GUIDE TO THIRD-PARTY SPECIAL NEEDS TRUST DRAFTING IN CALIFORNIA

A Comprehensive Guide for Practitioners

Prepared By Kevin Urbatsch for Continuing Legal Education

Trusts & Estates | Special Needs Planning | Elder Law

July 2026

Table of Contents

1. Overview of Third-Party Special Needs Trusts

1.1 Definition and Purpose

A third-party special needs trust (SNT) is an estate planning instrument that allows a person other than the beneficiary, typically a parent, grandparent, or other family member, to set aside assets for the benefit of an individual with a disability without jeopardizing the beneficiary's eligibility for essential means-tested public benefits such as Supplemental Security Income (SSI) and Medi-Cal (California's Medicaid program).

The primary purpose of a third-party SNT is to provide a system of fiscal management for handling funds and managing disbursements for items such as personal attendant services, advocacy, consumer services, social development services, rehabilitation, care services, consumer goods, education, training, and guidance, while supplementing, rather than supplanting, all other financial and service benefits for which the beneficiary may be eligible.

Third-party SNTs are sometimes referred to as "supplemental needs trusts," "inheritance trusts," or "family-funded special needs trusts." The nomenclature is not legally significant, though naming the trust in a way that identifies its special needs purpose can facilitate interactions with government benefits agencies.

> **PRACTICE TIP:** *While there is no legal requirement to title the trust as a "special needs trust," doing so is advisable because most SSI and Medi-Cal field offices are familiar with the term. Consider using "Third Party Special Needs Trust" or "Supplemental Needs Trust" in the trust name. If the beneficiary prefers less stigmatizing language, "Inheritance Trust" is an acceptable alternative.*

1.2 Distinction from First-Party (Self-Settled) SNTs

The distinction between third-party and first-party SNTs is fundamental to special needs planning:

- **Funding Source.** A third-party SNT is funded exclusively with assets belonging to someone other than the beneficiary. A first-party (or "d4A") SNT is funded with the beneficiary's own assets, typically from a personal injury settlement, inheritance received outright, or other source.
- **Medicaid Payback.** Upon the death of the beneficiary, a first-party SNT must contain a provision requiring repayment to the state Medicaid agency (Medi-Cal in California) for benefits paid during the beneficiary's lifetime (42 U.S.C. § 1396p(d)(4)(A)). A third-party SNT has no such payback requirement; remaining trust assets pass according to the settlor's wishes.

- **Who May Establish.** A first-party SNT may be established by the beneficiary (if competent), or by a parent, grandparent, legal guardian, or court. A third-party SNT may be established by any person or entity, provided it is funded with that person's own assets.
- **Age Restrictions.** A first-party d4A SNT must be established for individuals under age 65 (though a pooled trust under 42 U.S.C. § 1396p(d)(4)(C) has no age limit). Third-party SNTs have no age restrictions.
- **Sole Benefit Rule.** A first-party SNT must be for the "sole benefit" of the individual with a disability. A third-party SNT may have multiple beneficiaries, including non-disabled individuals.

DRAFTING NOTE: *Never commingle the beneficiary's own assets (e.g., back-due SSI, personal injury proceeds, ABLE account excess) with third-party trust assets. Commingling converts the entire trust to a first-party SNT, triggering the Medicaid payback obligation. See POMS SI 01120.201(J)(4) and SI 01120.201(C)(2)(c).*

1.3 Key Benefits and Use Cases

Third-party SNTs serve multiple critical estate planning functions:

- **Preservation of Public Benefits.** Properly structured trust assets are not counted as resources for SSI or Medi-Cal eligibility purposes.
- **No Medicaid Payback.** Remaining assets at the beneficiary's death pass to the settlor's chosen remainder beneficiaries, not to the state.
- **Lifetime Funding Flexibility.** A stand-alone inter vivos third-party SNT can be funded during the settlor's lifetime and can accept contributions from multiple donors.
- **Creditor Protection.** With proper spendthrift provisions, trust assets are generally protected from the beneficiary's creditors under California Probate Code §§ 15300–15309.
- **Multiple Beneficiary Capability.** A single trust can serve multiple beneficiaries, both disabled and non-disabled, providing flexibility through "sprinkling" provisions.
- **Tax Planning.** A qualifying third-party SNT may elect Qualified Disability Trust (QDT) status under IRC § 642(b)(2)(C)(ii), providing a larger personal exemption deduction.
- **SECURE Act Planning.** Post-SECURE Act, a properly drafted third-party SNT naming a beneficiary with a disability as an "eligible designated beneficiary" can stretch retirement account distributions over the beneficiary's life expectancy, avoiding the 10-year payout rule.

Common use cases include: parents planning for an adult child with developmental disabilities; grandparents wishing to leave an inheritance without disqualifying a grandchild from benefits; families coordinating with structured settlements; and situations where a disabled spouse needs supplemental support.

2. Legal Framework

2.1 Federal Law

2.1.1 OBRA ’93 and the Statutory Framework

The Omnibus Budget Reconciliation Act of 1993 (OBRA ’93) established the federal framework for special needs trusts. While OBRA ’93 primarily addressed first-party SNTs (codified at 42 U.S.C. § 1396p(d)(4)(A) and (C)), it also clarified the treatment of third-party trusts under both SSI and Medicaid.

For third-party SNTs, the key statutory provisions are:

- **42 U.S.C. § 1382b(e):** Defines when trust assets are countable resources for SSI purposes.
- **20 C.F.R. § 416.1201(a)(1):** Defines “resources” for SSI as cash or other liquid assets that an individual owns and could convert to cash to be used for support and maintenance.
- **42 U.S.C. § 1396p(d)(2)(A):** Addresses Medicaid trust counting rules and specifies that assets in a revocable trust are countable.

2.1.2 SSI Resource Rules and POMS Guidance

The Social Security Administration’s Program Operations Manual System (POMS) provides the operational guidance that field offices use to evaluate trusts. Key POMS sections include:

- **POMS SI 01120.200:** Trusts (General). Establishes the two critical requirements for a third-party trust to be excluded from countable resources: (1) The beneficiary cannot have authority to revoke the trust; and (2) The beneficiary cannot direct the use of trust assets for his or her support and maintenance.
- **POMS SI 01120.200(B)(17):** Confirms that a trust established by a third party with the third party’s own assets is not subject to the statutory trust provisions of § 1613(e) of the Social Security Act.
- **POMS SI 01120.200(D)(2):** Provides the resource determination rules for third-party trusts: the trust is analyzed under the general resource rules, not the statutory trust provisions.

- **POMS SI 01120.201:** Provides detailed analysis of trusts including irrevocability, transfer of resources, and the treatment of trust income.
- **POMS SI 01120.202–203:** Address exceptions, development of trust cases, and evaluation of trust terms.

> **PRACTICE TIP:** *California courts have recognized POMS as "important authority" in evaluating trusts (McGee v. DHCS (2023) 91 Cal.App.5th 1161). When drafting, draft with POMS compliance in mind; field office employees use POMS as their primary guide. If a trust provision is inconsistent with POMS, the trust may be denied exemption even if the provision is legally permissible under case law.*

2.2 California-Specific Statutes and Case Law

2.2.1 California Probate Code

California does not have a separate special needs trust statute. Third-party SNTs are instead governed by the same general trust provisions of the California Probate Code that apply to all trusts. Key provisions particularly relevant to drafting and administering third-party SNTs include:

- **Prob. Code § 15200:** A trust may be created by transfer of property to another as trustee during the settlor's lifetime, by declaration, or by exercise of a power of appointment.
- **Prob. Code § 15205(b)(1):** A trust must have an ascertainable beneficiary.
- **Prob. Code §§ 15300–15309:** Spendthrift trust provisions and creditor protections.
- **Prob. Code §§ 16000–16081:** Trustee duties, including duty to administer (§ 16000), loyalty (§ 16002), impartiality (§ 16003), avoiding conflicts (§ 16004), prudent investor standard (§§ 16045–16048), duty to keep beneficiary informed (§ 16060), and duty to account (§ 16062).
- **Prob. Code § 15403:** Trust modification/termination when trust is uneconomical to administer.

2.2.2 Key California Case Law

- **Crocker-Citizens Nat'l Bank v. Younger (1971) 4 Cal.3d 202:** Trust advisers are held to a fiduciary standard. This is critical for TAC and Trust Protector provisions; individuals serving in these roles owe fiduciary duties to the beneficiary.

- **McGee v. DHCS (2023) 91 Cal.App.5th 1161:** The court recognized POMS as "important authority" in determining whether a trust complies with Medicaid requirements. Reinforces the need to draft in conformity with POMS guidance.
- **Matthew L. v. Inland Regional Center** (OAH Nos. 2008020357 & 2008080285): An administrative law judge held that a Regional Center could not deny funding for respite and occupational therapy services by claiming that a beneficiary's properly structured third-party SNT should cover them, because the trust was neither a public agency nor a private entity with a legal duty to provide services, and therefore was not a countable "generic resource" under Welf. & Inst. Code §§ 4648, 4659. This decision supports the anti-supplanting and payor-of-last-resort provisions in Section 9.10 below.

2.3 Recent Developments (2023–2026)

2.3.1 Medi-Cal Eligibility Changes

- **Elimination of Medi-Cal Asset Test (2024–2025):** California eliminated the Medi-Cal asset test entirely from January 1, 2024 through December 31, 2025 (AB 133). During this period, there was no asset limit for Medi-Cal eligibility.

- **Reinstatement of Medi-Cal Asset Limits (2026):** Effective January 1, 2026, California reinstated Medi-Cal asset limits for Non-MAGI Medi-Cal programs (covering seniors and people with disabilities) at $130,000 for an individual and $195,000 for a couple (AB 116), and these limits remain in effect through June 30, 2027. While far higher than the former $2,000/$3,000 limits, these thresholds return asset planning to the forefront. Absent further legislative action, the asset limit is scheduled to drop sharply effective July 1, 2027, to $21,000 for an individual, $31,000 for a couple, plus $1,550 for each additional household member (up to 10 people), underscoring the continued importance of SNT planning for Medi-Cal purposes.

- **Medi-Cal Look-Back Period:** A look-back period phases in starting 2026, reaching 30 months by July 2028. Transfers made during 2024–2025 are NOT subject to the look-back. Properly structured special needs trusts remain exempt from Medi-Cal asset calculations regardless.

CAUTION: *Even during the period when Medi-Cal had no asset test, third-party SNTs remained essential for SSI planning. The SSI asset limit remains unchanged at $2,000/$3,000. With Medi-Cal asset limits reinstated in 2026, SNT planning is again critical for both SSI and Medi-Cal.*

2.3.2 ABLE Act Expansion

- **Age of Onset Expansion:** Effective January 1, 2026, the age of disability onset for ABLE account eligibility expanded from age 26 to age 46, making approximately 6 million additional Americans eligible.
- **Increased Contribution Limits:** The annual contribution limit increased to $20,000 for 2026, with an additional $15,650 for employed beneficiaries under ABLE-to-Work provisions.
- **529-to-ABLE Rollovers:** Made permanent effective July 4, 2025, allowing families to roll over 529 education savings plan funds to ABLE accounts (subject to annual contribution limits).

2.3.3 SSI Payment Levels

For 2026, the federal SSI payment is $994/month for an individual (2.8% COLA increase). California supplements the federal SSI payment with a State Supplementary Payment (SSP), bringing the combined maximum monthly SSI/SSP payment in California to $1,233.94 for an individual ($994 federal + $239.94 state) and $2,098.83 for a couple ($1,491 federal + $607.83 state). The SSI resource limit remains unchanged at $2,000 for an individual and $3,000 for a couple.

> **PRACTICE TIP:** *Despite the currently expanded Medi-Cal asset limits ($130,000 individual/$195,000 couple through June 30, 2027, dropping to $21,000/$31,000 thereafter), the unchanged SSI resource limit of $2,000 means that SNT planning remains essential for any client receiving or anticipating SSI. Always evaluate all benefits programs (not just Medi-Cal) when assessing the need for trust planning, and revisit Medi-Cal asset planning well before the July 2027 reduction takes effect.*

3. Eligibility and Qualifying Beneficiaries

3.1 Disability Requirements

While there is no statutory requirement that a third-party SNT beneficiary meet any particular disability standard to establish the trust, the trust's benefits-protection function is only meaningful if the beneficiary qualifies for means-tested public benefits. The relevant disability standards are:

3.1.1 SSI Disability Standard

For SSI purposes, an individual is "disabled" if unable to engage in any substantial gainful activity (SGA) by reason of a medically determinable physical or mental impairment that: (a) can be expected to result in death, or (b) has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 1382c(a)(3)(A).

