

Corporation of Guardianship

Attorney Drafting Guide for Third-Party Special Needs Trusts

- Proper Name/Identification. Please refer to us as: **Corporation of Guardianship, a North Carolina non-profit corporation**
- Corporate Trustee. The definition of corporate fiduciary in some trust documents would exclude us from serving as trustee because CoG is not a bank or a trust company with trust powers. If your trust includes language that defines a Corporate Fiduciary or a Corporate Trustee, please specifically include a reference to any non-profit that serves as Trustee of SNPTs in the definition. For example, see highlighted language we typically request be added to this definition: **“Any corporate fiduciary serving under this agreement as a Trustee must be a bank, trust company, or public charity that is qualified to act as a fiduciary under applicable federal and state law, or a nonprofit organization that operates a Special Needs Pooled Trust pursuant to United States Code Title 42, Section 1396p(d)(4)(C), and that is not related or subordinate to me or to any beneficiary within the meaning of Section 672(c) of the Internal Revenue Code.”**
- Trustee Compensation and Reimbursement. Here is the language we require as it relates to compensation and reimbursement. **“At all times when Corporation of Guardianship is serving as Trustee, it shall receive compensation for its services in accordance with its published fee schedule, published from time to time and in effect at the time such compensation becomes payable, including minimum fees, and additional compensation for special investments, closely-held business interests and certain other services, without reduction for any other compensation paid to any person or other entity. This compensation may be paid without prior court approval. This compensation may exceed the compensation for such services in effect from time to time under applicable law. In addition, Corporation of Guardianship shall be reimbursed for all reasonable expenses incurred in providing services under this trust instrument.”**
- Distribution Standard. CoG only serves under trusts with a purely discretionary standard or a special needs distribution standard. CoG does not serve as trustee of any trust that requires the periodic distribution of income to a beneficiary. Further, CoG does not serve as trustee of a trust that allows for distributions for a beneficiary’s health, education, maintenance, and support; that ascertainable standard will preclude eligibility for means tested public benefits.
- Manner of Distributions. Please explicitly restrict the Trustee’s distribution of cash directly to a beneficiary. Otherwise, please do not prohibit or limit the manner of trust distributions. We appreciate having as much flexibility as possible. Sample language: **“My Trustee shall not distribute cash directly to Beneficiary. Otherwise, my Trustee has sole and absolute discretion on the manner of distributions to the beneficiary.”** If the grantor would like restriction on the Trustee’s discretion, part or all of the following language is allowable: **Prior to making distributions, I encourage, but do not require, my Trustee to seek the advice of an attorney experienced in making distributions for persons with disabilities similar to Beneficiary. Further, if Beneficiary is receiving Supplemental Security Income, Medicaid benefits, or benefits through another similar program that has income and/or resource limitations, my Trustee shall take into consideration any applicable rules or guidelines related to the manner of trust distributions, but shall not be bound by them.**

- Discretion for Distributions that Reduce Public Benefits or Eliminate Eligibility. Please include language that allows CoG, in its sole discretion, to reduce or eliminate a beneficiary's public benefits if we believe it is in the beneficiary's best interest. Here is some suggested language: "Notwithstanding the grantor's intent to preserve the beneficiary's eligibility for public benefits, the Trustee may make distributions that impair or diminish Beneficiary's receipt or eligibility for government benefits or assistance, in the event that the Trustee, in its sole and absolute discretion, determines that such distributions better meet Beneficiary's needs, or are in Beneficiary's best interests, despite any consequent effect on Beneficiary's eligibility for, or receipt of, public benefits."
- ABLE Accounts. Trustees do not have the power to establish ABLE accounts. We can only fund them. Also, as trustee, we cannot be tasked with ensuring that the ABLE account remains an exempt asset – or even that our contribution won't result in SSI/Medicaid ineligibility. We are always mindful of public benefit rules in making any distributions, and we do our best not to make disqualifying contributions to ABLE accounts, but we are not always privy to ABLE account details. We have to rely on the information provided by our beneficiaries or their legal representatives regarding the existence of other ABLE accounts, the amounts contributed by other individuals to ABLE accounts, and the total balance in the ABLE account at the time we are making a contribution from the trust. Here is our preferred language for ABLE Accounts. The Trustee may contribute to a qualified ABLE account under Section 529A of the Internal Revenue Code in the name of the beneficiary or for the beneficiary's benefit. Trustee has no duty to monitor, supervise, or review, nor has any liability for, the ABLE account or the application of the ABLE account funds. Please also exclude the following language from ABLE Account provisions: All such contributions must be made in cash and may not cause the annual aggregate contribution limit (from all contributors) imposed by Section 529A(b)(2)(B) to be exceeded, and may not cause the aggregate excess contribution limit imposed by Section 529A(b)(6) to be exceeded.
- Priority of Beneficiaries. Please include language allowing CoG to make distributions from the trust without regard to remaindermen/contingent beneficiaries (i.e. we don't want to be sued by remaindermen if there aren't funds remaining in the trust at primary Beneficiary's death). Here is some sample language: "The primary beneficiary of this trust is [NAME]. The Trustee has no duty to preserve funds for any remainder beneficiaries."
- Medicaid Payback. Please **do not include any language** that references reimbursement to a State Medical Plan or Medicaid Payback. Third party funded trusts do not require Medicaid payback in order to be exempt from a beneficiary's assets for means tested public benefits programs.
- Power to Hire Professionals. Please include a provision that explicitly allows the Trustee to hire outside professionals as needed including, but not limited to: investment advisors, lawyers, accountants, care managers, etc. Please do not require that the trust utilize a specifically named individual, professional, or company.
- Investment Advisors/Directed Trusts. CoG does not serve in a directed trustee role. If a client wishes for CoG to maintain a relationship with a specific investment advisor or firm, that advisor/firm can be named as a suggestion or a preference, but not named as a requirement.

