

**Law 880-R01 | Topics in Advanced Trusts & Estates: Special Needs Estate Planning**  
**Winter 2025 | 1 credit**

**Professor(s):** Jennifer A. Crane, Esq. | **Final Exam:** Sat., Jan. 25 at TBD

*This document contains both the syllabus for the course and the reading assignments for each week; please read it carefully. Although I will make every effort to cover each assignment on the date listed, from time to time, a particular topic may spill over into the next class session.*

*Please see <https://stearnscenter.gmu.edu/wp-content/uploads/24-Common-GMU-Syllabus-Policies.pdf> for the University's common policies which are incorporated by this reference and made a part of the syllabus for this course.*

**Prerequisites:** Law 330 Trusts & Estates.

**Reading(s):** Texts/class assignments/reading schedules are delineated on the attached Exhibit A.

**Schedule Announcement(s):** Classes Meets via Zoom on the following dates, from 1:00 to 3:00 pm: 1/6,1/8,1/10,1/13, 1/14.

- a. Attendance is mandatory, unless students seek *and* obtain permission to miss class.
- b. Virtual Presence: Since we're entirely online, attendance means more than just showing up. To be a good virtual citizen, your camera must be on, and you should be in a distraction-free zone. Backgrounds are allowed as long as your face is clearly visible—no disappearing into the digital abyss!
  - i. *Note: In my in-person classes, laptops aren't allowed (without accommodation). While that's different here, your internet connection should only be used for Zoom. This subject is complex and deserves full time and attention; please, no multitasking with your Amazon or watching cat videos on YouTube. Give me your full attention, and I'll give you mine.*
- c. Consequences: Missing class without a legitimate reason in accordance with GMU's policies and procedures or failing to maintain a virtual presence throughout each class (camera on), could lead to deregistration or a FAIL.
- d. Excused Absences: Only serious circumstances (like illness or family emergencies) count as excused. We have a lot of information to learn in a very short time; your latest Netflix binge does not qualify.
- e. Communication: It's your responsibility to keep me informed—promptly and accurately. Miss a class without an excused reason? See *c*, above.

**Contact Information and Availability:** Please contact me to discuss questions or topics that interest you.

- f. You can reach me at [jcrane20@gmu.edu](mailto:jcrane20@gmu.edu). I will respond within one business day.
- g. I will hold office hours by appointment only.
- h. TWEN will contain announcements, the syllabus, and readings. Please check it regularly.

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## **COURSE DESCRIPTION**

Trust and estate planning for individuals with special needs, due to physical, mental, or intellectual differences (congenital or acquired), is an emerging specialty. Practitioners are tasked with creating comprehensive plans to support these beneficiaries. This course aims to provide an understanding of how to effectively create such a plan, covering benefits, special needs trusts, capacity planning, and their connection to trusts and estates.

The American Bar Association (“ABA”) standards for accrediting law schools require not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per class for each credit awarded for a class. According to the standards, fifty minutes suffices for one hour of classroom time, while an hour for out-of-class time is sixty minutes.

## **COURSE OBJECTIVES**

The aim of this course is to encourage students to build on and improve their academic and practical skills. On completion of this course, students should:

- i. Read and understand federal and state regulations pertaining to special needs planning.
- j. Comprehend and utilize appropriate terminology.
- k. Understand means tested and entitlement benefits.
- l. Understand the definitions of and correlations between legal and medical incapacity.
- m. Understand the concept of “least restrictive alternative”:
  - i. Understand capacity requirements for legal documents, especially powers of attorney, to assess an individual with special needs’ ability to execute.
  - ii. Understand general concept of guardianship/conservatorship when powers of attorney are not viable.
- n. Understand the classification of special needs trusts (first and third party).
- o. Understand the different special needs trust structures (pooled and standalone).
- p. Identify and distinguish assets which can be transferred to a special needs trust.
- q. Understand consultations for the preparation of an estate plan involving special needs.
- r. Assess strengths and weaknesses of planning options.
- s. Explain the requirements for a valid special needs trust and the estate planning requirements for the special needs trust to be utilized properly.
- t. Address different ramifications of failure to plan properly, including but not limited to disinheritance, or direct inheritance by a person with special needs.
- u. Describe the special needs trust administration process.
- v. Discuss how the individual with special needs must be provided for once current care plan expires, due to death or disability of caretaker.