For 2026, the SSA sets the SGA monthly earnings threshold at $1,690 for most individuals with disabilities and $2,830 for individuals who are statutorily blind. Gross earnings above these thresholds generally lead the SSA to conclude that the individual is capable of substantial work, which can result in denial or termination of SSDI or SSI disability benefits, a consideration relevant to any working beneficiary for whom the trust is designed to supplement, rather than replace, public benefits.

3.1.2 Medi-Cal Disability Categories

Medi-Cal eligibility for individuals with disabilities may be established through several pathways, including: SSI-linked eligibility; Aged, Blind, and Disabled (ABD) category; Working Disabled program (250% FPL); and expansion categories under the Affordable Care Act.

3.1.3 Regional Center Eligibility

California's Regional Center system serves individuals with developmental disabilities as defined in Welfare & Institutions Code § 4512: intellectual disability, cerebral palsy, epilepsy, autism, and conditions requiring services similar to those for intellectual disability.

> **PRACTICE TIP:** *A third-party SNT can be established for anyone, regardless of whether they currently meet any disability standard. Consider establishing trusts for minor children who show signs of developmental delay but haven't yet been formally evaluated, the trust can simply function as a discretionary trust if the child ultimately does not qualify for benefits.*

3.2 Age Considerations

Unlike first-party d4A SNTs (which must be established before age 65), third-party SNTs have no age restrictions. Key age-related considerations include:

- **Minor Beneficiaries:** The trust should address transition to adult services and benefits at age 18.
- **Age 18 Transition:** A child may newly qualify for SSI at age 18 when parental income/resources are no longer deemed to the child.
- **Age 65 and QDT Status:** A Qualified Disability Trust under IRC § 642(b)(2)(C)(ii) requires the beneficiary to be under age 65. After 65, the trust loses QDT tax treatment but retains its benefits-protective function.

- **ABLE Account Age of Onset:** Effective 2026, disability onset must have occurred before age 46 for ABLE account eligibility.

3.3 Impact on SSI

The SSI program (Title XVI) is the most restrictive means-tested program and typically drives SNT planning. In California, the federal SSI payment is supplemented by a State Supplementary Payment (SSP), so the maximum combined monthly SSI/SSP benefit is $1,233.94 for an individual ($994 federal + $239.94 state) and $2,098.83 for a couple ($1,491 federal + $607.83 state):

- **Resource Limit:** $2,000 individual / $3,000 couple (unchanged since 1989).
- **Trust as Excluded Resource:** If the beneficiary cannot revoke and cannot direct use for support and maintenance, trust principal is excluded. POMS SI 01120.200(D)(2).
- **Distributions as Income:** Cash paid directly to the beneficiary is unearned income. Food or shelter paid for with trust funds constitutes In-Kind Support and Maintenance (ISM), subject to the Presumed Maximum Value (PMV) rule, currently capped at approximately $351/month in 2026 (one-third of the FBR + $20).
- **Third-Party Payments:** Payments by the trust directly to vendors for non-food, non-shelter items are not income to the beneficiary.

3.4 Impact on Medi-Cal

- **Asset Limit:** $130,000 individual / $195,000 couple for Non-MAGI Medi-Cal programs (effective January 1, 2026 under AB 116), remaining in effect through June 30, 2027. Effective July 1, 2027, absent further legislative action, the asset limit drops to $21,000 for an individual, $31,000 for a couple, plus $1,550 for each additional household member (up to 10 people).
- **Trust Treatment:** Properly structured third-party SNT assets remain exempt from Medi-Cal asset calculations under 42 U.S.C. § 1396p(d).
- **Look-Back Period:** The 30-month look-back applies to uncompensated transfers. Funding a properly structured irrevocable third-party SNT is not an uncompensated transfer.
- **Estate Recovery:** Assets in a properly drafted third-party SNT are not subject to Medi-Cal estate recovery after the beneficiary's death because they are not part of the beneficiary's estate.

3.5 Impact on Other Benefits

Section 8 / Housing Choice Voucher: Section 8 (the Housing Choice Voucher Program) follows HUD's own income and asset rules under 24 C.F.R. Part 5, which differ materially from SSI and Medi-Cal rules and treat trust principal and income differently.

- **Section 8 Asset Test (HOTMA):** Effective January 1, 2024, the Housing Opportunity Through Modernization Act (HOTMA) added a formal net family asset limit for Section 8, set at $105,574 for 2026 and adjusted annually for inflation. An irrevocable third-party SNT that is not controlled by a household member or relative is excluded from this asset limit. 24 C.F.R. § 5.603(b).
- **Section 8 Income Treatment (Principal vs. Income):** Even though a properly structured SNT is excluded from the asset test, HUD's income rules still apply. Trust income that is earned but not distributed is not counted as income. Distributions of trust principal made on behalf of the beneficiary are not counted as income. However, distributions of trust income to or for the benefit of the beneficiary generally are counted as income and will increase the beneficiary's rent (30% of adjusted annual income), with a narrow exception for trust income used to pay a minor beneficiary's health or medical expenses. 24 C.F.R. § 5.609(b)(2).
- **Section 8 Imputed Income on Trust Assets:** Even where SNT assets are excluded from the asset limit, if the beneficiary's net family assets exceed $52,787 (2026), the PHA will count the greater of actual income produced by those assets or imputed income at 0.40% of asset value. Drafters and trustees should be mindful that this rule can apply to assets the beneficiary holds outside the trust, and should coordinate accordingly. 24 C.F.R. § 5.609(a)(2).
- **Drafting Implications:** Because HUD applies its own definition of income regardless of state trust accounting or IRS characterization, the trustee should maintain clear, separate records distinguishing distributions of principal from distributions of income, use a licensed third-party or professional fiduciary trustee where feasible (rather than a household member or relative), and avoid distributing trust income directly to or on behalf of the beneficiary where preserving Section 8 eligibility is a priority, favoring principal distributions or vendor payments for non-recurring needs instead.

In-Home Supportive Services (IHSS): Linked to Medi-Cal eligibility; trust should preserve Medi-Cal to preserve IHSS.

Regional Center Services: Not means-tested, but some Regional Centers have attempted to require trust funding of services they are otherwise obligated to provide under the Lanterman Act. Draft express limitations addressing anti-supplanting, payor-of-last-resort status, and the trustee's authority to resist such requests; see Section 7.5 (Regional Center Considerations), Section 9.10 (Sample Regional Center Provisions), and Matthew L. v. Inland Regional Center (Section 2.2.2) below.

CalFresh (SNAP): Has its own resource and income rules; trust distributions may affect eligibility.

Veterans Benefits: The VA has its own trust evaluation framework with different requirements than SSA.

DRAFTING NOTE: *When drafting distribution standards, consider all benefits programs the beneficiary receives or may receive, not just SSI and Medi-Cal. A distribution permissible under SSI rules may still jeopardize Section 8 or CalFresh eligibility. In particular, Section 8 counts distributions of trust income (but not principal) as income to the beneficiary, so trustees administering a Section 8 household should track and distinguish income versus principal distributions carefully and favor principal distributions or direct vendor payments when preserving Section 8 eligibility is a priority.*

4. Trust Structure and Essential Provisions

4.1 Trust Structure Options

4.1.1 Testamentary Trust

A testamentary SNT is created within a will or revocable living trust and comes into existence only upon the settlor's death. Advantages include simplicity and lower initial cost. Disadvantages include the inability of other family members to fund the trust during the settlor's lifetime, the public nature of probate (if created by will), and delay inherent in probate administration.

4.1.2 Stand-Alone Inter Vivos Trust (Preferred)

Most practitioners prefer the stand-alone living (inter vivos) trust for third-party SNT planning. Key advantages:

(a) Can be funded during the settlor's lifetime by the settlor or other family members;

(b) Designed specifically for the beneficiary with tailored provisions;

(c) Provisions remain private (not part of probate record);

(d) When submitted to SSA, caseworkers see only the SNT provisions, not provisions for other beneficiaries;

(e) Serves as a receptacle for gifts, life insurance, retirement benefits, and pour-overs from other family members' estate plans.

4.1.3 Special Rule: Spousal Third-Party SNTs

If a spouse is establishing a third-party SNT for a spouse with a disability, the trust must be created through a will, not as an inter vivos trust. 42 U.S.C. § 1396p(d)(2)(A); 42 U.S.C. § 1382b(e)(2)(A).

An inter vivos trust created by one spouse for the other is treated as a self-settled trust under federal benefits law.

> **CAUTION:** *Never create an inter vivos third-party SNT where the settlor is the beneficiary's spouse. This triggers first-party trust treatment and the Medicaid payback requirement. The trust must be testamentary, created upon the non-disabled spouse's death through a will or revocable trust.*

4.2 Revocability and Irrevocability

A critical and often misunderstood point: a third-party SNT need not be irrevocable to preserve the beneficiary's public benefits eligibility. The key requirement is that the beneficiary cannot revoke or terminate the trust. Any other party, including the settlor, may retain the power to revoke or amend without affecting the trust's benefits-protective status.

However, irrevocability is required or advisable when:

(1) **Retirement Account Planning**: The trust must be irrevocable to qualify as a "see-through" trust and achieve EDB status for stretch distributions under the SECURE Act.

(2) **Multiple Donors**: Donors are more comfortable contributing to an irrevocable trust.

(3) **Estate Tax Exclusion**: If the settlor retains revocation power, trust assets are included in the gross estate under IRC § 2038.

(4) **Creditor Protection for Settlor**: A revocable trust offers no protection from the settlor's creditors.

> **PRACTICE TIP:** *The default recommendation is to make the trust irrevocable from inception. This avoids estate inclusion, provides maximum creditor protection, facilitates multi-donor funding, and preserves retirement stretch planning options, all without affecting the trust's benefits-protective function.*

4.3 Trustee Selection, Succession, and Compensation

4.3.1 Trustee Selection Criteria

The choice of trustee is among the most critical decisions in SNT planning. Key selection criteria include: knowledge of public benefits rules; understanding of the beneficiary's disability and needs; willingness to coordinate with government agencies; financial competence; availability and longevity (the trust may last 50+ years); and geographic proximity to the beneficiary.

4.3.2 Types of Trustees

- **Family Members:** Personal knowledge of beneficiary but may lack financial expertise or benefits knowledge. Risk of burnout over decades.
- **Professional Fiduciaries:** Must be licensed by California Bureau of Professional Fiduciaries, maintain E&O insurance. Offer expertise and continuity. Not "related or subordinate" under IRC § 672(c).
- **Corporate Trustees:** Institutional continuity and investment expertise but typically require significant minimum trust size ($500,000+).
- **Co-Trustees:** Family member (personal knowledge) with professional trustee (financial/legal expertise) can be effective but creates complexity.
- **Tax Consequences of a Settlor Serving as Trustee:** If the settlor serves as trustee (alone or with a co-trustee) and retains administrative powers such as the discretion to allocate, distribute, or accumulate income among beneficiaries, the trust may be treated as a grantor trust under IRC §§ 671–677, causing the settlor to be taxed on trust income even without receiving distributions. IRC § 674(a). This result can often be avoided by appointing an independent trustee (one not related or subordinate to the settlor under IRC § 674(c)) to hold any tax-sensitive powers, or by limiting the settlor-trustee to the nondiscretionary powers described in IRC § 674(b).

4.3.3 Successor Trustee Provisions

Given the potentially decades-long duration of SNTs, robust succession planning is essential:

(a) Named successor trustees (at least two deep);

(b) A mechanism to appoint a successor if all named successors are unavailable (typically vested in the TAC or Trust Protector);

(c) A fallback mechanism if all other methods fail (e.g., court appointment under Prob. Code § 15660);

(d) Standards for successor selection (e.g., experience with SNT administration).

4.3.4 Replacement of a Trustee Due to Incapacity

Because SNT beneficiaries are often highly dependent on a fully functioning trustee to pay bills and coordinate care, the trust should include a mechanism to quickly replace a trustee who loses capacity, rather than relying solely on removal for cause. Common approaches include: (a) conclusive determination of incapacity by two physicians unrelated to the settlor and trustee, certifying under penalty of perjury that the incapacity is more likely than not to continue for a specified period; (b) authorizing the successor trustee to petition the court for removal upon a reasonable belief of incapacity, without liability for a good-faith petition; (c) granting the TAC or Trust Protector authority to remove a trustee it believes lacks capacity to serve; and (d) an interimtrustee mechanism that automatically suspends an incapacitated co-trustee's authority without requiring a formal removal proceeding.

