

Spousal Protection Trust Provisions

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The following contains three articles of a Last Will and Testament that is created by the Academy's drafting app. These articles describe the flow of assets when the first spouse dies. The intended audience of any legal document is another lawyer or a judge. If the language seems complicated, it is because the provisions must meet the requirements of the statutes, agency rules, and court opinions. The best approach is to feel comfortable with the concepts and the process used when the time comes.

Section 1.01 Distribution in Trust if Certain Conditions Exist

This section applies if my husband, Susan Tuttle, survives me and meets the following criteria.

The criteria for this section are that my husband or other designated heir is currently or imminently in need of long-term care services or is disabled. Long-term care services include care at home provided by a third-party vendor or a family member of the beneficiary pursuant to a care contract or care in a residential setting to include an Assisted Living Facility, Adult Family Home or Skilled Nursing Home. This section also applies if Susan does not survive but a designated beneficiary or "heir" is *disabled* as defined below:

meeting the definition in United States Code Title 42, Section 1382c(a)(3);

meeting the definition under Kentucky law related to means-based government programs;

receiving or being eligible to receive assistance under United States Code Title 42, Section 1396d(a), or under Kentucky law related to means-based government programs; or

receiving or being eligible to receive other benefits under a means-based government program, such as Medicaid or Supplemental Security Income.

If Susan or any person who is identified as an heir to my estate meets the criteria above, my Personal Representative shall establish a testamentary supplemental needs trust, described below, to hold, distribute, and administer that portion of my estate, i.e., the remaining probate and non-probate assets brought in the probate, attributable to that heir. This trust shall be governed by the Article below entitled "Spousal Protection Trust".

Article II. The Spousal Protection Trust

The trust created by this section will be referred to as a Supplemental Needs Trust because, while it is more likely that my spouse will be the beneficiary of this trust, it is possible that another family member or heir could be the beneficiary if my spouse has predeceased me but that person meets the criteria laid out above. Further, the term "supplemental needs" as defined is more commonly used by government

agencies and estate planning/elder law industry professionals.

Thus, any trust created by this Article shall be referred to as “<Name of Beneficiary> Testamentary Supplemental Needs Trust.” My Personal Representative will obtain a federal taxpayer identification number for this trust and deliver my probate estate to the Trustee of the trust. In most circumstances the Personal Representative and the Trustee of this trust will be the same person. Regardless, this person in his or her capacity as the Trustee will hold and manage the trust assets according to the provisions of this trust and will report any taxable events from its management on IRS Form 1041 as a separate taxable entity.

Section 2.01 Funding the Trust with Segregated Assets

Assuming my spouse survives and meets the criteria as laid out above regarding his status as to age, disability and need for care (current or imminent), my Personal Representative will immediately segregate my estate from the assets of my spouse and will not mingle my estate assets with those of my surviving spouse. If any assets are held before my death in a trust with my spouse as joint grantor, my Personal Representative will transfer those trust assets to either an estate account or to the trust created by this Last Will and Testament.

Section 2.02 Retirement Accounts

If I owned any retirement accounts at the time of my death and these retirement accounts designate the trust created by this Article as the beneficiary of my retirement account, the following provisions shall apply.

Regardless of any provision to the contrary, I direct that the Trustee of this Supplemental Needs Trust shall accumulate and not distribute any distributions from my retirement account to include those distributions that are required by law, commonly referred to as “Required Minimum Distributions.” Rather, the Trustee will hold such distributions in the trust account(s) and only make payments from said account as directed by the administrative provisions in this Article.

It is my desire that this Supplemental Needs Trust qualify as an “Accumulation Trust” and not a “Conduit Trust.” Any provision to the contrary as to distributions of retirement accounts is void.

The primary objective of this Trust is to protect assets for the benefit of my spouse rather than preserve trust assets for the benefit of my remainder beneficiaries. The Trustee is encouraged to communicate with my spouse's agent, i.e., attorney in fact, under any power of attorney executed by my spouse, to determine if it better supports my spouse's health care to terminate any and all retirement accounts which designate this trust as a beneficiary or owner. In making this determination, the Trustee is reminded to consider medical expense deductions to offset income tax if a retirement account is terminated.

The Trustee has the discretion to create more than one trust under this section so that each trust has one beneficiary only. This Trust may not be amended or revoked except by court order. This trust may be decanted provided the new trust conforms to existing law as to health care benefits eligibility and remains an asset that most efficiently finances the beneficiary's needs.

Section 2.03 Administrative Provisions

The following provisions apply to the administration of this Supplemental Needs Trust.

