



Estate Planning Techniques for Clients with Dementia or Alzheimer's

*Sample Power of Attorney Provisions to Include
Sample Testamentary Spousal Support Trust
Important Irrevocable Trust Provisions*

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Misty Clark Vantrease

Sample Power of Attorney Provisions to Include

Gift Making Powers. My agent shall have the full and absolute power to give to any charity, my spouse or any of my children, grandchildren, sisters, brothers, nieces, or nephews, gifts outright or in trust of real property and tangible or intangible personal property, including any contractual benefits whether life insurance, annuities or property interests of any nature, whether such interests be present or future interests, vested or contingent, that my Attorney-in-Fact in his or her sole discretion believes would be my wishes and is advisable, provided that the gift or series of gifts takes into account the estate planning wishes I have expressed from time to time (including through my Will, Trust, beneficiary designations, conversations). Gifts made by my Attorney-in-Fact may be made to my Attorney-in-Fact. The restrictions in this section (12) do not apply to any transfers made under 42 U.S.C. 1396p or any transfers made in conjunction with a written asset protection plan created by an attorney.

The authority herein granted shall include divesting me of assets in favor of other persons or entities, including my agent, for the purpose of converting countable assets into excludable assets for Medicaid, VA, or other governmental programs, or transferring assets with the objective of eventually becoming eligible for Medicaid, VA benefits, or other governmental programs.

Power to Protect Assets and Qualify for Governmental Benefits. To obtain for me and maintain my eligibility for any and all public benefits and other things due me under entitlement programs; to protect my assets from diminution and to qualify me to receive Medicaid, Supplemental Social Security (SSI) or any other governmental benefits; to create, execute and fund on my behalf a revocable or irrevocable trust on such terms as my Attorney-in-Fact deems to be in my best interests and to transfer to such trust any and all assets, and to apply on my behalf to qualify me to receive any governmental or insurance benefits for which I am or may become eligible; to make any decisions concerning the terms and beneficiaries of such trust, in accordance with my wishes as expressed in any documents I have created, which are still in effect at such time, including but not being limited to, my Last Will and Testament, if any; my revocable living trust, if any; (the fact that my Attorney-in-Fact may be a remainderman or a beneficiary in connection with any such transfer hereunder shall not affect the validity thereof, nor, by itself, constitute a breach of his or her fiduciary duty hereunder); and if I establish a trust to accomplish the goals described in this paragraph, my Attorney-in-Fact is authorized to convey my assets to such trust, provided the Trustee is willing to accept the contribution of such assets; and if I am ever admitted to a long term care nursing home or facility and still own my own home, my Attorney-in-Fact when applying for aid or attempting to create or maintain my eligibility for Medicaid benefits shall indicate my intent to return to my home as soon as I am able, to insure that my home shall remain as an exempt asset for purposes of Medicaid qualification;

Power to Represent Me. To deal with and represent me before the Social Security Administration and any other federal, state or local agency;

Further, I authorize my attorney at law to discuss and confer with my Attorney-in-Fact such matters as my attorney at law determines necessary, appropriate or helpful in the representation of my interests and, therefore, I do hereby waive the attorney client privilege so as to encourage such communications so as to protect my interests;

Power to relinquish dower rights. My Attorney-in-Fact has the right to relinquish my dower rights.

Power to enter into a pre-nuptial or post-nuptial agreement. My Attorney-in-Fact has the right to enter into a pre-nuptial agreement or a post-nuptial agreement on my behalf.

Excluded power of Attorney-in-Fact. My Attorney-in-Fact does **not** have the power to waive my right to a trial by jury and may **not** agree to binding arbitration instead of a trial by jury for any reason, including but not limited to admission to a nursing home or hospital.

Sample Testamentary Spousal Support Trust

Article 4

TRUST FOR SPOUSE NAME

The share of my estate that is set aside for Spouse Name shall be named, "Trust under Will f/b/o Spouse Name," and shall be held by my Trustee, Trustee Name, in a Trust for the benefit of Spouse Name, in accordance with the following provisions. If the designated Trustee declines to act or cannot act, my Personal Representative shall choose a corporate or non-corporate trustee as successor. xxOR If the designated Trustee declines to act or cannot act, I appoint Successor Trustee Name as successor Trustee. If the successor Trustee also declines to act or cannot act, my Personal Representative shall choose a corporate or non-corporate trustee as successor.