- Trust Protector. Please name a Trust Protector with a power to unilaterally amend the trust, the power to remove or replace a Trustee, and the power to transfer trust fund to a pooled trust.
- Amendments. Please include a provision that allows the Trustee or a Trust Protector to unilaterally Amend the Trust without court approval. Please ensure that such power is not limited to amendments to comply with public benefit rules alone. We prefer a broader explicit power to amend that includes other situations including scrivener's errors, changes in the law, administrative efficiency, or to conform the trust to the grantor's intent. Here is some suggested language: "The Trust Protector may amend the Trust, unilaterally and without the need for any court process, in order to correct scrivener's errors, facilitate the purpose of the trust, comply with public benefit rules, comply with relevant laws and regulations, or facilitate the administrative efficiency of the trust."
- Discretion to Fund Other Trusts. Please include language that would provide the trustee or a Trust Protector with the power to fund other trusts, and specifically allows for the Trustee to transfer funds from this individual trust account into a pooled trust account. We have found this provision to be quite helpful in preserving funds for the beneficiary's use at times when the trust funds dwindle and the administrative cost/expense of managing a separate trust no longer makes good economic sense. Here is some sample language: The Trustee or the Trust Protector may, in its sole and absolute discretion, create a pooled trust sub-account with a discretionary distribution standard f/b/o Beneficiary and transfer some or all of the trust property into such sub-account, if the Trustee or Trust Protector, in its discretion, determines that doing so would reduce costs or promote the efficiency of the trust administration.
- Successor Trustee & Trustee Resignation. If there is an explicitly named successor trustee beyond CoG, please provide us with complete contact information for that successor. If there is no successor trustee named in the document and no other provision in the trust for the appointment of a successor beyond Corporation of Guardianship, please include a provision that allows CoG to unilaterally name a successor trustee in the event that we resign. Please make sure our resignation is effective upon our written notice to the last known address of the beneficiary or his/her legal guardian, any named trust protector, and any successor trustee named in the document. We realize that allowing CoG to resign prior to the appointment and acceptance of a new trustee may result in a trustee vacancy.
- Bond & Accountings. Please explicitly state that no bond is required and that no court accounting is required.
- Spendthrift Protection. Please include a spendthrift provision.
- Trustee Powers. Please explicitly incorporate statutory powers of trustees under North Carolina's Uniform Trust Code (NCGS 36C) by reference.
- Choice of Law & Situs. Please explicitly state that North Carolina Law applies to the administration of this trust. Please provide the Trustee with the power to change the trust situs.

- Qualified Beneficiaries. Please explicitly exempt the trustee from compliance with 36C-8-813 as it relates to the rights and powers of qualified beneficiaries. Some suggested language: **My Trustee is not required to comply with statutory reporting requirements related to “qualified beneficiaries” under NCGS 36C-8-813.** Additionally, please limit the ability of all “qualified beneficiaries” to have access to trust records or to receive legal notices or accountings under other provisions of the trust. Anywhere you reference the power or authority of a “beneficiary” or the trustee’s duty to a “beneficiary”, please make sure to specify that these powers, authorities, and/or duties are limited to “income beneficiaries” (or their legal representative) only, and not to all qualified beneficiaries. For example: **The Trustee must make the trust’s financial records and documentation available to income beneficiaries at reasonable times and upon reasonable notice for inspection by such beneficiaries. The Trustee is not required to furnish any information regarding the trust to anyone other than an income beneficiary. The Trustee may exclude any information that the Trustee determines is not directly applicable to the income beneficiary receiving the information.**

- Residual or Remote Beneficiaries. We strongly prefer that specific individual or entity beneficiaries be named as remainder beneficiaries of trust property. CoG focuses its resources on serving living individuals with special needs, and does not typically provide estate administration services that require tracking down issue, heirs, or lineal descendants after the death of the primary beneficiary.
 - If possible, please consider naming the **beneficiary’s estate** as the residual beneficiary instead of naming heirs, issue, decedents or any other class of people.
 - In cases where avoiding claims against the estate are a priority (Medicaid or other creditors), we have a strong preference that the residual beneficiaries be **specifically identifiable individuals or charities**. We require complete contact information for each named residual beneficiary for our files.
 - Alternatively, please consider naming the **estate of someone else** (a grantor, another individual) as a residual beneficiary – such that the responsibility of tracking down heirs would fall to any Executor or Administrator (and not be a responsibility of the Trustee). However, there may be tax consequences if the Grantor’s estate is named as the residual beneficiary.
 - In the event the grantor chooses to **name heirs, issue, descendants, or any other class of people**, please understand that CoG will need to hire outside counsel to administer the post-death estate, which may or may not be cost effective depending on the remaining amount of funds available in the trust. We strongly encourage the grantor to determine a threshold amount of funds that must exist in the trust upon the primary beneficiary’s death in order to trigger the Trustee’s obligation to make distributions to heirs, issue, descendants, etc. For example, if the remaining trust funds are less than that threshold amount (\$50k? \$100k), then all of the remaining funds could be paid to one specifically named beneficiary or charity.