## **GRADING & PARTICIPATION**

I expect students to be prepared for each class. My goal is to have a dynamic class and participation is essential. I will encourage it by creating a positive and encouraging environment – not unlike consultations in this field.

The assessment structure for this course is included below. The consultation (which is the basis of the Topics in Advanced Trusts and Estates: Special Needs Estate Planning

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estate plan you will craft) will be your final exam and scheduled on a one-on-one format wherein each student meets with me after we have concluded the course materials.

Should you experience extenuating circumstances (e.g., illness or family crisis) and you need an extension of time, contact the Dean of Students as soon as possible. They will liaise with me and the Registrar to make any necessary arrangements.

### Grades Will be Weighted as Follows:

- a. 20%: Class participation: All students are expected to be “on-call” for each class. Students will be called on throughout the lecture and expected to participate in traditional Socratic style. For class participation to be constructive, contributions should be inquisitive, respectful, appropriate, and succinct (please, don’t be *that* person).
- b. 5%: Assess capacity to determine whether a power of attorney can appropriately be executed or a court-ordered proceeding is mandated and draft the power of attorney.
- c. 5%: Draft a basic guardianship petition for an individual with special needs after capacity evaluation indicates lack of capacity OR powers of attorney for an individual with special needs who *DOES* have capacity.
- d. 10%: Conduct a consultation in a one-on-one manner in which the student will explain (at a very basic level) the types of benefits and trusts as well as capacity management tools.
- e. 60%: A Final Exam in which the student outlines an entire special needs plan based on a mock interview with a set of defined factors. (Interview will be oral with instructor; plan will be written and must reference all factors taught during the course.) The exam is closed book; just like a real-life consultation.

Do not worry if there are mistakes: the purpose of the class is to learn. We are going to stretch our thinking to assess the legal and personal skills necessary of the successful special-needs practitioner. Genuine efforts will be rewarded. However, getting things wrong is different from failure to prepare, which will be met with a low class-participation grade.

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## COURSE SCHEDULE & ASSIGNMENTS

Class	Topic	Text
1	Terminology	<ul style="list-style-type: none"><li>• Hsiao, Amanda C. "Demystifying Disability: What to Know, What to Say, and How to Be an Ally." NAELA Journal, vol. 19, Spring 2023, National Academy of Elder Law Attorneys (PDF)</li><li>• Vocabulary, below.</li><li>• NAELA Book Review: A Lawyers Guide to Working With Special Needs Clients (PDF)</li><li>• Guide to Working With Special Needs Clients: Parts 1 and 2</li></ul>
	Means-tested benefits	SSI and Medicaid: <ul style="list-style-type: none"><li>• <a href="#">SI 00601.000</a> through <a href="#">SI 00605.000</a></li><li>• Virginia Medical Assistance Eligibility Manual (*if needed)</li><li>• <i>Draper v. Colvin</i> (779 F.3d 556)</li><li>• Reinhard, Susan C. "Disability and Aging: Long-Term Supports &amp; Services for a Diverse America." (YouTube)</li><li>• Guide to Working With Special Needs Clients: Part 3</li></ul>
	Entitlement benefits	SSDI, Childhood Disability Benefit (CDB) and Medicare <ul style="list-style-type: none"><li>• SSDI: <a href="#">DI 00115.000</a> through <a href="#">DI 00115.015</a></li><li>• CDB: <a href="#">RS 00203.080</a>: <a href="https://secure.ssa.gov/poms.nsf/lnx/0300203080">https://secure.ssa.gov/poms.nsf/lnx/0300203080</a></li><li>• Medicare:<ul style="list-style-type: none"><li>• 42 U.S. Code Subchapter XVIII as follows: <a href="https://www.law.cornell.edu/uscode/text/42/chapter-7/subchapter-XVIII">https://www.law.cornell.edu/uscode/text/42/chapter-7/subchapter-XVIII</a></li><li>• 42 U.S.C. § 426(b): Individuals with a disability under 65 who may qualify</li><li>• 42 U.S.C. § 426-1 and 42 U.S.C. § 426(h): Exceptions to waiting period for those with end- stage renal disease</li></ul></li><li>• SS Regs on Disability: <a href="https://www.ssa.gov/disabilityresearch/wi/medicare.htm">https://www.ssa.gov/disabilityresearch/wi/medicare.htm</a></li><li>• Guide to Working With Special Needs Clients: Parts 3 (cont'd)</li></ul>
2	Capacity	<ul style="list-style-type: none"><li>• §54.1-2983.2 <i>et seq.</i> of the Code of Virginia</li><li>• Basics of Estate Planning and Special Needs CLEs (PDF)</li></ul>

