

Different Options for Managing Your Special Needs Trust



For more information go to
<http://achievingindependence.com/>

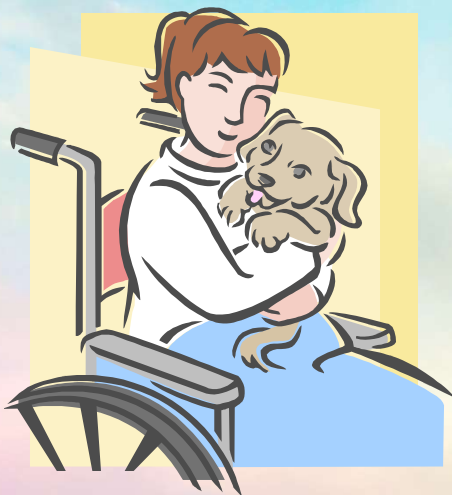


Defining the Challenge



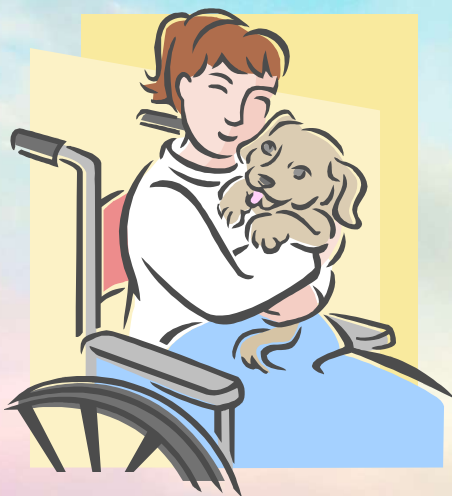
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Imagine



- Your clients have a daughter named Kathy who has autism.
- Kathy is likely to need some level of assistance for the rest of her life.
- They come to you to provide for her needs in the event of their incapacity or death.
- Kathy is otherwise healthy
- You do a complete estate plan which includes a special needs trust

Imagine



- You come to work and get terrible news that Kathy's parents died in an automobile accident
- She is now 17 years old and in good health
- Statistically she is projected to live until age 87
- What challenges might she face for the next 70 years?

The Challenge

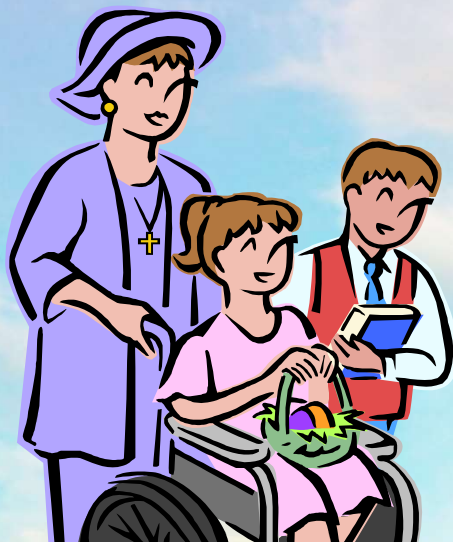
- ▶ Benefit laws may will change
- ▶ Social service systems will change
- ▶ Her condition may change
- ▶ Her advocacy system may change
- ▶ Attitudes may change
- ▶ The amount of resources she needs may change
- ▶ Trustee options will change



The Magic Document Syndrome

- For all too many planners – planning for a person with a disability is creating a special needs trust that focuses solely on preservation of needs based benefits.
- Think of a special needs trust as a private social service system that creates a structure to coordinate activities focused on Kathy's quality of life

Providing Advocacy for Your Client's Disabled Loved Ones



- Many families are seeking answers on how to provide quality of life for their disabled loved ones.
- More and more the legal and financial, care management and fiduciary industry are providing services that traditionally have been provided by the government.

Definition of Estate Planning

I want to provide for myself and my loved ones during my lifetime, and upon my incapacity or death give what I have to who I want, the way I want, when I want, and if I can save every last fee, tax or court cost possible.