4.1 Distributions of Income and Principal

The Trustee shall collect income and, after deducting all charges and expenses attributed thereto, may apply for Beneficiary's benefit, in-kind, or in cash, so much of the income and principal (even to the extent of the whole) as the Trustee deems advisable in the Trustee's sole and absolute discretion,

subject to the limitations set forth below. The Trustee shall add the balance of net income not paid or applied to the principal of the Supplemental Needs Trust.

a) Maximize Benefits

Consistent with the purpose of the Supplemental Needs Trust, before expending any amounts from the net income and/or principal of this trust, the Trustee shall consider the availability of all benefits from government or private assistance programs for which Beneficiary may be eligible. The Trustee, where appropriate and to the extent possible, shall endeavor to maximize the collection and facilitate the distribution of these benefits for Beneficiary's benefit.

b) No Reduction in Benefits

None of the income or principal of the Supplemental Needs Trust shall be applied in such a manner as to supplant, impair or diminish any governmental benefits or assistance for which Beneficiary may be eligible or which Beneficiary may be receiving, unless, in the sole and absolute discretion of the Trustee, such use of income and/or principal is beneficial to Beneficiary.

c) No Assignment

Beneficiary shall not have the power to assign, encumber, direct, distribute or authorize distributions from the Supplemental Needs Trust.

d) Discretionary Distributions

Notwithstanding the above provisions, the Trustee may make distributions to meet Beneficiary's need for food, shelter, health care, or other personal needs, even if those distributions will impair or diminish Beneficiary's receipt or eligibility for government benefits or assistance, but only if the Trustee determines that the distributions will better meet Beneficiary's needs, and it is in Beneficiary's best interests, notwithstanding the consequent effect on Beneficiary's eligibility for, or receipt of, benefits.

e) Supplemental Needs Trust Savings Clause

In the event that the mere existence of the authority to make distributions that will impair or diminish Beneficiary's receipt or eligibility for government benefits or assistance, as specified in subsections b) and d), above, will result in a reduction or loss of Beneficiary's entitlement program benefits, regardless of whether the Trustee actually exercises the authority, then such authority specified in subsections b) and d), above, shall be null and void, and the Trustee's authority to make these distributions shall terminate. If such authority is terminated, then the Trustee's authority to make distributions shall be limited to distributions for Beneficiary's Supplemental Needs, in a manner that will not adversely affect Beneficiary's government benefits.

Notwithstanding any provision to the contrary, in the event that the Supplemental Needs Trust is challenged or faces imminent invasion by any governmental department or agency in such a way as to

affect Beneficiary's eligibility for benefits available under any governmental program, the Trustee is empowered to amend the trust so as to maintain Beneficiary's eligibility for benefits under such governmental program.

4.2 Objective to Promote Independence of Beneficiary

While actions are in the Trustee's sole and absolute discretion, the Trustee should be mindful that it is my wish that Beneficiary live as independently, productively, and happily as possible.

4.3 Not Available Resource to Beneficiary

It is my intent to create a Supplemental Needs Trust that conforms to Kentucky law, in order to provide for Beneficiary's Supplemental Needs. I intend that the trust assets be used to supplement, not supplant, impair or diminish, 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. Consistent with that intent, it is my desire that, before expending any amounts from net income and/or principal of the trust, the Trustee consider the availability of all benefits from government or private assistance programs for which Beneficiary may be eligible and that, where appropriate and to the extent possible, the Trustee endeavors to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of Beneficiary. All actions of the Trustee shall be directed toward carrying out this intent and the discretion granted the Trustee under this agreement to carry out this intent is absolute.

For purposes of determining Beneficiary's eligibility for any such benefits, no part of the principal or undistributed income of the Supplemental Needs Trust shall be considered available to Beneficiary for public benefit purposes.

The Trustee shall hold, administer, and distribute all property allocated to the Supplemental Needs Trust for the exclusive benefit of Beneficiary during his or her lifetime. All distributions from the trust are in the sole and absolute discretion of the Trustee.