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<sup>1</sup>To be completed prior to each class as directed; subject to change with notice.

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		<ul style="list-style-type: none"><li>• "Understanding Elder Law and Special Needs Planning Ethics." NAELA Journal: Aspirational Standards, May 2, 2023 (<a href="http://www.naela.org/Web/Web/Resources_Tab/Consumer_Resources/Law_Topics/Understanding_Ethics.aspx">www.naela.org/Web/Web/Resources_Tab/Consumer_Resources/Law_Topics/Understanding_Ethics.aspx</a>)</li></ul>
	Least-Restrictive Alternatives	<ul style="list-style-type: none"><li>• Options in Virginia to Help Another Person Make Decisions: Choices Less Restrictive Than Guardianship and Conservatorship (<i>WINGS PDF</i>)</li><li>• Dale, Stephen W., and Peter J. Wall. "Supported Decision-Making: Paving the Way to Empowerment." NAELA Journal, vol. 20, Fall 2024, National Academy of Elder Law Attorneys (PDF)</li></ul>
	Powers of Attorney	<ul style="list-style-type: none"><li>• §64.2-1600 <i>et seq.</i> of the Code of Virginia (Uniform Power of Attorney Act)(PDF)</li><li>• <i>Voice</i> Article on POAs and the SN child (SNA): <a href="https://www.specialneedsalliance.org/blog/powers-of-attorney-and-your-child-with-special-needs/">https://www.specialneedsalliance.org/blog/powers-of-attorney-and-your-child-with-special-needs/</a></li><li>• <i>Voice</i> Article on balancing capacity tools (SNA): <a href="https://www.specialneedsalliance.org/the-voice/finding-a-balance-of-autonomy-support-and-assistance-using-supported-decision-making-agreements-and-powers-of-attorney/">https://www.specialneedsalliance.org/the-voice/finding-a-balance-of-autonomy-support-and-assistance-using-supported-decision-making-agreements-and-powers-of-attorney/</a></li><li>• Hartery, Elizabeth J. "Psychiatric Advance Directives." NAELA Journal, vol. 17, Fall 2021, National Academy of Elder Law Attorneys. (PDF)</li></ul>
	Guardian/ Conservator	<ul style="list-style-type: none"><li>• §64.2-2000 of the Code of Virginia (Uniform Adult Guardianship and Protective Proceedings Act) (PDF)</li><li>• Fairfax County Circuit Court Manual: Guardianships and Conservatorship (PDF)</li><li>• <i>Voice</i> Article on Guardianship and the Right to Vote (SNA): <a href="https://www.specialneedsalliance.org/the-voice/guardianship-and-the-right-to-vote/">https://www.specialneedsalliance.org/the-voice/guardianship-and-the-right-to-vote/</a></li><li>• <i>Voice</i> Article on Transfer of Gship (SNA): <a href="https://www.specialneedsalliance.org/blog/transferring-guardianship-between-states-2/">https://www.specialneedsalliance.org/blog/transferring-guardianship-between-states-2/</a></li><li>• <i>Voice</i> Article on Guardianship as Last Resort (SNA): <a href="https://www.specialneedsalliance.org/blog/guardianship-should-be-a-last-resort/">https://www.specialneedsalliance.org/blog/guardianship-should-be-a-last-resort/</a></li><li>• <i>Voice</i> Article on Changing Attitudes (SNA): <a href="https://www.specialneedsalliance.org/blog/changing-attitudes-towards-guardianship/">https://www.specialneedsalliance.org/blog/changing-attitudes-towards-guardianship/</a></li><li>• Laabs, Kelsey L. "The 'Who' of Guardianship: A Comparative Analysis of Orders of Priority for Appointment of a Guardian for an Adult." NAELA Journal, vol. 19, 2023, National Academy of</li></ul>