- a) *Income and Principal for Supplemental Needs*

In its sole, absolute, and unreviewable discretion, the Trustee may distribute discretionary amounts of net income and principal for the needs of beneficiary not otherwise provided by governmental financial assistance and benefits, or by the providers of services.

The term "supplemental needs" refers to the basic requirements for maintaining the good health, safety, and welfare when, in the discretion of the Trustee, these basic requirements are not being provided by any public agency, office, or department of any state or of the United States.

Supplemental needs will also include medical and dental expenses; annual independent checkups; clothing and equipment; programs of training, education, treatment, and rehabilitation; private residential care; transportation, including vehicle purchases; maintenance; insurance; and essential dietary needs. Supplemental needs may include spending money; additional food; clothing; electronic equipment such as radio, recording and playback, television and computer equipment; camping; vacations; athletic contests; movies; trips; and money to purchase appropriate gifts for relatives and friends.

The Trustee will have no obligation to expend trust assets for these needs. But if the Trustee, in its sole, absolute and unreviewable discretion, decides to expend trust assets, under no circumstances should any amounts be paid to or reimbursed to the federal government, any state, or any governmental agency for any purpose, including for the care, support, and maintenance of the beneficiary.

b) Objectives

While actions are in the Trustee's sole, absolute, and unreviewable discretion, all parties to this trust should be mindful that the wish is that the beneficiary live as independently, productively, and happily as possible.

The purpose of the provisions of the Spousal Protection Trust is to supplement any benefits received, or for which the beneficiary may be eligible, from various governmental assistance programs, and not to supplant any benefits of this kind. All actions of the Trustee shall be directed toward carrying out this intent, and the Trustee's discretion granted under this instrument to carry out this intent is sole, absolute, and unreviewable.

For purposes of determining the beneficiary's eligibility for any of these benefits, no part of the trust estate's principal or undistributed income will be considered available to the beneficiary for public benefit purposes. The beneficiary must not be considered to have access to the trust's principal or income, or to have ownership, right, authority, or power to convert any asset into cash for the Beneficiary's own use.

c) Unreviewable Discretion

The Trustee shall hold, administer, and distribute all property allocated to this trust for the exclusive benefit of the beneficiary during the Beneficiary's lifetime. All distributions from this trust share are in the sole, absolute, and unreviewable discretion of the Trustee, and the beneficiary is legally restricted from demanding trust assets for the Beneficiary's support and maintenance.

d) Trustee's Legal Mandate and Authority

In the event the Trustee is requested to release principal or income of the trust to or on behalf of the beneficiary to pay for equipment, medication, or services that any

government agency is authorized to provide, or to petition a court or any other administrative agency for the release of trust principal or income for this purpose, the Trustee is authorized to deny this request and to take whatever administrative or judicial steps are necessary to continue the beneficiary's eligibility for benefits. This includes obtaining legal advice about the beneficiary's specific entitlement to public benefits and obtaining instructions from a court of competent jurisdiction ruling that neither the trust corpus nor the trust income is available to the beneficiary for eligibility purposes. Any expenses incurred by the Trustee in this regard, including reasonable attorney fees, will be a proper charge to the trust estate.

Section 2.04 Guidelines to Trustee

The Trustee shall be responsible for determining what discretionary distributions will be made from this trust and may use a Care Manager in accordance with the provisions of this Section.

The Trustee may distribute discretionary amounts of income and principal to or for the benefit of the beneficiary for those supplemental needs not otherwise provided by governmental financial assistance and benefits, or by the providers of services. Any undistributed income will be added to principal. In making distributions, the Trustee must:

- consider any other known income or resources of the beneficiary that are reasonably available;

- consider all entitlement benefits from any government agency, including Social Security disability payments, Medicare, Medicaid (or any state Medicaid program equivalent), Supplemental Security Income (SSI), In-Home Support Service (IHSS), and any other supplemental purpose benefits for which the beneficiary is eligible;

- consider resource and income limitations of any assistance program;

- make expenditures so that the beneficiary's standard of living will be comfortable and enjoyable;

- not be obligated or compelled to make specific payments;

- not pay or reimburse any amounts to any governmental agency or department, unless proper demand is made by this governmental agency or reimbursement is required by the state; and

- not be liable for any loss of benefits.

Section 2.05 Non-Intervention Invoked

I specifically invoke judicial non-intervention as to this section and in general. For purposes of determining the beneficiary's state Medicaid program equivalent eligibility, no part of the trust estate's principal or undistributed income may be considered available to the beneficiary. The Trustee shall deny any request by the beneficiary to:

- release trust principal or income to or on behalf of the beneficiary to pay for equipment, medication, or services that the state Medicaid program equivalent would provide if the trust did not exist; or

- petition a court or any other administrative agency for the release of trust principal or income for this purpose.