DRAFTING NOTE: *Require any successor trustee to execute a HIPAA/CMIA-compliant medical authorization upon accepting office, permitting later successor trustees and counsel to obtain the physician certification needed to invoke the incapacity provision. Without an advance authorization, medical privacy laws can make it difficult to obtain the certification needed to trigger removal.*

4.3.5 Removal of a Trustee

Absent a specific trust provision, the California Probate Code authorizes removal of a trustee only in limited circumstances, such as: breach of trust; insolvency or unfitness to administer the trust; hostility or lack of cooperation among co-trustees; failure to act; excessive compensation under the circumstances; substantial inability to manage financial resources; substantial inability to resist fraud or undue influence; or other good cause. Prob. Code § 15642. Because a trustee can technically satisfy these minimum standards while still failing to serve the beneficiary well, many drafters grant a broader removal right, allowing the settlor (during any revocable period), the TAC, or the Trust Protector to remove a trustee with or without cause. Pairing a broad removal right with a workable successor-trustee mechanism is often a more effective safeguard than relying on the statutory removal grounds alone, since removal for cause can require costly and slow litigation.

4.3.6 Exculpatory (Nonliability) Provisions

The trust should address the extent to which a trustee will be relieved of liability for breach of trust. Under California law, a trustee cannot be exculpated for breaches committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the beneficiary's interests, or for any profit the trustee derives from a breach. Prob. Code § 16461. Within these limits, drafters have latitude to calibrate exculpation to the trustee's role: a professional or corporate trustee, who should have the expertise to administer an SNT correctly, is often held to full liability, while a family trustee acting in good faith may be given broader protection for honest mistakes. A particularly valuable provision for any SNT relieves the trustee of liability for failing to identify or maintain the beneficiary's public benefits eligibility, absent willful misconduct, bad faith, or gross negligence, while placing responsibility on the beneficiary or the beneficiary's legal representative to apply for and maintain public benefits.

PRACTICE TIP: *Discuss exculpation provisions carefully with the settlor before including them. Broader exculpation protects a family trustee facing an honest mistake but reduces the beneficiary's recourse if administration goes wrong. Sample exculpatory language appears in Section 9.5.3 below.*

4.3.7 Trustee Compensation

The trust should explicitly address compensation: professional trustees receive reasonable compensation consistent with Prob. Code § 15681; family trustees may receive specified compensation or defer to statutory reasonableness; consider fee caps for modest trust estates; authorize reimbursement of out-of-pocket expenses.

4.4 Trust Advisory Committees (TACs)

The Trust Advisory Committee model separates the trust management function (trustee) from the beneficiary advocacy function (TAC). The trustee serves as CEO while the TAC functions as a Board of Directors.

Some drafters expand this two-role checks-and-balances structure into a four-role model by adding a Care Manager or Advocate whose function is to periodically assess the beneficiary's needs and make recommendations to the Trustee and TAC. This expanded structure is optional and not required for an effective third-party SNT; see Section 4.10 below for a discussion of the Care Manager or Advocate role and Section 9.9 below for optional sample language.

4.4.1 Role and Purpose

The TAC provides ongoing oversight of the trustee and advocacy for the beneficiary. TAC members are typically family members, friends, or professionals who know the beneficiary well.

4.4.2 TAC Powers

Typical TAC powers include:

(a) Advise the trustee regarding distributions and beneficiary needs;

(b) Remove and replace the trustee, with or without cause;

(c) Right to receive accountings and financial records;

(d) Appoint successor TAC members;

(e) Approve or consent to distributions above a threshold;

(f) Direct trustee regarding quality-of-life decisions.

4.4.3 TAC Composition and Operation

The trust document should address: initial members (typically 2–5 individuals); quorum requirements; voting procedures; succession and replacement mechanisms; compensation (typically none or modest reimbursement); fiduciary standard; communication procedures; and minimum number of members required.

4.4.4 TAC Liability, Indemnification, and Powers Limitations

TAC authority is typically conferred in a nonfiduciary or fiduciary capacity, as the drafter elects; either way, the trust should address the standard of care and available protections for TAC members. Common provisions include: (a) limiting a TAC member's liability to willful misconduct or gross negligence, with no liability for the acts of other TAC members or of the trustee; (b) reimbursing a TAC member's reasonable costs of defending or settling a claim arising from TAC service, unless the claim establishes an intent to harm a beneficiary or self-dealing; (c) prohibiting the TAC from exercising any power that would give a member a general power of appointment within the meaning of IRC §§ 2041 and 2514, including use of TAC authority for a member's personal benefit; and (d) permitting the TAC to release, renounce, or reduce its own powers by written instrument delivered to the trustee.

PRACTICE TIP: *Many drafters intentionally keep distribution authority with the trustee alone and limit the TAC to an advisory and removal role. Splitting distribution authority between the trustee and TAC risks turning TAC members into co-trustees who share personal liability for each other's decisions, a result most family members serving on a TAC do not want. If the trustee needs guidance on public benefits rules, consider requiring the trustee to consult a professional or the TAC before making certain distributions, rather than giving the TAC a veto or independent distribution power.*

> **DRAFTING NOTE:** *Under Crocker-Citizens Nat'l Bank v. Younger (1971), TAC members will be held to a fiduciary standard. Include appropriate exculpation and indemnification provisions, and consider requiring TAC members to acknowledge their fiduciary responsibilities in writing upon appointment.*

4.5 Trust Protectors

4.5.1 Role and Purpose

The Trust Protector serves an emergency and adaptive function, a safeguard against future changes in law, regulation, or circumstances that could not be anticipated at the time of drafting. The role is designed to be passive until needed.

4.5.2 Trust Protector Powers

Typical Trust Protector powers include:

(a) Amend the trust to comply with changes in federal or state law, regulations, or POMS;

(b) Alter administrative or investment powers;

(c) Reflect changes in tax law;

(d) Correct ambiguities, scrivener's errors, or unintended consequences;

(e) Change trust situs or governing law;

(f) Convert between supplemental and discretionary distribution standards if warranted;

(g) Remove and replace trustee (backup to the TAC's power);

(h) Add or modify beneficiaries (with appropriate limitations).

4.5.3 Trust Protector Qualifications

The Trust Protector should be "independent" not related or subordinate to the settlor within the meaning of IRC § 672(c). This typically means the Trust Protector is not a spouse, parent, descendant, sibling, or employee of the settlor.

4.5.4 Trust Protector Succession, Removal, and Standard of Care

The trust should address what happens if a designated Trust Protector cannot or will not continue to serve. Typical provisions include: (a) permitting the Trust Protector to resign on notice (commonly at least 30 days) to the settlor, or if no settlor survives, to the TAC and trustee, without liability for the acts of a successor; (b) authorizing the settlor, while competent, to remove and replace a Trust Protector with or without cause; (c) authorizing a serving Trust Protector to name a successor by written instrument; and (d) providing a default mechanism, typically appointment by the TAC and, if the TAC cannot or will not act, court appointment on petition of an interested person, so the office of Trust Protector never remains vacant. Because the role is meant to be used only occasionally, most drafters also confirm that the Trust Protector has no ongoing duty to monitor the trust or the trustee's conduct and is not obligated to exercise any granted power, so that an inactive Trust Protector does not become a source of liability. The trust should also address Trust Protector compensation (typically, reasonable compensation as determined by the trustee or TAC) and reimbursement of expenses, including travel.

> **PRACTICE TIP:** *The Trust Protector role is ideally filled by an attorney with special needs planning expertise. Consider designating the drafting attorney or their firm as initial Trust Protector, with a mechanism for the TAC to appoint successors.*

4.6 Spendthrift Provisions

Spendthrift clauses are strongly recommended in third-party SNTs, though not strictly required by the POMS. SSA does not require a trust to include a spendthrift clause; a spendthrift clause is legally necessary under POMS guidance only where the trust provides for mandatory periodic payments to the beneficiary, since a beneficiary's right to receive such payments could otherwise be sold for a lump sum and counted as a resource. POMS SI 01120.200(B)(13). Because a fully discretionary third-party SNT does not provide for mandatory payments, the POMS resource exclusion does not strictly depend on a spendthrift clause. Nonetheless, best practice is to include a spendthrift clause in every third-party SNT: it provides an independent basis for creditor protection under state law (California Probate Code §§ 15300–15309, discussed below), reinforces the trust's overall anti-alienation intent for both SSA and other benefits agencies, and protects the trust if provisions are later modified to include periodic payments. A valid spendthrift provision restrains both voluntary and involuntary transfers of the beneficiary's interest. Standard language should provide that:

(a) The beneficiary may not anticipate, assign, or encumber any interest in the trust;

(b) No creditor of the beneficiary may reach trust assets prior to distribution;

(c) No part of the trust may be subject to attachment, garnishment, or execution;

(d) If any government agency asserts a right to trust assets, the trustee shall withhold distributions until the claim is resolved.

4.7 Discretionary Distribution Standards

4.7.1 Supplemental Standard

Under the supplemental standard, the trustee is prohibited from making any distribution that would reduce or eliminate the beneficiary's eligibility for public benefits. This typically means no distributions for food or shelter (the components of In-Kind Support and Maintenance). Provides maximum benefits protection but limits trustee flexibility.

4.7.2 Discretionary Standard

Under the broad discretionary standard, the trustee has full discretion to make distributions for any purpose, including food and shelter, when the trustee determines the benefit outweighs the temporary reduction in SSI.

> **PRACTICE TIP:** *The trend among experienced practitioners is toward the discretionary standard. The supplemental standard can leave beneficiaries in substandard housing when the trust could afford better. A well-drafted discretionary standard with a statement of intent gives trustees flexibility while providing guidance.*

4.7.3 Defining "Special Needs"

Because "special needs" is not defined in law, the trust document should define the term broadly. Include by illustration: basic living needs, goods and services enhancing self-esteem, housing, transportation, education, vocational training, recreation, travel, personal attendant care, medical/dental care not otherwise provided, technology, and any other goods or services that enhance quality of life.

4.8 Termination Provisions

The trust should terminate upon: (a) death of the beneficiary; (b) beneficiary no longer eligible for or receiving public benefits; (c) beneficiary no longer disabled (consider carefully, as disability may recur); (d) trust estate becomes uneconomical to administer (define threshold).

Upon termination, remaining assets pass to remainder beneficiaries designated by the settlor. No Medicaid payback is required. Consider granting the beneficiary a limited (non-general) power of appointment over remainder interests.

> **DRAFTING NOTE:** *Be cautious with termination upon the beneficiary "no longer being disabled." Disabilities may wax and wane. Consider requiring a sustained period (e.g., 24 months) of non-disability before termination.*

4.9 Multiple Beneficiary and Joint Trust Structures

Unlike first-party SNTs, third-party SNTs may have multiple beneficiaries, including both disabled and non-disabled individuals. Advantages include:

(a) A single trust vehicle can serve multiple family members with disabilities;

(b) Including non-disabled beneficiaries provides additional creditor protection;

(c) "Sprinkling" provisions allow the trustee to allocate income and principal among beneficiaries based on need;

(d) Administrative efficiency for families with multiple disabled members.

When drafting multiple-beneficiary trusts, each disabled beneficiary must still have the SNT distribution standard applied to their share.

4.10 Care Manager or Advocate (Optional Fourth Role)

In addition to the Trustee, TAC, and Trust Protector discussed above, some drafters add a fourth role (a Care Manager or Advocate) to the trust's management team. Unlike the TAC, which primarily oversees the trustee and holds removal authority, the Care Manager or Advocate's function is to periodically assess the beneficiary's evolving needs and make affirmative recommendations to the trustee and TAC regarding distributions and services, and to protect the beneficiary's rights and entitlement to public benefits. This role can be useful where the beneficiary's needs are complex, likely to change significantly over time, or where TAC members lack the professional background to identify appropriate services on their own.

This fourth role is entirely optional. Many third-party SNTs function well with only a Trustee, TAC, and Trust Protector, particularly where TAC members already have the relevant professional knowledge or where the beneficiary's needs are relatively stable. Where included, the Care Manager or Advocate should be given a purely advisory function, paralleling the TAC's advisory role over distributions, so that the role does not carry independent authority over trust assets that could create co-fiduciary exposure. Sample language incorporating this optional fourth role is provided in Section 9.9 below.

