification Decanting and Situs

A trust that may last fifty years should not depend entirely on the law and institutions existing on the execution date. Public-benefit rules change. State income-tax rules change. A beneficiary moves. A trustee resigns or merges. A drafting assumption proves wrong. A directed-trust statute becomes available. A third-party SNT should contain its own adaptation mechanisms while also preserving access to statutory and judicial remedies.

Amendment and modification authority

The document can authorize a protector or other independent person to amend for defined purposes, including changes in benefits, tax, or trust law; administrative efficiency; correction of errors; or implementation of the settlor's purposes. The power should specify procedural requirements, notice, consent, effective date, and prohibited changes.

The drafter should avoid an overbroad amendment power that creates estate inclusion, a general power of appointment, grantor-trust consequences, or a basis for treating the trust as revocable or available to the beneficiary. The holder should generally be independent of the beneficiary when the power could affect beneficial enjoyment.²³

Decanting merger and division

An express decanting power provides a useful belt-and-suspenders approach even where a statute applies. The Uniform Trust Decanting Act distinguishes between trusts in which the trustee has expanded distributive discretion and those in which discretion is limited, and state enactments vary

²¹ Uniform Trust Code § 808(d) (Unif. L. Comm'n 2000, last amended 2025); Uniform Directed Trust Act §§ 5, 8-11 (Unif. L. Comm'n 2017, amended 2019). A power excluded from directed-trust legislation—such as some powers to appoint or remove a trustee—or a narrowly drafted personal power may receive different treatment. Governing law controls.

²² *Matter of Allen v. Annalett*, 214 A.D.3d 1359, 183 N.Y.S.3d 880 (4th Dep't 2023) (affirming, for the reasons stated by Supreme Court, a declaration that the trust protector possessed authority under the instrument to remove an independent trustee).

²³ See I.R.C. §§ 2036-2038, 2041, 2514, 674; Treas. Reg. §§ 20.2041-1, 25.2514-1. See generally Uniform Trust Code §§ 411-417 (Unif. L. Comm'n 2000, amended 2010) (termination, modification, reformation, and combination or division of trusts).

in scope, notice, and permissible changes.²⁴ New York’s EPTL 10-6.6 is a useful state-specific comparison because it establishes different rules based on the scope of the trustee’s invasion power, imposes notice and fiduciary requirements, and expressly contemplates an appointed trust that may last longer than the invaded trust.²⁵

A trust may also need to be divided for investment, tax, family, or administrative reasons, or merged with another trust for the same beneficiary. The instrument should permit division and merger only when the resulting arrangement remains consistent with the trust’s material purposes and does not enlarge the beneficiary’s enforceable rights.

Situs and governing law

Situs flexibility is not simply a tax-planning provision. A change may improve trustee availability, proximity to the beneficiary, directed-trust options, modification procedures, or administrative efficiency. But “situs,” “place of administration,” and “governing law” are not always interchangeable. The instrument should authorize the relevant fiduciary or protector to address each separately and to appoint a trustee or agent in the new jurisdiction if needed.

Illustrative flexibility provision

The Trust Protector may change the situs or principal place of administration of this trust, designate the law governing administration or construction to the extent permitted by applicable law, and appoint or require the appointment of a trustee or other fiduciary in another jurisdiction. In exercising this power, the Trust Protector may consider the Beneficiary’s residence and access to fiduciaries, public-benefit consequences, state and local taxation, administrative expense, available trust structures, and procedures for modification or decanting. No change shall give the Beneficiary a right to compel distributions or otherwise defeat a material purpose of the trust.

The trust should also authorize the fiduciaries to seek judicial modification, nonjudicial settlement, reformation, construction, or other relief available under applicable law. Express authority does not guarantee a remedy, but it demonstrates that adaptation is consistent with settlor intent.

IX. Accounting Notice Privacy and Meaningful Oversight

Accountability is particularly important when the primary beneficiary cannot independently review a fiduciary’s work. At the same time, conventional accounting rules may disclose sensitive medical, behavioral, housing, or family information to remote remainder beneficiaries who play no constructive role during the beneficiary’s lifetime.