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		<p>Elder Law Attorneys. (PDF)</p> <ul style="list-style-type: none"><li>• Heisz, Kenneth. "Beware of the Con in Conservatorships: A Perfect Storm for Financial Elder Abuse in California." NAELA Journal, vol. 17, Spring 2021, National Academy of Elder Law Attorneys. (PDF)</li></ul>
3	First Party SNTs	<p>Selected excerpts OBRA '93</p> <ul style="list-style-type: none"><li>• 42 U.S.C. §1396p(d)(4)(A)</li><li>• POMS SI 01120.201, Trusts Established with the Assets of an Individual on or after 01/01/00</li><li>• § 64.2-779.10 <i>et seq.</i> of the Code of Virginia</li><li>• <i>Farah v. Commonwealth</i> Record No. 201413 (McCullough) Feb. 17, 2022</li><li>• <i>Sai Kwan Wong v. Daines</i> (582 F. Supp 2d 475)</li><li>• <i>Sullivan v. County of Suffolk</i> (174 F.3d 282)</li><li>• <i>Williams v. Colvin</i> (Case No. 12 C 7852) (N.D. Ill. Mar. 31, 2014)</li><li>• <i>In re Ullman</i>, Surrogate's Court, Onondaga Co., NY Citation 184 Misc. 2d 7, 707 N.Y.S.2d 603 (Sur. Ct. 2000)</li><li>• <i>In re: Kennedy</i>, Surrogate's Court of New York, Nassau County (2004 NYLJ LEXIS 1867)</li><li>• <i>Voice article on The Special Needs Trust Fairness Act</i>: <a href="https://www.specialneedsalliance.org/the-voice/the-special-needs-trust-fairness-act-is-finally-law-individuals-with-disabilities-can-now-establish-their-own-trusts/">https://www.specialneedsalliance.org/the-voice/the-special-needs-trust-fairness-act-is-finally-law-individuals-with-disabilities-can-now-establish-their-own-trusts/</a></li></ul>
	Third Party SNTs	<ul style="list-style-type: none"><li>• § 64.2-779.10 <i>et seq.</i> of the Code of Virginia</li><li>• Social Security Program Operations Manual System (POMS) SI 01120.200</li><li>• <i>Hobbs v. Zenderman</i> (542 F. Supp. 2d 1220)</li><li>• Administering a Special Needs Trust (Handbook published by the SNA) (PDF)</li></ul>
4	PSNTs	<ul style="list-style-type: none"><li>• U.S.C. §1396p(d)(4)(C) and SI 01120.203D and SI01120.200D.2</li><li>• What You Need to Know About Being an Adult with Disabilities: A Handbook for Self-Advocates, Parents, Guardians and Their Loved Ones (PDF)</li></ul>