> **PRACTICE TIP:** Joint trusts created by married couples should address what happens upon the death of the first spouse: does the surviving spouse retain the right to amend or revoke? Clearly delineate that the beneficiary still cannot revoke or direct. Consider separate shares for each spouse's contribution upon the first death.

5. Drafting Considerations

5.1 Statement of Intent

Every third-party SNT should begin with a clear statement of the settlor's intent. This statement guides trustee discretion, informs government benefits agencies, and provides interpretive guidance if the trust is challenged. A generic, boilerplate intent statement is legally sufficient but misses an opportunity: settlors, particularly parents, often want to express, in their own words, why they love their child and what they hope the trust will accomplish for that specific individual. A more personalized statement of intent is not only more meaningful to the family, but also gives the trustee, TAC, and Trust Protector far more concrete guidance for exercising discretion over the years. Drafters should encourage settlors to incorporate the beneficiary's name, personality, talents, relationships, and specific goals and challenges into the statement of intent, drawing out these details in the drafting interview.

Sample intent language illustrating a more personalized, beneficiary-specific approach (adapt the bracketed details to the specific client):

> *The Settlors establish this Trust to express their deep love for their [son/daughter/child], [Beneficiary's Name], and their commitment to ensuring [his/her/their] lifelong security and happiness. The Settlors recognize that [Beneficiary's Name]'s disabilities create some challenges in managing financial affairs and navigating complex benefit systems. This Trust is designed to provide [him/her/them] professional support and protection while maximizing [his/her/their] independence and quality of life. The Settlors intend that this Trust will serve as a protective vehicle for [Beneficiary's Name]'s assets, ensuring professional management and safeguarding these funds throughout [his/her/their] lifetime, while also providing for [his/her/their] supplemental and special needs in a way that preserves [his/her/their] eligibility for means-tested public benefits when possible.*
>
> *The Trust empowers [Beneficiary's Name] and supplies goods, services, and opportunities that foster [his/her/their] comfort, dignity, independence, and participation in community life. The Settlors celebrate [Beneficiary's Name]'s many talents and abilities and intend the Trust assets to enhance rather than limit [his/her/their] choices, supplementing but not*

replacing benefits otherwise available through local, state, federal, charitable, or private programs. To support [his/her/their] autonomy and well-being, the Trust's protective and management functions shall continue regardless of [Beneficiary's Name]'s public benefit status.

The Trustee is granted sole and absolute discretion to make distributions for things that improve [Beneficiary's Name]'s quality of life and support [his/her/their] goals and dreams. These may include, but are not limited to, personal attendant care, advocacy, therapies and rehabilitation, medical and dental needs not otherwise covered, education and training, technology and adaptive equipment, transportation and vehicles, housing and residential modifications, furnishings, recreation, travel, cultural and social experiences, and other items or services that contribute to [Beneficiary's Name]'s happiness and well-being.

In the exercise of discretion, the Trustee may authorize distributions even if they result in a reduction or elimination of public benefits, provided that such distributions are determined to be in [Beneficiary's Name]'s best interests and consistent with the overall intent of this Trust. While [Beneficiary's Name] shall have no right to compel distributions (a requirement to protect the Trust's integrity), the Trustee is directed to consider [Beneficiary's Name]'s wishes and preferences whenever possible.

The Trust is further intended to provide a durable structure of love and support for [Beneficiary's Name] throughout [his/her/their] lifetime. The Settlors desire that the Trustee take into account the guidance of any Trust Advisory Committee, Care Manager, or Trust Protector, and give consideration to any Memorandum of Intent prepared by the Settlors that conveys their values, preferences, and hopes for [Beneficiary's Name]'s care and happiness.

A material purpose of this Trust is to ensure [Beneficiary's Name] can live the fullest life possible, promoting residential stability, meaningful family connections, and enriching life experiences, whenever consistent with prudent administration and asset protection. As a secondary purpose, the Trustee is expected to exercise sound judgment in preserving and, where possible, increasing the value of the Trust estate for the benefit of remainder beneficiaries, while never compromising the primary mission of supporting [Beneficiary's Name]'s dreams and enhancing [his/her/their] quality of life.

PRACTICE TIP: *Use the drafting interview to draw out specifics about the beneficiary, favorite activities, personality traits, close relationships, career or living goals, and particular challenges, and weave those details into the statement of intent. Parents and other settlors are often eager to talk about their loved one, and capturing that voice in the trust document both personalizes the plan and gives the trustee durable, concrete guidance for exercising discretion over what may be decades of administration.*

5.2 Common Provisions

- **Irrevocability by Beneficiary:** The trust must clearly state that the beneficiary has no right to revoke, terminate, modify, or amend the trust.
- **No Right to Compel Distributions:** The beneficiary must have no right to compel any distribution. Distributions are entirely within the trustee's discretion.
- **Anti-Assignment:** The beneficiary's interest is not assignable, transferable, or subject to anticipation.
- **No Right to Income:** The beneficiary should have no mandatory right to trust income. All income should be accumulated or distributed in the trustee's sole discretion.
- **Government Benefits Protection:** Express provision directing the trustee to consider the impact of any distribution on the beneficiary's eligibility for government benefits.
- **Savings Clause:** If any provision would cause trust assets to be a countable resource, that provision shall be null and void or reformed to preserve benefits eligibility.

> **PRACTICE TIP:** *A savings clause is not a substitute for careful drafting. Government agencies may not give effect to a savings clause if substantive provisions are clearly inconsistent with benefits preservation. Draft the substantive provisions correctly in the first instance.*

5.3 Language to Avoid

> **CAUTION:** *The following language or provisions can jeopardize the trust's exempt status and should never appear in a third-party SNT:*

(1) Any language giving the beneficiary the right to revoke, modify, or terminate;

(2) Mandatory distributions of income or principal to the beneficiary;

(3) A general power of appointment for the beneficiary;

(4) "Support and maintenance" or HEMS (Health, Education, Maintenance, and Support) language directing distributions for these purposes, HEMS is a standard ascertainable distribution term borrowed from ordinary estate planning trusts, but in an SNT it creates exactly the kind of enforceable support right that POMS SI 01120.200(D)(2) treats as making trust principal available to the beneficiary. If the trustee is directed (or the beneficiary can compel distributions) for the beneficiary's "support and maintenance," SSA and DHCS can treat the trust as available to meet the beneficiary's basic needs, causing the trust to be counted as a resource. HEMS-style ascertainable standards are

appropriate for a typical family trust, but are inconsistent with the sole and absolute discretion standard an SNT requires;

(5) Directing the trustee to pay “living expenses” without limitation;

(6) Making distributions contingent upon the beneficiary’s “request” or “demand”;

(7) Any provision allowing trust assets to revert to the beneficiary upon termination;

(8) Medicaid payback provisions (required only in first-party SNTs);

(9) Directing distributions of cash directly to the beneficiary.

5.4 Permissible vs. Impermissible Distributions

5.4.1 Permissible Distributions (Will Not Reduce SSI)

(a) Payments directly to vendors for non-food, non-shelter goods/services;

(b) Transportation (vehicle purchase/maintenance, public transit passes);

(c) Education and training;

(d) Recreation and entertainment (vacations, memberships, event tickets);

(e) Technology (computers, tablets, internet service, assistive devices);

(f) Medical/dental care not covered by insurance or Medi-Cal;

(g) Personal care items, clothing, furniture, household goods;

(h) Telephone/cell phone service;

(i) Legal and advocacy services;

(j) Companion/caregiver costs (respecting employment law).

5.4.2 ISM-Triggering Distributions (Reduce SSI by PMV)

(a) Food (groceries, restaurant meals, meal delivery);

(b) Shelter costs: mortgage (including property taxes and insurance), rent, heating fuel, gas, electricity, water, sewer, garbage.

Note: Under the discretionary standard, these distributions may still be advisable if the trustee determines the benefit outweighs the SSI reduction (capped at approximately $351/month in 2026).

5.4.3 Impermissible Distributions

(a) Cash directly to the beneficiary (counts dollar-for-dollar as unearned income);

(b) Food or shelter if trust uses a supplemental (not discretionary) standard;

(c) Any distribution the beneficiary can direct for support and maintenance.

5.5 POMS Compliance Checklist

To ensure the trust passes SSA field office review, confirm:

(1) Trust established by a third party (not the beneficiary);

(2) Funded exclusively with third-party assets;

(3) Beneficiary cannot revoke or terminate the trust;

(4) Beneficiary cannot direct use of trust principal for support and maintenance;

(5) Contains a valid spendthrift clause (recommended best practice, though not itself a POMS requirement for a fully discretionary trust);

(6) Distributions are fully discretionary; trustee has sole discretion;

(7) Beneficiary has no right to trust income;

(8) Beneficiary has no control over trust assets;

(9) Distributions made for goods and services, not cash directly to beneficiary;

(10) No Medicaid payback provision (this is a third-party trust).

5.6 Qualified Disability Trust (QDT) Tax Election

A nongrantor (complex) trust is subject to the compressed trust income tax brackets and, absent special treatment, is limited to a nominal $100 personal exemption on its Form 1041. IRC § 642(b)(2)(C)(ii) allows a trust meeting the requirements of a "Qualified Disability Trust" (QDT) to instead claim a personal exemption equal to the exemption amount otherwise allowable to an individual under IRC § 151(d), adjusted annually for inflation, a meaningfully larger deduction that can materially reduce the trust's income tax liability.

- **Requirements.** To qualify as a QDT for a given tax year, the trust must be: (1) irrevocable; (2) established for the sole benefit of the beneficiary; (3) established for a beneficiary who was under age 65 (see Section 3.2 above regarding the effect of the beneficiary turning 65); and (4) established for a beneficiary who is disabled as defined for SSI/SSDI purposes. IRC § 642(b)(2)(C)(ii); 42 U.S.C. § 1396p(c)(2)(B)(iv).

- **Grantor Trust Exception:** QDT status is relevant only to a third-party SNT taxed as a nongrantor trust. If the trust is a grantor trust under IRC §§ 671–679 (typically during the settlor's lifetime, before the trust becomes irrevocable), its income is reported and taxed directly to the settlor, who claims his or her own personal exemption or standard deduction, QDT treatment is unnecessary and unavailable until the trust converts to nongrantor status, typically at the settlor's death.

- **Sole-Benefit Requirement and Multi-Beneficiary Trusts:** Because QDT status requires that the trust be established for the sole benefit of the beneficiary, a single "pot" trust serving multiple beneficiaries under a common corpus (see Section 4.9 above) will not qualify for QDT treatment. Where multiple disabled beneficiaries are involved and QDT status is desired, the drafter should provide separate shares or separate trusts for each disabled beneficiary rather than a commingled pot trust.

- **Annual Election and Multiple-Trust Allocation:** The QDT election is not a one-time or irrevocable election; the trustee determines eligibility and claims the enhanced exemption annually on the trust's Form 1041 (see Section 7.2.3 below). If a beneficiary is the beneficiary of more than one trust that separately claims QDT status, IRC §642(b)(2)(C)(iii) requires the personal exemption amount to be divided among the trusts in proportion to each trust's accounting income; the trustee should coordinate with any co-trustees or trustees of other trusts for the same beneficiary to avoid a duplicative exemption claim.

- **Distinct from Benefits Eligibility:** QDT status is a federal income tax classification and is analytically distinct from the SSI/Medi-Cal resource exclusion discussed in Section 2.1.2 above. A trust that loses QDT eligibility, for example, because the beneficiary has reached age 65, remains fully effective at preserving public benefits eligibility; only the enhanced income tax exemption is lost.

Sample QDT intent language:

This trust is intended to qualify as a Qualified Disability Trust as set forth in Internal Revenue Code § 642(b)(2)(C)(ii). The trust is irrevocable, is established for the sole benefit of the Beneficiary, the Beneficiary was under age 65 when this trust was established, and the Beneficiary is disabled and is receiving, or is eligible to receive, benefits under the Supplemental Security Income or Social Security Disability Insurance programs.