From Loving Trust



Planning for Incapacity

Striking a Balance

- Many families that have a loved one with a disability are balancing their needs with the needs of their loved ones.
- A good estate plan should reflect the values of the Grantors by leaving instructions to guide the trustee about what factors to consider in maintaining that balance.
- For instance, if you were to have a stroke, a well written estate plan should provide the trustee with clear instructions on what to consider when providing for your needs as well as the needs of the rest of your family including your child with a disability.

The Quest for the Ideal Trustee

For more information go to
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**The Kathy
Jones Special
Needs Trust**

Be Part of the Team

- After focusing on Special Needs Trusts for 3 decades – I have come to the conclusion that building a management team to administer the Special Needs Trust is the single greatest factor about whether a trust will succeed or fail
- I wish I could draft a document that would protect a disabled person – but it just isn't possible

The Ideal Trustee

- Will use discretion in the best interest of the disabled beneficiary
- Must understand public benefits and keep up with changes in the law
- Can wisely invest and conform to all statutory fiduciary requirements
- Understands taxes
- Keeps perfect books
- Provides advocacy and prevents abuse
- Is immortal





Divide These Duties Into Three Categories

Advocacy

- Will use discretion in the best interest of the disabled beneficiary
- Must understand public benefits
- Provides advocacy and prevents abuse

Accountability

- Keeps perfect book
- Carries insurance, is bondable or has deep pockets
- Is immortal

Financial

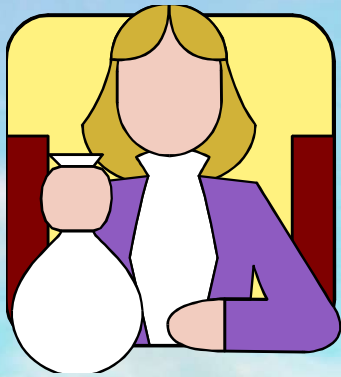
- Can wisely invest and conform to all statutory fiduciary requirements
- Understands taxes

Management Models

For more information go to
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Model 1

The Trustee Directed by a Trust Advisory Committee



Trustee

- The Trustee manages funds, makes distributions, does taxes, keeps records
- The Trustee is directed by a Trust Advisory Committee which gives guidance on distributions, can amend the trust or replace the Trustee



Care Manager

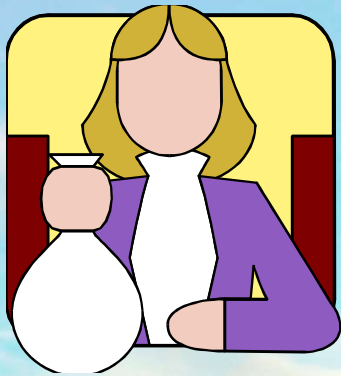
- Can include a care manager to assess the needs of the beneficiary to guide the management team.



Advisory Committee

Model 2

The Trustee Directed by a Care Manager



Trustee

- The Trustee manages funds, makes distributions, does taxes, keeps records
- The Care Manager interacts with the beneficiary and advises trustee on distributions



Care Manager

The Trust Protector oversees the trust performance and can make adjustments as laws change or replace the trustee if necessary.



**Trust
Protector**

Model 3

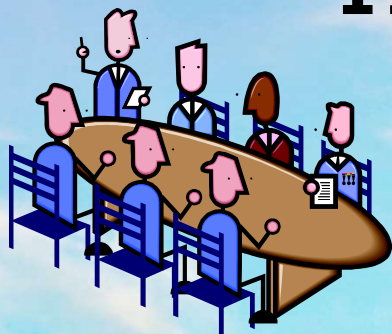
Limited Purpose Trust

For trusts for specific purposes, such as to provide only housing, can be more tightly defined and trustees can seek assistance from benefit, tax and financial advisors may be adequate.