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	Funding and Administering SNTs	<ul style="list-style-type: none"><li>• Administering a Special Needs Trust Handbook (PDF)</li><li>• <i>Voice</i> article on residence as part of trust administration: <a href="https://www.specialneedsalliance.org/the-voice/leaving-a-residence-to-a-person-with-a-disability/">https://www.specialneedsalliance.org/the-voice/leaving-a-residence-to-a-person-with-a-disability/</a></li></ul>
5	Recognition and response to needs of client; acquisition of soft skills by attorney	<ul style="list-style-type: none"><li>• Discussion of <u>Haben</u> and <u>All that Moves Us</u></li><li>• <i>Voice</i> Article on Supported Decision Making (SNA): <a href="https://www.specialneedsalliance.org/the-voice/supported-decision-making-in-the-us-history-and-legal-background/">https://www.specialneedsalliance.org/the-voice/supported-decision-making-in-the-us-history-and-legal-background/</a></li><li>• Guide to Working With Special Needs Clients: Part 4</li><li>• Memorandum of Intent and Instructions (PDF)</li></ul>
	Conducting a consultation	<ul style="list-style-type: none"><li>• Consultation notes (PDF)</li><li>• What You Need to Know About Being an Adult with Disabilities: A Handbook for Self-Advocates, Parents, Guardians and Their Loved Ones (PDF)</li><li>• "Demystifying Disability: What to Know, What to Say, and How to be an Ally." NAELA Journal, vol. 19, Spring 2023, National Academy of Elder Law Attorneys. (PDF)</li></ul>

**Books:**

1. Courtney, R. A. (2019). A lawyer's guide to working with special needs clients. American Bar Association.
2. Girma, H. (2020). Haben: The deafblind woman who conquered Harvard Law. Twelve.
3. Wellons, J. (2022). All that moves us: A pediatric neurosurgeon, his young patients, and their stories of grace and resilience. Random House.

## **Speaking the Language of Advocacy: Key Legal Terms for Special Needs Planning**

- Administrator: court appointed fiduciary of an intestate estate
- Advance medical directive: a durable power of attorney that designates a surrogate decision maker for healthcare matters; a legal document explaining the principal's wishes about medical treatment if s/he becomes incapacitated as determined by two doctors
- Agent: person appointed to make financial or health care decisions on behalf of the client under a Durable Financial or Health Care Power of Attorney; authority generally terminates at death
  - Bank accounts and taxable accounts that have been designated as POD or TOD
- Beneficiary: person designated to receive something because of a legal instrument
- Bequest: a testamentary gift of tangible personal property that is identifiable and distinguishable from all other personal property and can be satisfied only by the delivery of that piece of tangible personal property
- Devise: a testamentary disposition of real property<sup>2</sup>
- Disabled Adult Child (DAC), which requires a determination that the onset of the participant's disability occurred before age 22, that the person is unmarried, and that the participant has a parent who has a disability, is retired or deceased and who qualifies for Social Security him/herself.
- Durable power of attorney: a power of attorney that remains in effect during the principal's incapacity
  - Entails the court's supervision of the distribution of the estate
- Estate planning: the preparation for the distribution of the management of a person's estate during incapacity and at death using powers of attorney, wills, trusts, insurance policies and other arrangements
- Executor/Personal Representative: person responsible for administering decedent's estate, paying final bills, taxes, etc.<sup>3</sup>
- Fiduciary duty: a duty of utmost good faith, trust, confidence and candor owed by a fiduciary to the beneficiary; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person
- Fiduciary relationship: a relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship

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<sup>2</sup> Title passes immediately to the devisee upon the probate of the Will (whether full or recordation without qualification), subject only to divestment by the Personal Representative to pay the debts of the estate. See *Coles Heirs v. Jamison*, 112 Va. 311 (1911); but see *Yamada v. McLeod*, 243 Va. 426. (1992) 15 Wm & Mary L.Rev. 949 (1975) offers a well-reasoned discussion of an executor's powers over real estate.

<sup>3</sup> The Executor is named or nominated in the will, but appointed by the Clerk of Court, Va. Code § 64.2-444. Va. Code § 64.2-1416 provides that powers vested in the three (3) or more fiduciaries may be exercised by a majority.