PRACTICE TIP: *Direct the trustee to review QDT eligibility with a qualified tax professional each tax year, particularly the year the beneficiary turns 65, and to make the QDT election by properly completing Form 1041 for each qualifying year.*

> **PRACTICE TIP:** *When submitting the trust to SSA for review, include a cover letter identifying key POMS-compliant provisions and citing relevant POMS sections. Providing a stand-alone SNT (rather than the entire family trust) streamlines the review process.*

6. Funding the Trust

6.1 Sources of Funding

6.1.1 Gifts

Direct gifts during the settlor's lifetime are the most straightforward funding method. Gifts to an irrevocable third-party SNT qualify for the annual gift tax exclusion ($19,000 per donor per beneficiary for 2026) if the trust includes Crummey withdrawal powers, though Crummey powers in an SNT must be carefully drafted.

> **DRAFTING NOTE:** *If using Crummey powers, ensure the withdrawal right is: (a) held by someone other than the SNT beneficiary; or (b) lapses quickly. Many practitioners avoid Crummey powers in SNTs altogether and treat contributions as taxable gifts (using the settlor's lifetime exemption).*

6.1.2 Inheritances and Bequests

The SNT can receive bequests from the settlor's will, revocable trust, or other testamentary instruments. Other family members can also name the SNT as a beneficiary of their estate plans.

6.1.3 Life Insurance

Naming the third-party SNT as beneficiary of life insurance policies is a common and effective funding strategy. Consider:

(a) Second-to-die policies for married couples;

(b) An ILIT owning the policy with the SNT as beneficiary for estate tax planning;

(c) Ensure the policy names the trustee of the SNT, not the disabled individual.

6.1.4 Retirement Accounts

Post-SECURE Act planning for retirement accounts and third-party SNTs has been dramatically transformed. Before the SECURE Act (effective January 1, 2020), retirement plans such as IRAs, 401(k)s, and 403(b)s were generally discouraged as SNT funding sources. Under the SECURE Act, a properly structured third-party SNT can instead achieve "eligible designated beneficiary" (EDB) treatment, allowing the beneficiary's required minimum distributions (RMDs) to be stretched over the beneficiary's own life expectancy rather than distributed and taxed within 10 years of the account owner's death (the default "10-year rule"). IRC § 401(a)(9)(H). Many of the open questions left by the original 2019 statute remained unresolved for years while the IRS operated under proposed regulations; the IRS and Treasury issued final regulations on July 19, 2024 (T.D. 10001, 89 Fed. Reg. 58886), which apply for RMDs in calendar years beginning on or after January 1, 2025 (with a good-faith compliance standard for earlier years), and which resolve most of the uncertainty discussed in this section. Achieving "stretch-out" protection requires the trust to satisfy several distinct requirements, discussed in Sections 6.1.4.1 through 6.1.4.7 below.

6.1.4.1 Eligible Designated Beneficiary (EDB) Status

The SECURE Act created a new category of beneficiary, the "eligible designated beneficiary" (EDB), who is not subject to the 10-year rule and may instead use the pre-SECURE stretch rules. IRC § 401(a)(9)(H)(ii). An EDB is: (A) the account owner's surviving spouse; (B) an individual who is disabled, as defined in IRC § 72(m)(7); (C) an individual who is chronically ill, as defined in IRC § 7702B(c)(2); (D) a minor child of the account owner, until the child reaches the age of majority; or (E) an individual beneficiary who is not more than ten years younger than the account owner. IRC § 401(a)(9)(E)(ii). For SNT drafters, categories (B) and (C) (disabled and chronically ill beneficiaries) are the most relevant, since a properly drafted third-party SNT can name the beneficiary with a disability as the EDB and use the beneficiary's own life expectancy to calculate RMDs.

6.1.4.2 Definitions of "Disabled" and "Chronically Ill" for EDB Purposes

"Disabled" for EDB purposes is defined in IRC § 72(m)(7) and Treas. Reg. § 1.72-17(f): the individual must be unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration. This standard is similar to, but not identical to, the SSI/SSDI disability standard discussed in Section 3.1 above; notably, the SECURE Act standard requires that the impairment be "indefinite," meaning it cannot reasonably be expected to improve enough to permit substantial gainful activity in the foreseeable future. The beneficiary's disability must be certified as of the date of the account owner's death.

"Chronically ill" for EDB purposes is defined in IRC § 7702B(c)(2), the same standard used to qualify for benefits under a long-term care insurance contract. The beneficiary must, as certified by a licensed health care practitioner: (i) be unable to perform, without substantial assistance, at least two of the activities of daily living listed in the Code; (ii) have a comparable level of disability as determined by Treasury regulations; or (iii) require substantial supervision to protect against threats to health and safety due to severe cognitive impairment. The chronic illness must be certified as "indefinite" and reasonably expected to be lengthy in nature. The certification must be made by a "licensed health care practitioner" under IRC § 7702B(c)(4): a physician, a registered professional nurse, a licensed social worker, or another individual meeting Treasury-prescribed requirements.

6.1.4.3 See-Through Trust Requirements

For a trust to be treated as a "see-through" trust, meaning the IRS looks through the trust to the individual beneficiaries to determine the applicable distribution period, the trust must satisfy four requirements under Treas. Reg. § 1.401(a)(9)-4, A-5(b): (1) the trust is valid under state law, or would be but for the fact that it has no corpus; (2) the trust is irrevocable, or will become irrevocable by its terms upon the account owner's death; (3) the trust's beneficiaries are individuals who are identifiable from the trust instrument; and (4) the plan administrator is given documentation (a copy of the trust instrument and a list of all trust beneficiaries) so that trust beneficiaries who will be treated as designated beneficiaries are identifiable to the administrator, generally by October 31 of the year following the account owner's death. Treas. Reg. § 1.401(a)(9)-4, A-6. A trust that fails any of these four requirements is not a designated beneficiary at all, and the retirement account must be distributed within 10 years regardless of the beneficiary's disability or chronic illness.

The documentation requirement in item (4) applies only to employer-sponsored retirement plans (e.g., 401(k), 403(b), and other defined contribution plans); the 2024 final regulations confirmed there is no requirement to furnish documentation of a designated beneficiary's disability or chronic illness to an IRA custodian. For an account owner who died in 2020, 2021, 2022, or 2023, the deadline to furnish documentation of a designated beneficiary's disability or chronic illness to a plan administrator was extended to October 31, 2025. Self-certification by the beneficiary alone is not sufficient; certification must come from a licensed health care practitioner as described in Section 6.1.4.2 above, though an SSA disability determination letter may serve as a safe harbor for certifying disability status.

6.1.4.4 Conduit Trusts vs. Accumulation Trusts

See-through trusts come in two forms, neither of which is defined in the Code or regulations but which have become terms of art. A "conduit trust" requires the trustee to immediately distribute to the beneficiary any amount withdrawn from the retirement account, including the RMD. A conduit trust is generally not appropriate for a special needs beneficiary, because the mandatory pass-through payment would be paid directly to the beneficiary, creating unearned income that can jeopardize SSI and Medi-Cal eligibility, and defeating the trust's benefits-protective purpose. An "accumulation trust," by contrast, does not require the trustee to immediately distribute amounts withdrawn from the retirement account; the trustee retains full discretion to accumulate the RMD within the trust and distribute it (or not) according to the trust's ordinary distribution standard. An accumulation trust is the appropriate structure for a third-party SNT intended to hold retirement account assets.

6.1.4.5 Annual RMDs During the 10-Year Period (the "At Least As Rapidly" Rule)

A significant point of confusion following the original SECURE Act was whether beneficiaries subject to the 10-year rule needed to take any distributions before the final year, or could simply wait and withdraw the entire account in year 10 (as under the prior 5-year rule). The 2024 final regulations resolved this in favor of annual distributions: if the account owner died on or after their required beginning date (RBD, currently age 73 for most account owners, rising to 75 for those born in 1960 or later), a designated beneficiary subject to the 10-year rule must continue taking annual RMDs, calculated under the "at least as rapidly" (ALAR) rule, throughout the 10-year period, in addition to fully distributing the account by the end of the 10th year. Treas. Reg. §

1.401(a)(9)-5. This annual RMD requirement did not apply for 2021 through 2024 under IRS transitional relief (Notice 2022-53; Notice 2023-54; Notice 2024-35), but does apply beginning with the 2025 distribution calendar year.

This rule has direct application to an accumulation trust holding retirement assets for a disabled or chronically ill beneficiary. If the account owner died on or after their RBD, the trustee must take annual RMDs from the retirement account each year during the beneficiary's lifetime (not merely at the end of a 10-year period) even though the trust itself may accumulate those RMDs rather than distributing them outright to the beneficiary. The same annual RMD requirement applies to the remainder beneficiaries who take under the 10-year rule following the death of the disabled or chronically ill beneficiary in an applicable multi-beneficiary trust (discussed in Section 6.1.4.6 below), if the original account owner died on or after their RBD.

6.1.4.6 Applicable Multi-Beneficiary Trust for Disabled or Chronically Ill Beneficiaries

The SECURE Act added a special accumulation trust category for disabled and chronically ill beneficiaries: the "applicable multi-beneficiary trust" (AMBT). IRC § 401(a)(9)(H)(iv)–(v). The 2019 statute and early proposed regulations described two forms of AMBT: a "Type I" trust that splits into separate sub-trusts for each beneficiary immediately upon the account owner's death, and a "Type II" trust that remains a single trust but restricts access to the disabled or chronically ill beneficiary during that beneficiary's lifetime. The 2024 final regulations eliminated the need for a separate "Type I" category by extending the general separate-account rule to any see-through trust that divides into separate sub-trusts immediately upon the account owner's death, regardless of whether any beneficiary is disabled or chronically ill; only the "Type II" AMBT structure remains as a distinct rule, and it is the structure most relevant to a third-party SNT. A trust qualifies as a (Type II) applicable multi-beneficiary trust if: (1) the trust has more than one beneficiary; (2) all of the trust's beneficiaries are designated beneficiaries (individuals, or, as discussed below, certain qualifying charities); and (3) at least one of the designated beneficiaries is disabled or chronically ill. This category matters because a standalone third-party SNT is generally treated by the IRS as having multiple beneficiaries once contingent remainder beneficiaries are taken into account, so most third-party SNTs holding retirement assets will need to qualify under this rule rather than as a single-beneficiary trust.

If the trust qualifies as an applicable multi-beneficiary trust, the disabled or chronically ill beneficiary's own life expectancy is used to calculate RMDs, rather than the life expectancy of the oldest beneficiary in the beneficiary pool, as required under prior law. Only the disabled or chronically ill beneficiary may have any interest in the retirement account payable to the trust during that beneficiary's lifetime; upon that beneficiary's death, the remaining benefits pass to the other designated beneficiaries under the general 10-year rule. IRC § 401(a)(9)(H)(v).

SECURE 2.0 Act § 337(b) amended IRC § 401(a)(9)(H)(v) to provide that, for a Type II applicable multi-beneficiary trust, any beneficiary that is an organization described in IRC § 408(d)(8)(B)(i) is treated as a designated beneficiary. Section 408(d)(8)(B)(i) itself refers to organizations described in IRC § 170(b)(1)(A) to which charitable contributions may be made, but specifically excludes supporting organizations under IRC § 509(a)(3) and donor-advised funds under IRC § 4966(d)(2), so not every charitable entity qualifies for this exception. Treas. Reg. § 1.401(a)(9)-4(g)(3) implements this rule, treating a qualifying charity as a designated beneficiary solely for AMBT purposes, entitled to receive amounts only after the death of the disabled or chronically ill beneficiary, without disqualifying the trust as an AMBT. This is a significant relaxation of prior law that categorically excluded charities as remainder beneficiaries of any trust intended to hold retirement assets. The exception applies only to a qualifying charity that receives amounts after the disabled or chronically ill beneficiary's death; a charity (or other non-individual entity) that could receive amounts concurrently with, or during the lifetime of, the disabled or chronically ill beneficiary, or a supporting organization or donor-advised fund at any time, will still disqualify the trust.

Drafting Warning: If the SNT permits the trustee to distribute any portion of trust income or principal to a beneficiary who is not disabled or chronically ill during the disabled or chronically ill beneficiary's lifetime, the trust will not qualify as an applicable multi-beneficiary trust, and the 10-year rule will apply to the entire retirement account. The trust's distribution standard (see Section 4.7 above) must be drafted consistently with this requirement. The 2024 final regulations clarify, however, that a trust may still include a "poison pill" provision terminating the disabled or chronically ill beneficiary's interest to preserve eligibility for SSI or Medi-Cal, without losing AMBT status, provided the trust also states that the other trust beneficiaries still cannot receive any amount from the trust until the death of all disabled or chronically ill beneficiaries, regardless of whether that beneficiary's interest has been terminated. Treas. Reg. § 1.401(a)(9)-4(g)(2). If the termination occurs after the Determination Date (defined in Section 6.1.4.7 below), the trust is treated as modified to add the other beneficiaries as of the date of termination, which may have separate tax consequences the trustee should evaluate with a tax professional before terminating the beneficiary's interest. The trust's termination provisions (see Section 4.8 above) should be drafted with this rule in mind.