Co-Trustees

Model 4 – Pooled Special Needs Trust directed by a Trust Advisory Committee



Leaky Lagoon
Pooled Trust

- Pooled special needs trust manages funds, makes distributions, does taxes, keeps records
- Pooled special needs trust shares resources between 100's of families
- Can include care manager or advocates often at lower costs than the normal rate
- Ideally pooled special needs trust accountable to family or circle of support for the beneficiary.



Care Manager



Advisory Committee



Suggested Language for Management of 3rd Party Trusts

Upon the trust becoming irrevocable, Golden State Pooled Trust, or a corporate trustee, private professional fiduciary or pooled special needs trust experienced administration of special needs trusts for persons with disabilities shall be selected by our *[advisory committee/ trust protector]*.

In the event that the *[advisory committee/ trust protector]* confirms the Golden State Pooled Trust to serve, or selects another pooled trust to serve in their place, the *[advisory committee/ trust protector]* shall retain the right to review the performance of the pooled trust including access to all relevant records and investment accounts. In addition, the *[advisory committee/ trust protector]* shall retain the right to replace any then serving trustee and transfer management to a private professional fiduciary, pooled trust, or corporate trustee of the *[advisory committee/trust protector]* choosing *[with/without cause]*.

What is a Private Professional Fiduciary?

According to PFAC

(Professional Fiduciary Association of California)

A fiduciary is a person who assumes responsibility for a position of trust.

What Governs the Duties of a Fiduciary

- The fiduciary as trustee has the responsibility of carrying out the terms of the trust as set forth in the document.



What are Primary Duties of a Fiduciary

- Safeguarding assets.
- Making distribution in accordance with the trust terms.
- To invest the trust resources using the Prudent Investor Rule.
- Providing annual reports to the beneficiary(ies) or other identified parties.
- File and pay taxes.



Why Use A Private Professional Fiduciary

- To avoid burdening family members or friends.
- When there are no family or friends.
- To avoid conflict among family and friends.
- To avoid mistakes that non-professionals can easily make when dealing with the complexities of trust administration.



How Do You Find and Select a Qualified Private Fiduciary

- Referrals from Probate and Estate Planning attorneys
- Referrals from other financial advisors
- PFAC website <http://www.pfac-pro.org/index.php>
- Professional Fiduciaries Bureau of CA <http://www.fiduciary.ca.gov>



How Does the Fiduciary Work within the Team

- Reviewing and understanding the needs of the beneficiary(ies).
- Working with the beneficiary(ies) and the financial advisor to set and maintain a budget/goals.
- Working with the financial advisor and the tax planning professional to capitalize on tax advantages.

Designing a SNT with an Advisory Committee

The Basic Concept of an Advisory Committee

- Advisory committees have been incorporated in special needs trusts since their earliest inception.
- The concept is to provide some oversight to the trustee about the needs of the beneficiary to ensure that the SNT is being administered in the beneficiary's best interest.



The Basic Concept of an Advisory Committee

- In the best of circumstances the advisory committee provides a system of checks and balances to ensure that the trustee is acting in the best interest of the beneficiary
- A well run advisory committee empowers key family advocates to ensure that the beneficiary's needs are met and they are free from abuse and neglect.



Why Many Advisory Committee's Fail

- Vague purpose
- Lack of structure and poorly defined duties
- Lack of familiarity with the needs of the beneficiary and lack of relevant information to base advisement on.



Making the Purpose of the Advisory Committee Clear

- All too often it is not clear to the advisory committee members and the trustee what exactly is the advisory committee's purpose.
- If the document only specifies that the loved one must be kept eligible for public benefits then both the trustee and the advisory committee are left to guess what the grantor's overall intent was and how they would fulfill their obligations.



Defining the Committee Structure and Duties

- It is imperative to be clear about how the trust committee is structured, who is in charge, and when and how the committee members needs to act?
- It is becoming more and more common to require the trustee to work with a care manager to create an annual distribution plan to be reviewed by the Trust Advisory Committee as their primary function.