The drafting should answer four questions:

1. Who must receive information during the beneficiary’s lifetime?
2. What information must be supplied, and in what form?
3. Who may act for a beneficiary who cannot meaningfully review it?
4. How will the trust protect privacy while preserving enforceable oversight?

²⁴ Uniform Trust Decanting Act §§ 11-12 (Unif. L. Comm’n 2015, amended 2025). The governing state’s enactment and any nonuniform provisions must be reviewed.

²⁵ N.Y. Est. Powers & Trusts Law § 10-6.6(b)-(c), (e), (h), (j), (n), (r)-(s).

A modern instrument might provide information to the beneficiary in an accessible summary, with full statements delivered to a guardian, agent, beneficiary representative, independent advocate, or trust protector. It may restrict disclosure to remainder beneficiaries to the extent permitted by law. It may permit informal accountings and releases without foreclosing court settlement where appropriate.

Illustrative information provision

At least annually, the Trustee shall provide a report of trust property, receipts, disbursements, and material actions to each person entitled to information under applicable law and to any Beneficiary Representative then serving. The Trustee shall provide the Beneficiary with information in a form reasonably suited to the Beneficiary's ability to understand it, unless the Trustee reasonably determines, after consultation with the Beneficiary Representative or other qualified person, that direct disclosure would cause substantial harm. Any limitation on disclosure shall be no broader or longer than reasonably necessary and shall not eliminate disclosure to an independent person capable of protecting the Beneficiary's interests.

The “substantial harm” concept should be used sparingly. Disability alone is not a reason to conceal information. Nor should the trustee appoint a friendly recipient who cannot or will not scrutinize administration.

The beneficiary representative

A beneficiary representative can receive notices, review accounts, participate in planning, and raise concerns without controlling distributions. The trust should specify appointment and removal, independence, compensation, access to information, and whether the representative acts in a fiduciary capacity. The role can be especially valuable where no guardian exists and supported decision-making is appropriate.

The instrument should also address virtual representation and the binding effect of releases or settlements under state law. These provisions must be drafted with care when the representative has a conflict, is also a remainder beneficiary, or is selected by the trustee whose conduct is under review.

A complete waiver of accountings is not a reliable substitute for oversight. State statutes differ on mandatory information rights, representation, limitation periods, and exculpation. The Uniform Trust Code requires information and reports for specified beneficiaries and places limits on exculpation, but local enactments and mandatory provisions must be reviewed.²⁶ In *Matter of JP Morgan Chase Bank*, the New York court refused to enforce a provision eliminating all but a final account where the beneficiary was under a disability and no one was protecting his interests. New York also declares void any attempt to exonerate an inter vivos or testamentary trustee from liability for failure to exercise reasonable care, diligence, and prudence.²⁷ These authorities are not national rules, but they illustrate why privacy protections and reasonable liability limitations should not eliminate meaningful oversight.

²⁶ Uniform Trust Code §§ 105(b)(8)-(9), 813, 1008 (Unif. L. Comm’n 2000, last amended 2025). These provisions address mandatory information rights and limitations on exculpation, but state enactments vary.

²⁷ *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, 38 Misc. 3d at 376-80; N.Y. Est. Powers & Trusts Law § 11-1.7(a)-(c); see also *Matter of KeyBank N.A.*, 58 Misc. 3d 235, 254-56, 66 N.Y.S.3d 524 (Sur. Ct. Saratoga Cnty. 2017).

X. Liability Protection Without Immunity

Qualified trustees may be reluctant to serve if every benefits consequence creates potential surcharge exposure. Reasonable protections encourage sound decision-making. But broad exculpation combined with weak information rights can make a vulnerable beneficiary functionally powerless.

A balanced document can:

- authorize reliance on public-benefits counsel, tax counsel, investment advisers, care managers, and other specialists;
- protect good-faith decisions that incidentally reduce benefits;
- permit delegation where allowed by law;
- allocate responsibility clearly in a directed structure;
- allow reasonable compensation and reimbursement;
- require disclosure of conflicts; and
- preserve liability for bad faith, reckless indifference, willful misconduct, or another nonwaivable statutory standard.