6.1.4.7 Avoiding Problematic Remainder Beneficiaries; the Determination Date

Because contingent remainder beneficiaries are counted in determining whether a trust's beneficiaries are "identifiable" for see-through trust purposes, drafters must take care in naming remainder beneficiaries of a trust intended to hold retirement assets. As a general rule, charities and other non-individual entities should not be named as remainder beneficiaries of a trust that is not structured as an applicable multi-beneficiary trust; because an ordinary see-through trust requires that all trust beneficiaries be individuals, naming a charity can cause the account to lose designated beneficiary status altogether, subjecting it to the 10-year rule (or a shorter 5-year rule) regardless of the primary beneficiary's disability or chronic illness. Where the trust qualifies as a Type II applicable multi-beneficiary trust (see Section 6.1.4.6 above), a charity may be named as an ultimate remainder beneficiary (receiving only after the disabled or chronically ill beneficiary's death) without disqualifying the trust, under the SECURE 2.0 exception discussed above; and it is generally no longer necessary to eliminate individual remainder beneficiaries merely because they are older than the disabled or chronically ill beneficiary, since that beneficiary's own life expectancy governs RMDs for that beneficiary's interest regardless of the ages of other individual beneficiaries, a significant improvement over the pre-SECURE Act rule that used the oldest beneficiary's life expectancy for the entire trust.

For beneficiaries not cured by the SECURE 2.0 charitable exception (for example, a charity or other non-individual entity with rights during the disabled or chronically ill beneficiary's lifetime, or a non-qualifying entity in a trust not structured as an AMBT), the Code provides a safety valve: the trustee (or, where authorized, the Trust Advisory Committee or Trust Protector) may eliminate the problematic beneficiary by the "Determination Date," defined as September 30 of the calendar year following the year of the account owner's death. This is typically accomplished by distributing the problematic beneficiary's interest outright (including, if necessary, using retirement account funds to pay a charitable beneficiary) in exchange for a qualified disclaimer, completed within nine months of the account owner's death, so that as of the Determination Date only qualifying beneficiaries have any right to the retirement account.

PRACTICE TIP: *Consider granting the Trustee or Trust Protector express authority to eliminate problematic beneficiaries, obtain disclaimers, or reform the trust as necessary to preserve EDB and applicable multi-beneficiary trust status before the Determination Date. Building this flexibility into the trust avoids relying on a court reformation, which the IRS has historically been reluctant to recognize for tax-motivated changes made after the fact.*

Sample intent language (adapt the bracketed terms to the specific plan and beneficiary). A more complete sample provision incorporating the full AMBT structure discussed above (including the sole-interest, poison-pill, and optional charitable remainder beneficiary language) is provided in Section 9.6 below:

The intent of this provision is that this trust meets the requirements of being an Accumulation Trust and an Applicable Multi-Beneficiary Trust as defined in Internal Revenue Code Section 401(a)(9)(H)(iv) and (v), for purposes of being treated as an eligible designated beneficiary of a Retirement Plan. A material purpose of this trust is to allow it to qualify as an eligible designated beneficiary of a Retirement Plan so that the life expectancy of the Beneficiary is used to calculate the required minimum distribution under Internal Revenue Code Section 401(a)(9) over the Beneficiary's lifetime. For purposes of this provision: an "Accumulation Trust" is a trust that does not require the Trustee to immediately distribute amounts withdrawn from a Retirement Plan to the Beneficiary, whether the withdrawal is a required minimum distribution or for any other purpose; a "Retirement Plan" means a plan or account subject to the required minimum distribution rules of Internal Revenue Code Section 401(a)(9) and related Treasury Regulations *that permits distributions over the lifetime of an eligible designated beneficiary; and the "Determination Date" means September 30 of the calendar year following the year of the Retirement Plan account owner's death, or such other date as may be established by applicable regulation or guidance. The Beneficiary shall qualify as an eligible designated beneficiary because of being disabled within the meaning of Internal Revenue Code Section 72(m)(7), or chronically ill as defined in Internal Revenue Code Section 401(a)(9)(E)(ii), and shall be treated as the oldest living beneficiary of this trust for purposes of determining the required minimum distributions from the Retirement Plan as of the Determination Date.*

DRAFTING NOTE: *When completing a retirement account beneficiary designation form, name the SNT specifically by its full legal title and date (e.g., "[Beneficiary]'s Special Needs Trust established under Article [__] of the [Settlor] Living Trust dated [Date]"), rather than a general reference such as "my trust" or "my estate." This ensures the plan administrator and, if necessary, the IRS can identify the correct trust and its beneficiaries for EDB and see-through trust purposes.*

> **PRACTICE TIP:** *SECURE Act planning for beneficiaries with disabilities has been "flipped on its head": retirement assets that once were poor candidates to fund an SNT are now often the best asset to leave to a disabled or chronically ill beneficiary. With the 2024 final regulations now in effect, accumulation trusts that allow RMDs to be accumulated within the trust remain the preferred structure, preserving the stretch while protecting benefits eligibility, but the trustee should confirm annual RMD compliance under the "at least as rapidly" rule (see Section 6.1.4.5 above) and current documentation deadlines each year with a qualified tax professional.*

6.2 Coordination with Estate Plans

Key coordination points:

(a) The settlor's revocable trust or will should include a pour-over provision directing the disabled beneficiary's share to the SNT;

(b) Other family members should be advised to direct inheritances to the SNT (not outright);

(c) Beneficiary designations on life insurance, retirement accounts, and POD/TOD accounts should name the SNT trustee;

(d) Letter of intent or memorandum of wishes should be prepared;

(e) Consider including a contingent trust as a safety net.

6.3 Pour-Over and Beneficiary Designation Strategies

Effective pour-over provisions should:

(a) Identify the SNT by name, date, and trustee;

(b) Reference the trust "as amended from time to time";

(c) Provide a contingent direction if the SNT is not in existence;

(d) Consider whether the pour-over should be to a separate subtrust within the SNT.

For beneficiary designations:

(a) Name: "[Trustee Name], Trustee of the [Trust Name] dated [Date], and any amendments thereto";

(b) Include the trust's EIN on the designation form;

(c) Never name the disabled individual as direct beneficiary;

(d) Periodically review designations.

> **CAUTION:** *Commingling Prohibition: The beneficiary's own assets must NEVER be commingled with third-party trust assets. If the beneficiary receives an inheritance outright or wins a lawsuit, those assets must go to a SEPARATE first-party SNT or ABLE account, not deposited into the third-party SNT. Commingling converts the entire trust to first-party status. POMS SI 01120.201(J)(4); SI 01120.201(C)(2)(c).*

7. Administration Considerations for Drafters

7.1 How Drafting Choices Affect Administration

The drafter's choices directly shape day-to-day administration, often for decades. Experienced practitioners draft with administration in mind:

Distribution Standard: A supplemental standard eliminates ambiguity but may leave the beneficiary in inadequate housing. A discretionary standard requires a more sophisticated trustee who can evaluate ISM trade-offs.

- **Trustee Powers:** Include explicit authority to: hire caregivers, purchase real property, make loans, operate a business, hire professionals, and make distributions to ABLE accounts.
- **TAC/Protector Structure:** A well-defined TAC reduces administrative burden by providing clear guidance regarding the beneficiary's needs.
- **Accounting Requirements:** Specify accounting frequency, recipients, and level of detail. Over-specification creates burden; under-specification leads to disputes.

7.2 Recordkeeping, Accounting, and Reporting

7.2.1 Trustee's Recordkeeping Obligations

Under California Probate Code, the trustee must maintain detailed financial records sufficient to:

(a) Track all receipts and disbursements;

(b) Identify each distribution by purpose, vendor, and beneficiary benefit;

(c) Distinguish between principal and income;

(d) Document the trustee's reasoning for discretionary decisions;

(e) Support tax filings.

7.2.2 Formal Accountings

Under Prob. Code § 16062, the trustee must account at least annually and at termination. Contents must comply with Prob. Code § 16063 and include: a statement of receipts and disbursements, assets on hand, liabilities, trustee's compensation, agents hired, and changes in investment plan.

> **PRACTICE TIP:** *Draft the trust to specify who receives accountings. In a third-party SNT, the beneficiary may not have capacity to review. Consider requiring accountings be delivered to the TAC and/or a designated advocate.*

7.2.3 Tax Reporting

The trust must obtain an EIN and file Form 1041 annually. If the trust qualifies as a QDT, the trustee should make the election to claim the enhanced personal exemption. The beneficiary receives a Schedule K-1 for distributions of income.

7.3 SSA and DHCS Reporting Obligations

7.3.1 SSA Reporting

The primary duty to report to SSA rests with the SSI recipient (or representative payee), not the trustee. However:

(a) The trust document may impose a duty on the trustee to notify the beneficiary or representative payee of distributions;

(b) The trustee must respond to SSA requests for trust documentation during reviews;

(c) Distributions constituting ISM must be tracked and reported;

(d) Cash distributions to the beneficiary must be reported as unearned income.

7.3.2 Medi-Cal / DHCS Reporting

The trust should require the trustee to:

(a) Maintain documentation establishing the trust as a third-party SNT;

(b) Respond promptly to DHCS or county eligibility worker requests;

(c) Provide copies of the trust instrument upon request;

(d) Document the third-party source of all trust funding.

7.4 Employment Law Considerations

If the trust funds personal attendants or caregivers, the trust document should:

(a) Acknowledge that hiring caregivers may create an employer-employee relationship;

(b) Authorize withholding and remitting payroll taxes;

(c) Authorize purchase of workers' compensation insurance;

(d) Direct compliance with wage and hour laws;

(e) Authorize use of trust funds for employment-related expenses.

> **DRAFTING NOTE:** *Many families informally pay caregivers without proper employment compliance. The trust document should expressly require compliance with all employment laws to protect the trustee from personal liability.*

7.5 Regional Center Considerations

The trust should include:

(a) A statement that trust assets shall not supplant services any government agency is obligated to provide;

(b) Express prohibition on making trust assets "available" to Regional Center;

(c) Authority for the trustee to advocate for Regional Center services;

(d) Authority to fund services above what Regional Center provides.

Sample clause language implementing each of these protections is provided in Section 9.10 (Sample Regional Center Provisions) below. See also Matthew L. v. Inland Regional Center (Section 2.2.2 above), which supports the position that a properly structured third-party SNT is not a "generic resource" that a Regional Center may require to fund services the Regional Center is otherwise obligated to provide.

8. ABLE Accounts and Coordination with Third-Party SNTs

8.1 Overview of ABLE Accounts

Achieving a Better Life Experience (ABLE) accounts are tax-advantaged savings accounts for individuals with disabilities. Key features for 2026:

- **Eligibility:** Disability onset before age 46 (expanded from 26 effective January 1, 2026). Approximately 6 million additional individuals now eligible.
- **Contribution Limit:** $20,000 per year (2026). Employed beneficiaries may contribute an additional $15,650 under ABLE-to-Work.
- **Account Balance and SSI:** Balances up to $100,000 are excluded from SSI resources. Balances above $100,000 suspend (but do not terminate) SSI. Medi-Cal is not affected.
- **Qualified Disability Expenses (QDEs):** Education, housing, transportation, employment, assistive technology, health, legal fees, funeral expenses, and basic living expenses (including food and shelter, without ISM consequences).
- **529-to-ABLE Rollovers:** Made permanent July 4, 2025. Allows transfer from 529 plans to ABLE accounts, subject to annual limits.

8.2 Key Advantage: Food and Shelter Without ISM

The most significant advantage: distributions from an ABLE account for housing expenses do NOT constitute In-Kind Support and Maintenance for SSI purposes. The ABLE account can pay rent, mortgage, utilities, and food without reducing SSI, something a third-party SNT cannot do without triggering the PMV reduction.