Sample Language

Composition of Trust Advisory Committee

- The Trust Advisory Committee shall consist of a minimum of 3 members, but no more than 5 members to be determined by the chairperson(s) then serving. If any member of the Trust Advisory Committee is unwilling or unable, for any reason, to act or continue to act as a committee member, the chairperson(s) then serving may decide whether or not to fill the vacancy. However, there shall be at least three (3) members serving at all times. If there are fewer than 3 members serving and the chairperson(s) then serving are unable or unwilling to appoint a successor committee member, the Trustee may appoint the successors.

Sample Language

Composition of Trust Advisory Committee

- **The initial Chairpersons for the Trust Advisory Committee shall be**
 - Bill Jones
 - Mary Jones
- In the event that either Bill Jones or Mary Jones cannot or will not serve, then the remaining chairperson shall <serve alone/select a successor chairperson/elect whether to select a co chair>.
- In the event that neither Bill Jones nor Mary Jones is willing to serve, then the remaining advisory committee members shall select a chairperson by majority vote.

Sample Language

Composition of Trust Advisory Committee

- **Duties of the Chairperson(s)**
- The Chairperson(s) primary duty is to ensure that the duties and the timelines of the Trust Advisory Committee are followed, and to make sure that there are at all relevant times the proper number of members on the committee.
- **Selection of the Remaining Trust Advisory Committee Members**
- The grantors shall maintain a schedule of successor Trust Advisory Committee members to be updated from time to time to provide guidance for the Trust Advisory Committee for selection of successor Trust Advisory Committee members to maintain the requisite number of committee members.

How an Advisory Committee Can Prevent Abuse

- While it is desirable to have members that live in the same locality as the beneficiary, there are many special needs trusts that operate fine with advisory committee members that live far away.
- In fact, we have many trust advisory committee members that do an outstanding job while living outside of the country.



How an Advisory Committee Can Prevent Abuse

- The challenge for committee members that are not able to visit the beneficiary on a regular basis is that they may become out of touch with the beneficiary's needs.
- There is a danger in having a vulnerable beneficiary who is isolated with no one monitoring his or her needs and any signs of abuse or neglect.



How an Advisory Committee Can Prevent Abuse

- The most effective method to prevent abuse is to make sure that someone visits the beneficiary regularly.
- If it is not practical for an advisory committee member to personally visit the beneficiary on a regular basis, the solution may be to have a provision in the trust which pays for a trained professional such as a care manager to periodically come and visit, preferably unannounced.



Sample Language

Periodic Visits by TAC or Care Manager

- It is our desire that Kathy be visited at least monthly by a member of the Trust Advisory Committee and report back to the rest of the Trust Advisory Committee and trustee any concerns or needs that Kathy might have. In the event that no member of the Trust Advisory Committee is able or willing to make these visits with regularity, we wish the trustee to have a professional care manager make regular visits with Kathy and report their findings to the Trust Advisory Committee and trustee.

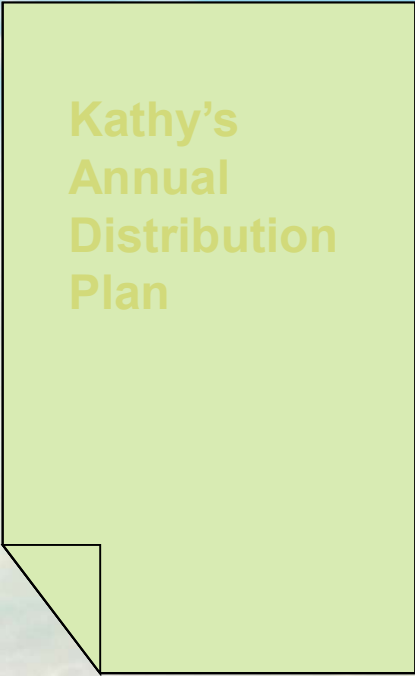
Keeping the Advisory Committee Relevant

- Often times the effectiveness of an advisory committee depends on how relevant the committee members feel their involvement effects the beneficiary's quality of life.
- If the committee lacks relevant information the committee will flounder, members will lose interest and the committee will cease to function.