In the event the Trustee is requested to release principal or income of the Supplemental Needs Trust to or on behalf of Beneficiary to pay for equipment, medication, or services that any government agency is authorized to provide, or in the event the Trustee is requested 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 such request and is authorized in its sole and absolute discretion to take whatever administrative or judicial steps may be necessary to continue Beneficiary's eligibility for benefits, including obtaining legal advice about 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 Beneficiary for eligibility purposes. Any expenses of the Trustee in this regard, including reasonable attorney's fees, shall be a proper charge to the Supplemental Needs Trust.

4.4 Distribution Guidelines

The Trustee shall be responsible for determining what discretionary distributions shall be made from the Supplemental Needs Trust. The Trustee may distribute discretionary amounts of income and principal to or for the benefit of Beneficiary for those Supplemental Needs not otherwise provided by governmental financial assistance and benefits, or by the providers of services. Any undistributed income shall be added to principal.

In making distributions, the Trustee will:

- (i) consider any other known income or resources of Beneficiary that are reasonably available;
- (ii) take into consideration all entitlement benefits from any government agency, such as Social Security Disability payments (SSDI), Medicaid, Department of Medicaid Services, Supplemental Security Income (SSI), and any other special purpose benefits for which Beneficiary is eligible;
- (iii) take into consideration resource and income limitations of any such assistance program;
- (iv) make expenditures so that Beneficiary's standard of living will be comfortable and enjoyable;
- (v) not be obligated or compelled to make specific payments;
- (vi) not pay or reimburse any amounts to any governmental agency or department, unless proper demand is made by such governmental agency and reimbursement is required by the state; and
- (vii) not be liable for any loss of benefits.

4.5 No Seeking of Order to Distribute

For purposes of determining Beneficiary's state Medicaid program equivalent eligibility, no part of the principal or undistributed income of the Supplemental Needs Trust may be considered available to Beneficiary. The Trustee will deny any request by Beneficiary to:

- (i) release principal or income of the trust to or on behalf of Beneficiary to pay for equipment, medication, or services that the state Medicaid program equivalent would provide if the trust did not exist; or
- (ii) petition a court or any other administrative agency for the release of trust principal or income for this purpose.

The Trustee may, in its sole and absolute discretion, take necessary administrative or legal steps to protect Beneficiary's state Medicaid program eligibility, including obtaining a ruling from a court of

competent jurisdiction that the trust principal is not available to Beneficiary for purposes of determining eligibility. Expenses for this purpose, including reasonable attorney's fees, are a proper charge to Beneficiary's Supplemental Needs Trust.

4.6 Indemnification of Trustee When Acting in Good Faith

The Trustee shall be indemnified from the trust property for any loss or reduction of public benefits sustained by Beneficiary as a result of the Trustee exercising, in good faith, the authority granted to the Trustee under this Article.

4.7 Distribution Upon the Death of Spouse Name

Upon the death of Beneficiary, the Trustee shall distribute or retain the remaining Supplemental Needs Trust property as if the beneficiary failed to survive me and according to Paragraph 3.2 herein.

4.8 The provisions of Articles 6, 7, and 8 shall apply to this Article except where such provisions conflict with the provisions of this Article. [NOTE: make sure to use the correct Article numbers for the Powers and Compensation Of Trustee, Prohibition Against Transfers, and Predecessor Fiduciary Articles in the Will]

Important Irrevocable Trust Provisions

Section XXXX An Irrevocable Trust

This trust is irrevocable, and neither Trustmaker may alter, amend, revoke, or terminate it in any way.

Section XXXXX Transfers to the Trust

Trustmakers transfer to the Trustee the property listed in Schedule A, attached to this agreement, to be held on the terms and conditions set forth in this instrument. Trustmakers retain no right, title, or interest in the income or principal of this trust or any other incident of ownership in any trust property.

Section XXXXX No Distributions of Income or Principal

The Trustee shall have no right, power, privilege, or authority to invade or distribute income or principal of the trust to or for Trustmakers' benefit, under any circumstances.

Section XXXX Statement of Trustmakers' Intent

We are creating this trust as part of our estate plan to ensure efficient management and administration of the trust assets for our beneficiaries.

It is Trustmakers' express intent that the principal and income of this trust will not be available to either Trustmaker for any purpose, including Medicaid. An Independent Trustee may amend this trust to more fully comply with Trustmakers' stated intent.

Other Provision to Consider-

Tax Provisions to Achieve Grantor Trust Status for IRS purposes

Lifetime Income Considerations

Homestead Considerations for the Residence.

Trust Protector or Advisory Committee Provisions.

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