> **PRACTICE TIP:** *The optimal strategy: use the ABLE account for food and shelter expenses (up to $20,000 annual contribution) and use the SNT for all other supplemental needs. This maximizes SSI while providing comprehensive support.*

8.3 Drafting to Coordinate SNT and ABLE Account

8.3.1 Authorization to Fund ABLE Account

The trust should explicitly authorize the trustee to contribute to the beneficiary's ABLE account. Sample language:

> *The Trustee is authorized and encouraged to contribute from Trust assets to any ABLE account established for the benefit of [Beneficiary] under 26 U.S.C. § 529A, up to the maximum annual contribution permitted by law, to the extent such contributions would benefit the Beneficiary by reducing ISM charges or otherwise enhancing Beneficiary's quality of life.*

8.3.2 Priority of Distributions

Consider including guidance on distribution priority:

(a) First, fund ABLE account to maximum contribution for shelter/food expenses;

(b) Second, make direct vendor payments from SNT for non-food/non-shelter needs;

(c) Third, if additional support is warranted, evaluate ISM trade-off for direct SNT distributions.

8.3.3 ABLE Account Monitoring

The trust should address:

(a) Monitor ABLE account balance relative to the $100,000 SSI threshold;

(b) Ensure distributions from ABLE are used only for Qualified Disability Expenses;

(c) Coordinate with representative payee regarding ABLE account activity;

(d) Determine whether trustee or family member should be ABLE account administrator.

8.4 ABLE Account at Beneficiary's Death

Upon the beneficiary's death, remaining ABLE account funds are subject to Medicaid payback for benefits received after ABLE account establishment. However, if funded from the SNT (third-party funds), the payback depletes the ABLE balance only, it does not reach back into the SNT.

> **DRAFTING NOTE:** *Because ABLE accounts are subject to Medicaid payback at death while third-party SNTs are not, the optimal strategy is to fund the ABLE account annually but spend it down on food and shelter during the year, minimizing the balance at death while maximizing the SSI-protective benefit during life.*

9. Sample Provisions and Checklists

9.1 Sample Statement of Purpose

> *This Trust is established for the primary purpose of supplementing, and not supplanting, any benefits or assistance of any federal, state, county, city, or other governmental entity for which Beneficiary may otherwise be eligible or which Beneficiary may be receiving. The Trustee shall not make any distribution from this Trust that would result in the reduction, denial, or loss of any such benefits or assistance, except where the Trustee, in the Trustee's sole and absolute discretion, determines that the distribution would provide a greater benefit to Beneficiary than the government benefit that would be reduced, denied, or lost.*

9.2 Sample Irrevocability Clause

This Trust is irrevocable and may not be amended, revoked, or terminated by Beneficiary. Beneficiary has no power to alter, amend, revoke, or terminate any trust provision or to designate the persons who shall possess or enjoy trust assets or income. [Settlor/Trust Protector] retains the right to amend this Trust solely as provided in Article [__] hereof.

9.3 Sample Spendthrift Clause

No interest in the income or principal of this Trust shall be voluntarily or involuntarily anticipated, assigned, encumbered, or subjected to any creditor's claim or to legal process prior to actual receipt by a beneficiary. No part of this Trust shall be subject to attachment, garnishment, or execution by any creditor of any beneficiary. If any government agency makes a claim against the Trust, the Trustee shall suspend distributions to the affected beneficiary until the claim is resolved, or shall make distributions in a form that does not jeopardize the beneficiary's eligibility for benefits.

9.4 Sample Distribution Standard (Discretionary)

The Trustee, in the Trustee's sole and absolute discretion, shall distribute to or for the benefit of Beneficiary such amounts of net income and principal as the Trustee determines appropriate for Beneficiary's special needs. "Special needs" shall include, without limitation: medical, dental, and therapeutic care not otherwise provided; education and training; transportation; technology and assistive devices; recreation, entertainment, and travel; personal attendant care; housing and furnishings; clothing; telephone and internet service; and any other goods, services, or experiences that enhance Beneficiary's comfort, happiness, self-esteem, or quality of life. The Trustee may, but is not required to, make distributions that constitute In-Kind Support and Maintenance when the Trustee determines the benefit to Beneficiary outweighs the resulting reduction in SSI benefits.

9.5 Sample Trustee Provisions

The following sample provisions address trustee issues that often arise in administration but are not always included in a basic SNT template: replacing an incapacitated trustee, removing a poorly performing trustee, and limiting trustee liability.

9.5.1 Sample Replacement of Trustee Upon Incapacity

If the Trustee is unable to serve because of physical or mental incapacity or illness, the successor trustees named in this Trust, in the order named, shall serve as Trustee. Physical or mental incapacity or illness shall be conclusively established if two physicians authorized to practice medicine in the state where the Trustee resides, who are unrelated to the Settlor and the Trustee by blood or marriage, examine the Trustee and issue written declarations under penalty of perjury stating that the Trustee is unable to serve because of incapacity or illness that is more likely than not to continue for an additional [number] days. By accepting the office of Trustee, an individual is deemed to waive the physician-patient privilege to the extent necessary to implement this provision.

9.5.2 Sample Removal of Trustee by Trust Advisory Committee

The Trust Advisory Committee, by [majority/unanimous] vote, may remove any Trustee serving under this Trust at any time, with or without cause, and may appoint a successor Trustee. Removal and appointment shall be effective upon written notice to the removed Trustee. No successor Trustee shall be liable for any act, omission, or default of a predecessor Trustee, and may accept the predecessor's accounting records showing assets on hand without further investigation or liability.

9.5.3 Sample Trustee Nonliability for Public Benefits Determinations

The Trustee shall not be liable to the Beneficiary or any third party for failing to identify any public benefit program or resource available to the Beneficiary, or for causing a period of disqualification or ineligibility for public benefits, so long as the Trustee did not act with willful misconduct, bad faith, or gross negligence. It remains the responsibility of the Beneficiary and the Beneficiary's legal representatives to seek out and apply for appropriate public benefits, provide all documentation required to qualify the Beneficiary, and otherwise ensure the Beneficiary's continued qualification for such benefits.

9.5.4 Sample Professional Trustee Qualification Provisions

Corporate Fiduciary. *Any corporate fiduciary serving as Trustee under this Trust must be a bank, trust company, or public charity qualified to act as a fiduciary under applicable federal and state law, must have experience administering special needs trusts, and must not be related or subordinate to the Settlor or to any beneficiary within the meaning of IRC § 672(c).*

Private Professional Fiduciary (California). *Any private professional fiduciary serving as Trustee under this Trust must be licensed by the California Bureau of Professional Fiduciaries, must maintain a reasonable amount of errors and omissions insurance, must have experience administering special needs trusts, and must not be related or subordinate to the Settlor or to any beneficiary within the meaning of IRC § 672(c).*

9.6 Sample Applicable Multi-Beneficiary Trust (AMBT) Provision

The following provision is designed to be inserted into a third-party SNT that may be named as beneficiary of a retirement plan, to qualify the trust as a (Type II) applicable multi-beneficiary trust under IRC § 401(a)(9)(H)(iv)–(v) and Treas. Reg. § 1.401(a)(9)-4(g). See Section 6.1.4.6 above for a discussion of the underlying requirements. This provision assumes the Beneficiary is the trust's sole current beneficiary during the Beneficiary's lifetime, with named remainder beneficiaries taking only after the Beneficiary's death; adapt the bracketed terms, and omit the optional charitable remainder provision in Section 9.6.6 below if no charity is named as a remainder beneficiary.

9.6.1 Statement of Intent to Qualify as an Applicable Multi-Beneficiary Trust

It is Settlor's intent that this Trust qualify as an Accumulation Trust and, to the extent this Trust has more than one beneficiary at any time, as an Applicable Multi-Beneficiary Trust within the meaning of Internal Revenue Code Section 401(a)(9)(H)(iv) and (v) and the Treasury Regulations thereunder, so that the Beneficiary is treated as an eligible designated beneficiary of any Retirement Plan payable to this Trust, and so that required minimum distributions from any such Retirement Plan are calculated using the Beneficiary's own life expectancy for so long as the Beneficiary is living. A material purpose of this Trust is to preserve this tax treatment, and this Article shall be construed and, if necessary, the Trustee or Trust Protector is authorized to amend or reform this Trust as provided in Section 9.6.7 below, to the minimum extent necessary to carry out that purpose.

9.6.2 Definitions

For purposes of this Article, the following terms have the meanings set forth below: (a) "Accumulation Trust" means a trust that does not require the Trustee to immediately distribute to the Beneficiary any amount withdrawn from a Retirement Plan, whether the withdrawal is a required minimum distribution or for any other purpose; (b) "Retirement Plan" means an individual retirement account, individual retirement annuity, or an interest in a qualified retirement plan, section 403(b) annuity, or eligible deferred compensation plan, in each case subject to the required minimum distribution rules of Internal Revenue Code Section 401(a)(9) and the Treasury Regulations thereunder; (c) "Eligible Designated Beneficiary" means an individual who qualifies as such under Internal Revenue Code Section 401(a)(9)(E)(ii), including an individual who is disabled within the meaning of Internal Revenue Code Section 72(m)(7) or chronically ill within the meaning of Internal Revenue Code Section 7702B(c)(2); and (d) "Determination Date" means September 30 of the calendar year following the calendar year of the Retirement Plan account owner's death, or such other date as may be established by applicable statute, regulation, or other guidance.

9.6.3 Sole Interest of the Beneficiary During Lifetime

Notwithstanding any other provision of this Trust, for so long as the Beneficiary is an Eligible Designated Beneficiary and is living, no individual or entity other than the Beneficiary shall have any right to any portion of a Retirement Plan payable to this Trust, whether of income, principal, or otherwise, and no distribution of any portion of a Retirement Plan shall be made to or for the benefit of any individual or entity other than the Beneficiary. The Trustee shall hold all amounts withdrawn from a Retirement Plan, including any required minimum distribution, as part of the trust estate administered for the Beneficiary's benefit under the general distribution provisions of this Trust, and no other beneficiary of this Trust shall have any right to demand or receive any such amount until after the Beneficiary's death.

9.6.4 Distributions Following the Beneficiary's Death

Upon the Beneficiary's death, any remaining interest in a Retirement Plan payable to this Trust shall be held, administered, and distributed to the remainder beneficiaries designated elsewhere in this Trust, subject to whatever payout period applies to those remainder beneficiaries under Internal Revenue Code Section 401(a)(9), including the 10-year rule under Internal Revenue Code

Section 401(a)(9)(H)(i), as applicable. Nothing in this Article shall be construed to extend the Beneficiary's life-expectancy payout period to any remainder beneficiary.

9.6.5 Preservation of AMBT Status Upon Termination of the Beneficiary's Interest

If the Trustee, in the Trustee's sole discretion, or as directed elsewhere in this Trust, terminates the Beneficiary's interest in this Trust prior to the Beneficiary's death for the purpose of preserving the Beneficiary's eligibility for Supplemental Security Income, Medi-Cal, or any other needs-based public benefit, that termination shall not, by itself, cause this Trust to fail to qualify as an Applicable Multi-Beneficiary Trust, provided that no individual or entity other than the Beneficiary shall have any right to receive any amount from a Retirement Plan payable to this Trust until the Beneficiary's actual death, regardless of whether the Beneficiary's beneficial interest in this Trust has been terminated. The Trustee acknowledges that if such a termination occurs after the Determination Date, this Trust will be treated as having been modified, as of the date of termination, to add the other trust beneficiaries with respect to the Retirement Plan, which may have separate tax consequences the Trustee should evaluate with a qualified tax professional before terminating the Beneficiary's interest.

9.6.6 Optional: Charitable Remainder Beneficiary

[Optional: include only if a charity is named as a remainder beneficiary of a Retirement Plan payable to this Trust:] Settlor has named [Charity Name] as a remainder beneficiary of this Trust with respect to a Retirement Plan. Settlor intends that [Charity Name] be treated as a designated beneficiary of this Trust solely for purposes of qualifying this Trust as an Applicable Multi-Beneficiary Trust under Internal Revenue Code Section 401(a)(9)(H)(v) and the Treasury Regulations thereunder, and Settlor represents that, to Settlor's knowledge, [Charity Name] is an organization described in Internal Revenue Code Section 408(d)(8)(B)(i) and is not a supporting organization described in Internal Revenue Code Section 509(a)(3) or a donor-advised fund described in Internal Revenue Code Section 4966(d)(2). If [Charity Name] does not qualify as a designated beneficiary under these provisions, or if the Trustee or Trust Protector determines that naming [Charity Name] as a remainder beneficiary would cause this Trust to fail to qualify as an Applicable Multi-Beneficiary Trust, the Trustee or Trust Protector is authorized to remove [Charity Name] as a remainder beneficiary with respect to the Retirement Plan by the Determination Date, consistent with Section 9.6.7 below, and to distribute [Charity Name]'s share of non-Retirement Plan trust assets, if any, undisturbed.