Keeping the TAC Relevant Using Distribution Plans

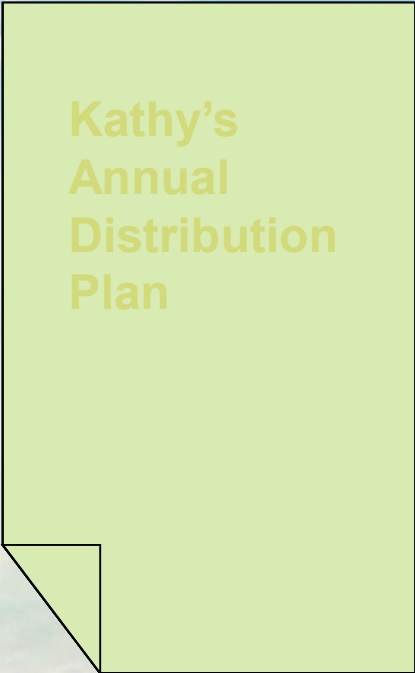
- Providing all parties, including the Trust Advisory Committee, with a written plan, commonly referred to as a distribution plan, provides a tangible tool for all involved parties.



Kathy's
Annual
Distribution
Plan

Keeping the TAC Relevant Using Distribution Plans

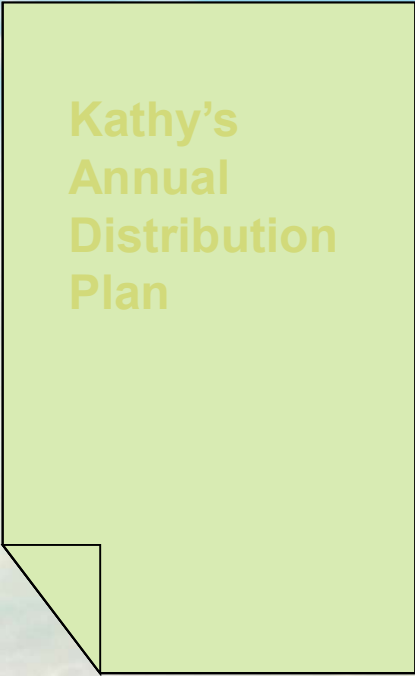
- They can use this distribution plan to review, reflect upon, and to provide informed advice that the trustee can use to direct future trust activities.
- In most cases, this plan is created primarily by the care manager with input from the trustee and Advisory Committee members.



Kathy's
Annual
Distribution
Plan

Distribution Plans

We have found that performing an annual review of a distribution plan by the advisory committee and trustee should be the advisory committee's primary function.



Kathy's
Annual
Distribution
Plan



Sample Language

Annual Distribution Plan

The trustee shall produce a written distribution plan to be reviewed by the Trust Advisory Committee annually. The primary purpose of the distribution plan is to provide specific recommendations of services likely to be provided to Kathy for the upcoming year, the cost of those services, and a good faith estimation of how those expenditures will affect the longevity of the trust.

The Trustee may/shall specifically employ a qualified Care Manager to assess Kathy's medical, social and direct care needs and incorporate those assessments in the distribution plan. The Care Manager shall be a qualified professional who is familiar with services in Kathy's community as well as the developmental needs of persons with disabilities similar to Kathy's.

The distribution plan shall provide guidance and advisement concerning Kathy's needs, rights, and entitlement to public benefits, and what discretionary distributions should be made for needs not covered by public benefits, as well as recommendations concerning distributions otherwise covered by public benefits, including, but not limited to, payment for supplemental medical and therapeutic care, education and habilitation services, attendant care services whenever the need arises, residential services, and daily support services. Whenever possible the distribution plan shall make a good faith estimate of the likely cost of each recommendation to be incorporated in an annual budget.