In its sole, absolute, and unreviewable discretion, the Trustee may take necessary administrative or legal steps to protect the beneficiary's state Medicaid program equivalent eligibility. This includes obtaining a ruling from a court of competent jurisdiction that the trust principal is not available to the beneficiary for purposes of determining state Medicaid program equivalent eligibility. Expenses for this action, including reasonable attorney fees, will be a proper charge to the trust estate.

Section 2.06 Termination and Distribution of Trust

If the Trustee, in its sole, absolute, and unreviewable discretion, determines that the beneficiary is no longer dependent on others and is able to independently support himself or herself, the Trustee shall distribute or retain the remaining property according to the other provisions of this trust as though the provisions of this trust had not been effective.

If the other provisions of this trust do not provide for the remaining property's distribution or retention, then the Trustee shall distribute the remaining property to the beneficiary outright and free of trust.

Independently support is satisfied when the beneficiary has been gainfully employed for 33 months of the 36-month period immediately preceding the decision to terminate the trust share.

The terms *gainful employment* and *gainfully employed* mean the full-time employment that produces sufficient net income to enable the beneficiary to contribute not less than 100% of the funds (exclusive of other revenue sources) that are necessary to provide for the beneficiary's independent care, support, maintenance, and education. In its sole, absolute, and unreviewable discretion, the Trustee shall determine whether or not the beneficiary has satisfied the condition of gainful employment.

Section 2.07 Distribution Upon the Death of the Beneficiary

Upon the beneficiary's death, the Trustee shall distribute or retain the remaining property according to the other provisions of this trust as though the provisions of this section had not been effective. If the other provisions of this trust provide for the beneficiary's share to be held in trust, then those provisions will be interpreted as though the beneficiary died after the establishment of that trust.

If the other provisions of this trust do not provide for the distribution or retention of the remaining property, then the beneficiary will have the testamentary limited power to appoint all or any portion of the principal and undistributed income remaining in the beneficiary's trust at the Beneficiary's death among one or more persons or entities. But the beneficiary may not exercise this limited power of appointment to appoint to himself or herself, the Beneficiary's estate, the Beneficiary's creditors or the creditors of the Beneficiary's estate.

Section 2.08 The Care Plan

The Trustee is encouraged to employ a Care Manager to ensure that the beneficiary maintains a safe living situation. The Care Manager must be a registered nurse with at least five years of experience in geriatric medicine, a licensed social worker with five years of experience in health care benefits, or a care management agency, duly licensed as a business entity, with experience in the field of assessment of conditions similar to those of the beneficiary, and familiarity with the public benefits to which the beneficiary may be entitled.

Section 2.09 Separate Account

If the Trustee uses a Care Manager, the Care Manager may establish periodic payments for part or all of the payments authorized under this trust and maintain a separate bank account for disbursement by the Care Manager. Any account must be carried in the trust's name and must have the trust's federal tax identification number. At least monthly, the Care Manager shall provide information on receipts and disbursements from this account to the Trustee. This account must contain no more than an amount reasonably necessary for the beneficiary's needs for a period of 60 days.

The Trustee will not be held liable for any actions of the Care Manager, unless the Trustee has actual knowledge of and consented to the Care Manager's proposed actions before the actions were actually taken. The Care Manager must not make any distributions that may cause a reduction of public benefits unless the Trustee has consented to the distribution.

(i) Annual Care Plan

If the Trustee uses a Care Manager, the Care Manager shall provide a written care plan for purposes of evaluation of the beneficiary's medical and psychosocial status to the Trustee at least annually. The care plan must include recommendations concerning resources and services beneficial to the beneficiary.

(ii) Quarterly Assessments

If the Trustee uses a Care Manager, the Care Manager shall visit the beneficiary at least quarterly to assess the Beneficiary's physical and emotional needs, including the appropriateness of the present placement, attendant care, access to required resources, reliability for making and keeping medical appointments, and access to socialization activities.

(1) Compensation of the Care Manager

If the Trustee uses a Care Manager, the Care Manager will be entitled to fair and reasonable compensation for the services he or she provides. The compensation amount will be for the customary and prevailing charges for services of a similar nature during the same time and in the same geographic locale.