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- Fiduciary relationships – such as TRUSTEE-BENEFICIARY, GUARDIAN-WARD, AGENT-PRINCIPAL, and ATTORNEY-CLIENT – require the highest duty of care
- Fiduciary relationships usually arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first; (2) when one person assumes control and responsibility over another; (3) when one person has a duty to act for or give advice to another on matter falling within the scope of the relationship, or (4) when there is a specific relationship that is traditionally recognized as involving fiduciary duties
- Fiduciary: one who is in charge of another’s person and/or property and owes to another the duties of good faith, trust, confidence, and candor; one who must exercise a high standard of care in managing another’s money or property
  - For a trust to be valid, it must involve specific property, reflect the settlor’s intent, and be created for a lawful purpose
- Grantor/Settlor/Trustmaker: one who creates/transfers assets to a trust
- Guardian: one who is appointed to have custody of minor children if both parents/guardians are not available; can also be one who is appointed to have control of the personal and medical affairs of an incapacitated adult
- Heir: a person who, under the law of intestacy, is entitled to receive an intestate decedent’s property; more loosely a person who inherits real or personal property by will or intestate succession
- Legacy: a testamentary gift of money
  - Example: Life insurance proceeds
- Medicaid, which provides basic medical care to low-income individuals. Most states also have “waiver” Medicaid programs covering residential, day care, career, and other services.
- Non-Probate: of or relating to some method of estate disposition apart from wills; property so disposed. Typical non-probate assets:
- Power of attorney: an instrument granting someone authority to act as an agent or attorney-in-fact for the principal
- Principal: person who authorizes another to act on his or her behalf as an agent or attorney-in-fact
  - Probate does not preclude inquiry into the validity of the Wills’ provisions or on their proper construction or legal effect
- Probate: the judicial procedure by which a testamentary document is established to be a valid Will; proving a Will to the satisfaction of the Court; to admit a will to proof
  - Qualified Retirement Accounts including 401(k) and IRAs; 403(b); TIRF, etc.
- Residue: the part of a decedent’s estate remaining after all the debts, expenses, taxes and specific bequest and devises have been satisfied; also termed residual estate, residue, residuary

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- Section 8 Housing, which subsidizes residential rents for families for low-income families, which may include those with special needs. Eligibility is based on a sliding scale that considers income and family size.
- Social Security Disability Insurance (SSDI), which requires that participants have been unable to work for at least a year due to their disability. Benefits are based on the individual's income history and the number of quarters they have worked and contributed to the program.
- Supplemental Nutrition Assistance Program (SNAP/Food Stamps), which has eligibility guidelines similar to SSI.
- Supplemental Security Income (SSI), which provides funds for food and shelter to individuals with disabilities. To qualify, a person must have less than \$2,000 in "countable assets."
- Tangible Personal Property: corporeal personal property of any kind; personal property that can be seen, weighted, measured, felt or touched, as in any way perceptible to the senses (*Can you move it with your hands?*)
  - Example: Tax-deferred annuities
- Testator: person who is signing a testamentary document (a Will)
- Trust Beneficiary: individual or entity designated in the trust document who may receive income and/or principal distributions from the trust
- Trust Protector: individual or institution (other than the Trustee) designated in the trust document who may be granted certain special powers over the trust, such as to remove/replace the trustee, change trust situs, make certain amendments to the trust, etc.
- Trust: a trust involves three elements, namely (1) a trustee who holds the trust property and is subject to equitable duties to deal with it for the benefit of another; (2) a beneficiary to whom the trustee owes equitable duties to deal with the trust property for his benefit; (3) trust property which is held by the trustee for the beneficiary.
- Trustee/Co-Trustee: individual or institution appointed in the trust document to administer the trust
  - Unless set aside, the probate of a Will is conclusive upon the parties to the proceedings (and others who had notice of them) on all questions of testamentary capacity, the absence of fraud or undue influence, and due execution of the Will