The distribution plan shall be made available to members of the Trust Advisory Committee for their review at least <15 days> prior to implementation. The distribution plan shall include a projection of longevity of the special needs trusts based on the assumed depletion of the trust as well as a reasonable rate of return on the investments of the trust.

The Care Manager shall be entitled to fair and reasonable compensation for services rendered. The amount of compensation shall be equal to the customary and prevailing charges for services of a similar nature during the same period of time and in the same geographic locale. The Care Manager shall be reimbursed for the reasonable costs and expenses incurred carrying out its fiduciary duties under this agreement.

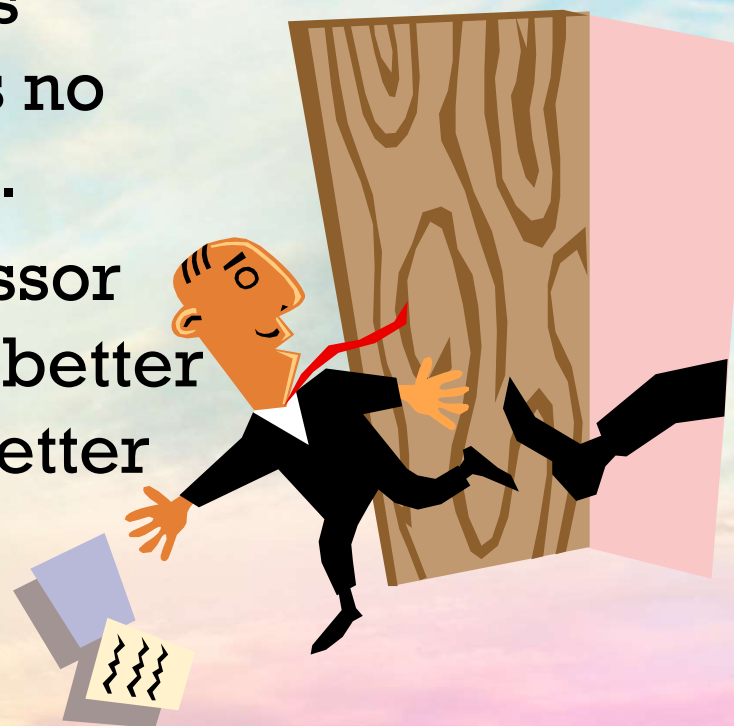
The Power to Hire and Fire the Trustee

- The power to replace the trustee is in most cases an essential tool to keep the Trust Advisory Committee in ultimate control.
- I have learned the hard way that there must always be some mechanism to fire and replace the Trustee if circumstances change.