Article III. Limitations Imposed if Any Retirement Account Designates any Trust Created by This Will as a Beneficiary

The Trustee may exercise the authority and discretion provided for in this Section over any of my qualified retirement plan accounts and benefits to which the trust is a beneficiary. The powers granted in this Section are in addition to, and not in limitation of, all other powers granted to the Trustee in this agreement.

Section 3.01 When Accumulation Trust Provisions Apply

Except as specifically provided otherwise in this Will, if any other trust created under my Will becomes the beneficiary of death benefits under any qualified retirement plan when disabled or the beneficiary of any trust that qualifies as a supplemental needs trust, the Trustee must withdraw the trust's share of the plan assets in accordance with the provisions of Section 401(a)(9) Internal Revenue Code and applicable Medicaid regulations as described herein. The Trustee may withdraw additional amounts from the trust's share of the plan as my Independent Trustee may determine advisable for any purpose. The Trustee may

distribute as much of the amounts withdrawn from the trust's share of the plan as my Independent Trustee may determine advisable for any purpose. My intent is that any such trust will be an accumulation trust, the beneficiaries of which qualify as designated beneficiaries under Internal Revenue Code Section 401(a)(9).

Upon the death of the Primary Beneficiary of a trust governed by these accumulation trust provisions, the Trustee must withdraw any amounts remaining in the qualified retirement plan in accordance with the provisions of Internal Revenue Code Section 401(a)(9).

Notwithstanding any other provision of my Will or state law to the contrary, the Trustee may not distribute any qualified retirement benefit payable to an accumulation trust established under my Will, the beneficiaries of which qualify as designated beneficiaries under Internal Revenue Code Section 401(a)(9), to or for the benefit of my estate, any charity, or any beneficiary other than an individual, on or after the *designation date*. My intent is that all qualified retirement benefits held by or payable to such trust on or after the designation date be distributed to or held only for identifiable individual beneficiaries, within the meaning of Internal Revenue Code Section 401(a)(9) and applicable United States Treasury Regulations. As used in this paragraph, *beneficiary* means any person who is entitled or who becomes entitled to receive distributions of income or principal from the trust, including, without limitation, the appointees of a power of appointment. To the extent that any accumulation trust established under my Will becomes the beneficiary of a qualified retirement plan, any power of appointment within such trust with respect to qualified retirement plan assets shall only be exercisable in favor of an identifiable individual beneficiary and, if necessary to preserve a longer applicable distribution period, must not be exercised in favor of an individual born before the Primary Beneficiary or, if there is no Primary Beneficiary, the oldest Income Beneficiary. This provision is not intended to diminish the share of trust beneficiaries to whom qualified retirement benefits proceeds may not be distributed, except to the extent that non-retirement plan trust assets are insufficient to satisfy those beneficiaries' shares, in which case their shares will be diminished on a *pro rata* basis. The Trustee may sever any trust created under my Will as provided in Section, Authority to Merge or Sever Trusts, to effect the intent of this paragraph.

(i) Purpose

This Section's purpose is to ensure that, for any trust that qualifies under Internal Revenue Code Section 401(a)(9) to use the life expectancy of a designated beneficiary of that trust to calculate the required minimum distributions to be withdrawn from the qualified retirement plan, The Trustee may use such life expectancy to calculate the required minimum distributions to be withdrawn. For all other trusts, The Trustee must withdraw all required distributions within the maximum time period allowed by Internal Revenue Code Section 401(a)(9). This Section is to be interpreted consistent with my intent despite any direction to the contrary in my Will.

Section 3.02 Required Minimum Distribution

In administering any trust created under my Will where life expectancy may be used to calculate the applicable distribution period under Internal Revenue Code Section 401(a)(9), the required minimum distribution for each qualified retirement plan for any year is the greater of (1) the value of the qualified retirement plan determined as of the preceding year-end, divided by the applicable distribution period, and (2) the amount that The Trustee is required to withdraw under the laws then applicable to the trust to avoid penalty.

For purposes of determining the applicable distribution period, the designated beneficiary whose life expectancy must be used shall be determined as provided in Section 401(a)(9) of the Internal Revenue Code and applicable United States Treasury Regulations.

In administering any trust where life expectancy may not be used to determine the applicable distribution period, the required minimum distribution for each qualified retirement plan for any year shall be the amount that The Trustee is required to withdraw under the laws then applicable to the trust under Internal Revenue Code Section 401(a)(9) to avoid penalty.

Life expectancy, applicable distribution period, required minimum distribution, and other similar terms used in this Section, will be determined in accordance with Section 401(a)(9) of the Internal Revenue Code and applicable United States Treasury Regulations.