9.6.7 Trustee's Discretion in Retirement Plan Distributions; Authority to Preserve AMBT Status

The Trustee shall take only the required minimum distribution from any Retirement Plan payable to this Trust in each calendar year, calculated using the Beneficiary's life expectancy for so long as the Beneficiary is an Eligible Designated Beneficiary and living, unless the Trustee determines that a larger distribution is warranted for the Beneficiary's benefit or is otherwise required by the terms of the Retirement Plan or applicable law, including any requirement to take annual distributions under the "at least as rapidly" rule. To preserve this Trust's qualification as an Applicable Multi-Beneficiary Trust and the Beneficiary's status as an Eligible Designated

Beneficiary, the Trustee, or the Trust Protector if authorized elsewhere in this Trust, may, in its discretion and by the Determination Date: (a) obtain and act upon a qualified disclaimer from any beneficiary whose continued status as a trust beneficiary would cause this Trust to fail to qualify as an Applicable Multi-Beneficiary Trust; (b) distribute such a beneficiary's interest in non-Retirement Plan trust assets outright, or use Retirement Plan assets to satisfy that beneficiary's interest if necessary and permitted by law; and (c) amend or reform this Article, consistent with Settlor's intent expressed in Section 9.6.1 above, to the minimum extent necessary to preserve the Beneficiary's Eligible Designated Beneficiary status and this Trust's qualification as an Applicable Multi-Beneficiary Trust in light of applicable statutes, regulations, or other guidance in effect at the relevant time. The Trustee shall incur no liability for any action taken or not taken in good faith under this Section.

DRAFTING NOTE: *This provision assumes the Beneficiary is the trust's sole current beneficiary and that this trust otherwise contains standard third-party SNT provisions (spendthrift clause, discretionary distribution standard, no right to compel distributions, etc.) as discussed in Sections 5.1–5.3 above. If this trust has multiple current beneficiaries in a pot or sprinkling structure (see Section 4.9 above), this provision must be substantially revised, since Section 9.6.3 above requires that no individual other than the disabled or chronically ill beneficiary have any current interest in the Retirement Plan, a structure inconsistent with a pot trust. Consider instead directing retirement assets to a separate share or a stand-alone accumulation trust for the disabled or chronically ill beneficiary alone.*

9.7 Sample TAC Provisions

> *There is hereby established a Trust Advisory Committee ("TAC") to advise and oversee the Trustee in the administration of this Trust. The initial members of the TAC shall be: [Names]. The TAC shall have the following powers: (a) to advise the Trustee regarding distributions; (b) to remove and replace the Trustee, with or without cause, by majority vote; (c) to receive annual accountings and financial reports; (d) to appoint successor TAC members by majority vote; (e) to approve or disapprove distributions exceeding $[amount] in any calendar month. The TAC shall act by majority vote of all serving members. A quorum shall consist of [number] members. TAC members shall serve without compensation but shall be reimbursed for reasonable expenses.*

9.8 Sample Trust Protector Provisions

> *[Name] is hereby appointed as Trust Protector. The Trust Protector shall not be a person who is a "related or subordinate party" to the Settlor within the meaning of IRC § 672(c). The Trust Protector shall have the following powers: (a) to amend this Trust to comply with changes in federal or state law, regulations, or policy affecting Beneficiary's benefits eligibility; (b) to alter administrative or investment provisions; (c) to correct scrivener's*

errors or ambiguities; (d) to change the situs or governing law; (e) to remove and replace the Trustee if the TAC fails to act. The Trust Protector may not amend this Trust in a manner that would: (i) benefit the Trust Protector personally; (ii) alter beneficial interests inconsistently with Settlor's intent; or (iii) cause inclusion of Trust assets in any person's gross estate.

9.9 Sample Structure of Trust Management Team (Optional Four-Role Model)

The following optional provision establishes a four-role management team: Trustee, Trust Advisory Committee, Trust Protector, and Care Manager or Advocate, rather than the three-role Trustee/TAC/Trust Protector structure discussed in Sections 4.4 and 4.5 above. This structure is not required; it is best suited to beneficiaries whose needs call for periodic professional assessment separate from the TAC's oversight function. See Section 4.10 below for further discussion of the Care Manager or Advocate role.

Structure of Trust Management Team. Settlor's objective is that this agreement provide Beneficiary with advocacy and the best quality of life possible. This agreement includes a system of checks and balances in part because the Trustee has sole and absolute discretion over the trust resources, and Beneficiary has no discretion. Settlor intends that any Trustee maintain a high degree of accountability. To that end, this agreement incorporates a Trustee, a Trust Advisory Committee, a Trust Protector, and a Care Manager or Advocate: (a) the primary function of the Trustee is to carry out Settlor's intentions as expressed in this agreement and any accompanying Memorandum of Intent; (b) the primary function of the Trust Advisory Committee is to advise the Trustee on distributions that would be in Beneficiary's best interests and to remove and replace the Trustee when necessary; (c) the primary function of the Trust Protector is to amend this trust if, once it becomes irrevocable, changes in law jeopardize its status as exempt for government benefit eligibility purposes; and (d) the primary function of the Care Manager or Advocate is to periodically assess Beneficiary's needs and make recommendations to the Trustee and Trust Advisory Committee for distributions and services, and to protect Beneficiary's rights and entitlement to public benefits.

9.10 Sample Regional Center Provisions

Regional Centers are California institutions designed to serve individuals with developmental disabilities under the Lanterman Act. Although third-party SNT assets generally should not be considered available to pay for services a Regional Center is obligated to provide, some Regional Centers have nonetheless attempted to access trust funds. To protect trust assets and preserve full Regional Center funding, it may be prudent to include one or more of the following express limitations. These provisions are adapted from forms originally supplied by attorney Thomas Beltran.

9.10.1 Sheltering Trust Assets from Regional Centers

This Trust shall not be liable for the cost of services, aid, insurance, or medical assistance to the Beneficiary, as a consumer of Regional Center services, as those terms are used in Welfare &

Institutions Code § 4659(a), any successor statute, or any regulations or other policy promulgated by the Department of Developmental Services, a Regional Center, or any other department, agency, or association. This Trust is intended to supplement, not supplant, other services available to the Beneficiary. If those other services are insufficient to meet the Beneficiary's needs, the Trustee may exercise the Trustee's discretion in funding the unmet need.

9.10.2 Trust as Payor of Last Resort

For purposes of determining the Beneficiary's eligibility for full Regional Center funding, without co-payment, fees, or any contribution whatsoever, this Trust (including its corpus and income) shall not be considered a private resource, private entity, generic resource, or funding source for services provided without cost under the Lanterman Act or any successor statute. For purposes of determining the payor of last resort for Regional Center services, no part of the principal or undistributed income of the Trust estate shall be distributed on demand to pay for services that a Regional Center would otherwise pay for under the Lanterman Act, Title 17 of the California Code of Regulations, or other applicable policies or authorities concerning Regional Center services.

9.10.3 Protection of Trust Assets

The Trustee shall deny any request by the Beneficiary, by someone acting on the Beneficiary's behalf, or by an individual acting on behalf of a Regional Center, that the Trustee release Trust principal or income to or on behalf of the Beneficiary to pay for equipment, medication, or services that the Department of Developmental Services or a Regional Center would provide if the Trust did not exist. The Trustee shall defend against any request or petition filed in any court or before any administrative agency seeking release of Trust principal or income for that purpose, and may, in the Trustee's discretion, take necessary administrative or legal steps to protect the Beneficiary's eligibility for Regional Center funding, including obtaining a ruling from an administrative forum or court of competent jurisdiction that the Trust principal is not available to the Beneficiary for purposes of determining any co-payments or other fees for Regional Center services. Expenses incurred for this purpose, including reasonable attorney's fees, are a proper charge against the Trust estate.

9.11 Sample ABLE Account Authorization

The Trustee is authorized and encouraged to make contributions from Trust assets to any ABLE account established for the benefit of Beneficiary under 26 U.S.C. § 529A or any successor statute, up to the maximum amount permitted by law in any calendar year. The Trustee shall consider funding the ABLE account for food and shelter expenses as a priority distribution strategy to avoid In-Kind Support and Maintenance charges under SSI rules. The Trustee shall monitor the ABLE account balance and coordinate contributions to ensure the account balance does not exceed $100,000, unless the Trustee determines that suspension of SSI is in Beneficiary's best interest.

9.12 Sample Termination Provision

This Trust shall terminate upon the first to occur of: (a) the death of Beneficiary; (b) a determination by the Trustee, in consultation with the TAC, that Beneficiary no longer receives or is eligible for means-tested public benefits and is not likely to be in the foreseeable future; or (c) a determination that the Trust estate has diminished to a level at which continued administration is uneconomical (currently less than $25,000, adjusted for inflation). Upon termination, remaining Trust assets shall be distributed to [Remainder Beneficiaries]. Beneficiary shall have a limited power of appointment, exercisable by specific reference to this power in Beneficiary's will, to appoint remaining Trust assets among Settlor's then-living descendants.

9.13 Comprehensive Drafting Checklist

Use this checklist to verify completeness before finalizing any third-party SNT:

☐	Trust identifies settlor as someone other than the beneficiary
☐	Trust funded exclusively with third-party assets (not beneficiary's own)
☐	Trust states beneficiary cannot revoke, amend, or terminate
☐	Beneficiary cannot direct use of assets for support/maintenance
☐	Valid spendthrift clause included
☐	All distributions are discretionary (no mandatory distributions)
☐	Beneficiary has no right to trust income
☐	Statement of purpose/intent articulates supplemental nature
☐	Distribution standard defined (supplemental or discretionary)
☐	"Special needs" defined broadly in trust document
☐	Trustee succession plan (at least 2 named successors)
☐	TAC established with clear powers, composition, and procedures
☐	Trust Protector designated with appropriate powers and limitations
☐	Trust Protector is independent under IRC § 672(c)
☐	Compensation provisions for trustee, TAC, and Trust Protector
☐	No Medicaid payback provision (this is a third-party trust)
☐	No general power of appointment for beneficiary
☐	ABLE account funding authorization included
☐	Employment law compliance provisions for caregiver funding
☐	Regional Center anti-supplanting language included
☐	Savings/reformation clause included

☐	Termination provisions with remainder beneficiary designations
☐	QDT eligibility preserved (irrevocable, sole benefit, under 65)
☐	Retirement account/SECURE Act compliance (if applicable)
☐	Accounting and reporting obligations specified
☐	Government benefits protection clause included
☐	Pour-over provisions coordinated with settlor's estate plan
☐	Beneficiary designations reviewed for all assets
☐	Letter of intent/memorandum of wishes prepared
☐	Trust submitted to SSA for approval (if beneficiary currently on SSI)

PRACTICE TIP: *After drafting, have a colleague review the trust specifically for POMS compliance. Consider maintaining a firm-wide template that incorporates these checklist items as drafting prompts.*

9.14 Key Statutory and Regulatory References

Federal Statutes:

42 U.S.C. § 1382b(e): SSI Trust Resource Rules

42 U.S.C. § 1396p(d): Medicaid Trust Provisions

42 U.S.C. § 1396p(d)(4)(A): First-Party SNT (d4A)

26 U.S.C. § 529A: ABLE Accounts

26 U.S.C. § 642(b)(2)(C)(ii): Qualified Disability Trusts

20 C.F.R. § 416.1201: SSI Resource Definition

California Statutes:

Cal. Prob. Code §§ 15200–15212: Creation of Trusts

Cal. Prob. Code §§ 15300–15309: Spendthrift Trusts

Cal. Prob. Code §§ 16000–16081: Trustee Duties

Cal. Prob. Code §§ 16060–16064: Duty to Report/Account

Cal. Bus. & Prof. Code §§ 6500–6592: Professional Fiduciaries Act

Cal. Welf. & Inst. Code § 4512: Developmental Disability Definition

POMS References:

SI 01120.200: Trusts (General)

SI 01120.201: Trusts Established with Assets of Third Party

SI 01120.202: Exceptions for Trusts

SI 01120.203: Evaluating Trusts

SI 01120.204: Deeming from Trusts

SI 00835.300: In-Kind Support and Maintenance

* * *