Illustrative reliance and liability provision

A Trustee may obtain and rely in good faith on advice from legal counsel, accountants, investment professionals, public-benefits specialists, care managers, and other qualified advisers selected with reasonable care. To the extent permitted by applicable law, a Trustee shall not be liable for an action or omission taken in reasonable reliance on such advice or on a direction properly given by a person holding authority under this instrument. No provision of this trust excuses bad faith, willful misconduct, reckless indifference to the purposes of the trust or the interests of the Beneficiary, or liability that applicable law does not permit the Settlor to waive.

The standard should align with governing law. States differ on exculpation, directed duties, delegation, and the effect of reliance provisions. The instrument should not promise more protection than the law permits.

The protection should also be tied to process. A trustee who identifies the relevant benefit, obtains competent advice where needed, learns the beneficiary's circumstances, considers reasonable alternatives, documents the decision, and acts consistently with the trust's purposes should be protected even when the outcome is imperfect. A trustee who never develops the information needed to exercise discretion should not be insulated by adjectives.

XI. Administration Should Be Designed at the Drafting Table

Good clauses do not administer themselves. The planning process should produce an administrative structure that is proportionate to the trust's size and the beneficiary's needs.

For a modest trust, a professional trustee plus a family adviser may be sufficient. A large trust supporting complex housing and care may require an administrative trustee, investment direction, benefits counsel, care management, and independent oversight. Too many roles can create cost, delay, and finger-pointing. Too few can concentrate responsibility in an institution that has financial competence but little knowledge of the beneficiary.

Before execution, the drafter should conduct a governance conference with the settlor and, when appropriate, the beneficiary. The agenda should include:

- the beneficiary's strengths, communication style, preferences, and current supports;
- anticipated housing and caregiving needs;
- expected trust funding and likely duration;
- the intended balance between conservation and present quality of life;
- the value and reliability of current public benefits;
- proposed fiduciaries and realistic successor options;
- family conflicts and remainder-beneficiary expectations;
- circumstances warranting professional care management or benefits advice;
- the role of an ABLE account;
- information and privacy preferences; and
- who has authority to adapt the plan after the settlor's death.

The attorney should also explain that a letter of intent, benefits inventory, contact list, and current care plan require periodic updates. These are not substitutes for operative trust language, but they allow the trustee to understand the life the trust is intended to support.

XII. A Drafting Checklist for the Unknown

Every third-party SNT should be tested against the following questions:

1. Does the purpose clause identify the beneficiary's welfare as the trust's primary objective?
2. Can the trustee spend despite an incidental loss of benefits when the expenditure is worthwhile?
3. Does the beneficiary have a meaningful voice without a right to compel distributions?
4. Can the trust coordinate effectively with an ABLE account?
5. Are remainder interests expressly subordinate during the beneficiary's lifetime?
6. Is responsibility divided among fiduciaries and advisers only where the division adds value?
7. Does every protector, director, adviser, and representative have defined powers, duties, succession rules, and information rights?
8. Can the trust change situs, governing law, or administrative structure?
9. Are decanting, modification, merger, and division available without relying solely on current default law?
10. Who receives accountings, and who protects the beneficiary if the beneficiary cannot evaluate them independently?
11. Does the document protect privacy without eliminating oversight?
12. Can fiduciaries rely reasonably on specialists without being immunized for bad faith or reckless administration?
13. Would the plan still function if the beneficiary moves, benefits rules change, family caregivers disappear, and the original trustee is unavailable?
14. Has the document created a process for learning what matters to the beneficiary over time?

XIII . Conclusion

Benefits preservation remains foundational to third-party SNT drafting, but it is not the whole assignment. The trust must support a person, not merely protect a status. The difference appears in the provisions that determine whose interests come first, who listens to the beneficiary, who makes decisions, who reviews them, and who can repair the structure when circumstances change.

The modern third-party SNT should preserve discretion without erasing autonomy; create oversight without paralyzing administration; and provide flexibility without abandoning settlor intent. It should enable a trustee to ask not only, “Will this distribution affect eligibility?” but also, “What does the beneficiary gain, what is actually being lost, and does this decision advance the life the trust was created to support?” Most importantly, it should give future decision-makers enough authority and information to pursue what families usually care about most: good people around the beneficiary and a safe place for the beneficiary to live, even when the systems expected to deliver those supports fail.

That is the shift from benefits-preservation drafting to durable beneficiary-centered planning.