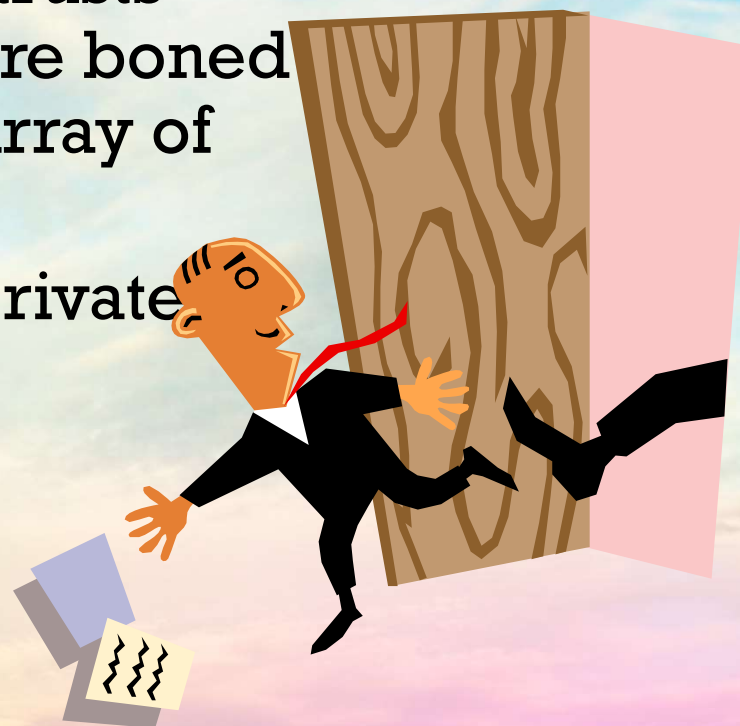
The Power to Hire and Fire the Trustee

- Adjustments may be necessary for any number of reasons.
 - It could be that the trustee selected when the trust was drafted was appropriate, but that trustee is no longer the appropriate choice.
 - It could also be that the successor trustee does a good job, but a better option comes along that has better services at a lower cost.



The Power to Hire and Fire the Trustee

- Trust companies and services change wildly about minimum account size and services that they perform.
- There is a proliferation of pooled trusts offering services ranging from bare boned fiduciary services to a complete array of services.
- Many states like California have private licensed fiduciaries that are becoming a more competitive option.



A Special Focus on Care Management

Care Managers – Finding Peace of Mind



- Professional care management has given peace of mind to many of my families.
- I have seen beneficiaries clinically improve by using a care manager.

Utilizing Care Managers to Guide the Trust

- Utilizing care managers to assess the needs of the beneficiary and develop a distribution plan that is updated periodically can help direct the trust and allow the trustee, advisory committee or trust protector make common sense decisions.

