

**14th Annual Changes and Trends Affecting
Special Need Trusts**

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**Seven Timeless Principles of
Special Needs Planning**

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As we develop an ever-growing toolbox of special needs planning options, the challenge of using the most cost-effective and life-enhancing options for each beneficiary remains as difficult as it has been for decades. This article is intended to discuss seven timeless principles that will help us leverage information and skills that we have had for many years along with new techniques:

- (1) ***First do no harm.*** When benefactors are willing to plan for the long-term care and protection of an individual with disabilities, seize the opportunity. This may be the only chance in that intended beneficiary's lifetime to leverage available resources.
- (2) Select navigators (fiduciaries, advisors, and advocates) who can go the distance and give them the protection to do so.
- (3) Round up the resources that are available to fund the plan. Work with a broad definition of the term "resources." Identify, protect, manage, and leverage resources, including beneficiary capabilities, beneficiary earnings, beneficiary public benefits, the grantor's property, costs of administration of property, advocates, advisors, extended family member generosity, trustee options, expense reduction, and loss prevention opportunities.
- (4) Design and build a beneficiary service center to balance trustee control with beneficiary control, and to ensure that the beneficiary is at the center of all plans and choices.
- (5) Project the future, traveling through time, considering predictable changes as well as possible changes, opportunities, and risks. While none of us has a crystal ball, some of the changes are as predictable as the sun rising and yet are not always incorporated into long-term plans.
- (6) Take the time to go back and forth between objectives and options; think of an ongoing game of ping pong that continues to go back and forth—where the participants never take their eyes off the ball. Develop a trust administration meeting agenda as early as possible in the case to help track past experiences and identify options for the future.
- (7) *Implement → monitor → assess → revise → repeat.*

#1

First Do No Harm

The call comes to your office. The caller asks to meet with you to get a few pointers on how to make trust distributions. He notes that he is the trustee of a new fully-funded special needs trust for a family member and is ready to start making distributions. “Thirty minutes should do it,” says the caller.

You ask why he does not return to the attorney who drafted the trust, and he tells you that the attorney recommended he call you for this step.

When you ask why, the caller notes that while his attorney knew all about drafting special needs trusts, she did not know anything about public benefits. The attorney told him that he could probably swing by your office and get that information, as you probably had that in a hand-out on the coffee table in your reception area anyway.

The drafting is done, the documents are signed, the grantor/testator has died, the probate is over, and the trust is funded. There was no special needs planning. Is there a problem?

In Texas, there is *quite possibly* no problem—no harm—so long as the beneficiary is not the trustee, and so long as the trustee has discretion over distributions¹. It may actually be *difficult* in Texas to imagine a situation where a third-party trust is countable and disqualifying for *most* public benefits programs *so long as the beneficiary is not the trustee and the trustee has distribution discretion*.

In the example above, some of the opportunities for funding the trust, reducing transition costs, and setting the trust on a path that *increases* the likelihood for success may be past. But maybe not. It is possible that the original drafting attorney seized the opportunity to set aside property for the beneficiary, recognizing the value of a third-party trust. There may still be many opportunities for planning. *Oddly*, even when the trust presented to you is not optimal, and even if there are problems, it may not be necessary or helpful to modify the trust. In many cases, the key component missing is a distribution and administration plan—the special needs planning step. Where clients are willing to create such plans on their own, there are now books and online resources available to help².

¹ The benefits that most frequently apply to trust beneficiaries will likely be Social Security Administration benefits (including retirement and disability benefits such as Supplemental Security Income, also known as SSI, and Social Security Disability Insurance, also known as SSDI), along with Medicare and Medicaid), but there are other benefit programs including State and community services, federal housing programs, food subsidies, and a vast array of other programs that have different rules.

² See, for example, The Arc’s Center for Future Planning, <https://futureplanning.thearc.org>, and *Managing a Special Needs Trust*, by Jackins, Blank, Shulman, and Onello.

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