Section 3.03 Distributions from Roth IRAs

Prior to taking any distribution from a qualified retirement plan, The Trustee will first determine the date that any Roth IRA was established, and then determine whether a distribution from that Roth IRA would be a qualified distribution as defined in Internal Revenue Code Section 408A(d)(2) or would be subject to any state or federal penalty taxes. The Trustee shall take all reasonable precautions to ensure that a distribution from any Roth IRA is treated as a qualified distribution and reduce or avoid application of state or federal penalty taxes to the distribution.

Section 3.04 Designated Beneficiary Requirements

I direct the Trustee to comply with those provisions of the Internal Revenue Code and applicable United States Treasury Regulations that allow the beneficiaries of the trust, or any trust share, to be treated as designated beneficiaries of any qualified retirement plans or qualified retirement benefits for purposes of determining the distribution period under Internal Revenue Code Section 401(a)(9).

Section 3.05 Required Documentation, Elections, Withdrawals, and Investment Management

I direct the Trustee to immediately determine what, if any, documentation must be furnished to the administrator of each of the qualified retirement plan benefits and to provide that documentation in a timely manner.

The Trustee may deal with and make all elections with respect to the qualified retirement plan accounts and benefits. In addition, and not in limitation of the foregoing, the Trustee may divide any qualified retirement plan account into separate accounts or subaccounts, and direct the distribution of the accounts and subaccounts when appropriate.

The Trustee may exercise the right to determine the manner and timing of payments (by lump sum or otherwise) of qualified retirement plan benefits that are permitted under qualified retirement plans and are consistent with the federal income tax rules regarding required minimum distributions under Section 401(a)(9) of the Internal Revenue Code.

The Trustee may direct that the benefits from any qualified retirement plan be paid directly to any beneficiary of this trust who is currently eligible to receive distributions of net income and principal from the trust.

The Trustee may, after my incapacity or death, administer, invest, and otherwise manage any qualified retirement plan accounts to which the trust is a beneficiary in the same manner that I could administer, invest or manage those accounts prior to my death or incapacity. The Trustee may not, however, change the beneficiary of any qualified retirement plan account or benefit.

The Trustee may change custodians and investment advisors for any qualified retirement plan accounts to which the trust is a beneficiary, and may direct the management and investment of those accounts to the extent permitted by the plan.

Section 3.06 Penalty on Early Withdrawals

The Trustee may pay any penalty tax imposed because of the early withdrawal of funds from any qualified retirement plan account including, but not limited to, the withdrawal of funds from a Roth IRA within five years of its creation unless such payment would result in the oldest Income Beneficiary of a separate trust not qualifying as a designated beneficiary under the required minimum distribution rules contained in Section 401(a)(9) of the Internal Revenue Code and applicable United States Treasury Regulations.

Section 3.07 Conversion

The Trustee may convert any IRAs to which my trust is a beneficiary to Roth IRAs as those accounts are defined in Section 408A of the Internal Revenue Code. The Trustee may also convert any qualified retirement plans to IRAs and generally deal with those accounts to the extent permitted by law.

I direct the Trustee to work in conjunction with my Personal Representative to ensure that sufficient distributions are withdrawn from my qualified retirement plan accounts in the year of my death to fully fund the required minimum distributions for that year.

The Trustee may not change or designate beneficiaries under any retirement plan. Any power extended to the Trustee under the terms of a retirement plan that purports to give the Trustee the power to change the identity or rights of any beneficiaries under the plan is deemed to be void ab initio.

I direct that qualified retirement plan benefits not be used or applied on or after September 30 of the calendar year following my death for payment of my debts, taxes, expenses of administration or other claims against my estate or for payment of estate, inheritance or similar transfer taxes due on account of my death.

Section 3.08 Distribution to Unqualified Beneficiaries

If any trust beneficiary under this agreement is not an "individual" within the meaning of Section 401(a)(9) of the Internal Revenue Code and the applicable regulations, the Trustee may, by September 30th of the year following the year of my death, distribute that beneficiary's entire interest outright, and free of the trust, to the beneficiary if, in the Trustee's sole and absolute judgment, failure to make the distribution would jeopardize the treatment of the trust's remaining beneficiaries as designated beneficiaries under Section 401(a)(9) of the Internal Revenue Code and applicable regulations.

If the value of an interest is not readily ascertainable for any beneficiary who is not an individual, the Trustee may settle and agree upon a reasonable value with the beneficiary and distribute the amount agreed between the Trustee and the beneficiary. Any settlement must, however, be completed and distributed before September 30th of the year following the year of my death.