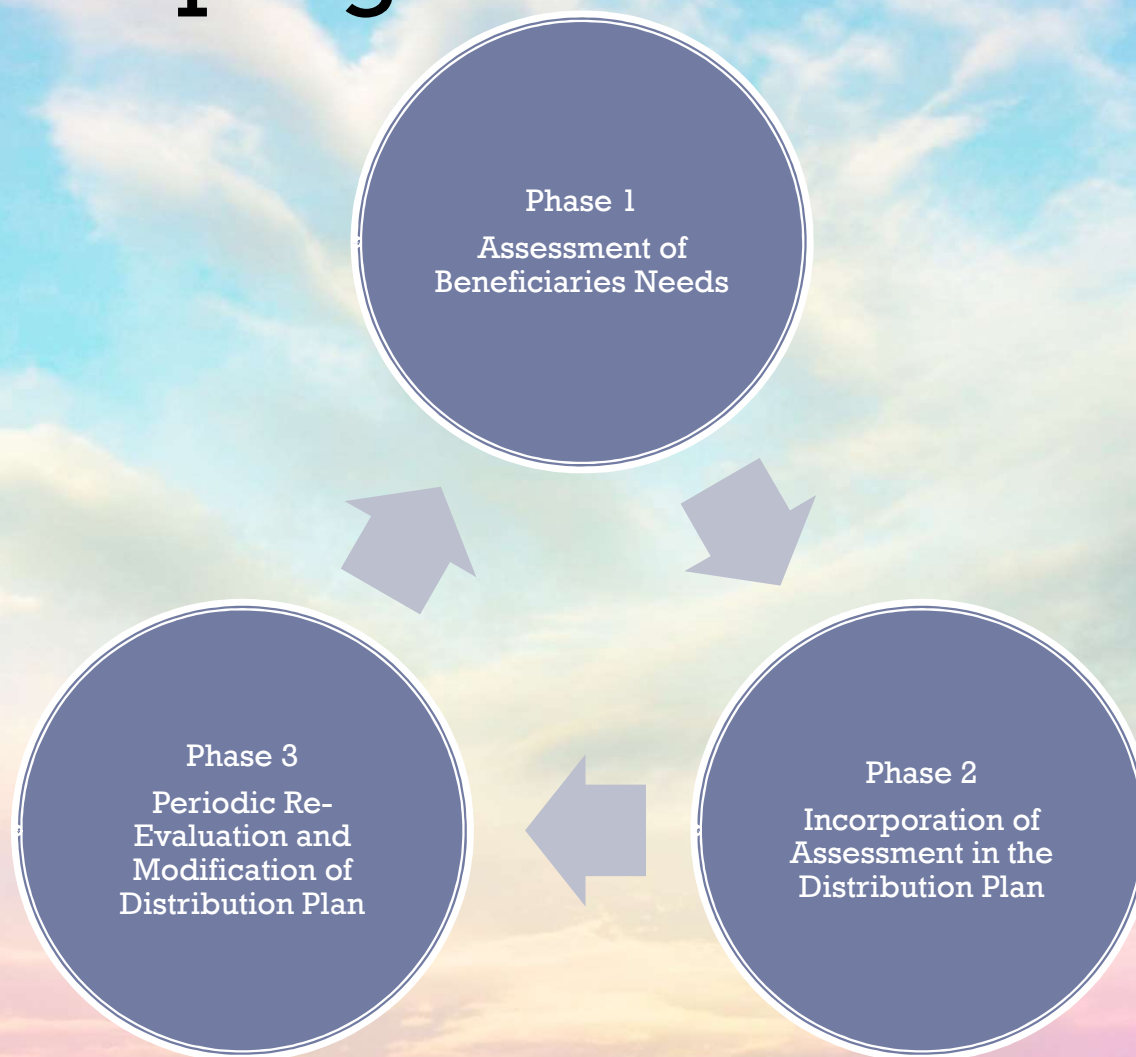


DISTRIBUTION PLANS

Breaking Down the Distribution Plan into Phases

- 1. An assessment of the beneficiary's needs.
- 2. Incorporating that information within the distribution plan.
 - Based on the distributions that will be necessary to meet beneficiary needs, along with an evaluation of the trust's investment portfolio and other available resources, the distribution plan should project the trust's long-term performance.
- 3. Periodic re-evaluation to measure the trust's actual performance against expectations and to make necessary adjustments.
- Let's review the process, step by step.

A Three-Step Process of Developing a Distribution Plan



Phase 1 – Assessment

- In cases where the beneficiary has significant needs, it's usually preferable to have a professional care manager perform the assessment.
- We routinely ask the care managers to work with the beneficiary, family, support system and medical providers to provide a written report to help shape the distribution plan and to guide other persons involved with the trust.

Phase 1 – Assessment

- **These reports include:**
 - observations concerning the beneficiary and the circle of support in their environment;
 - recommendations of services that might assist the beneficiary and the family, and
 - recommendations for the safety of the beneficiary and caregivers.

Phase 2 -- Development of the Distribution Plan

- The plan should include both short and long-term objectives for assisting the beneficiary.
- It should also include information about the resources available to fulfill that objective, including assets both inside and outside the trust.
- The distribution plan should include projections of how trust investments will perform and when the trust is likely to be exhausted.

Phase 3 – Periodic Reassessment

- The third phase consists of periodic evaluations of the trust's performance and updating both the assessments and distribution plan as needed.
- It's common for caregiving family members to eventually suffer a back injury, especially as a child's weight increases.
- A care manager can monitor the safety needs of both the caregiver and beneficiary and recommend precautions.

Phase 3 – Periodic Reassessment

- Providing for the care and quality of life of a person with disabilities has many variables, and the process doesn't end until the beneficiary dies or the special needs trust is exhausted.
- It's almost impossible to anticipate every contingency.
- That's why an interdisciplinary team of family members, advocates and professional advisors is needed.

Keeping the Distribution Plan Up-to-Date

- The process of assessing the beneficiary's needs and then balancing them against available resources in order to establish a budget isn't a one-time process.
- The value of investment portfolios will fluctuate, and many states are reducing assistance to persons with disabilities.

Projecting the Longevity of the Special Needs Trust

- The budget portion of the distribution plan should ideally utilize a projected rate of return and rate of distributions in order to determine how long the trust will last.
- In most cases, the objective of the trust would be to ensure that these funds last for the beneficiary's lifetime.
- We have found that having the distribution plan reviewed by the trust advisory committee and the trustee greatly helps all parties make rational recommendations, based on available resources.

Sample Language

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