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THE SUPPLEMENTAL NEEDS TRUST THE CORE OF THE PLAN

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Estate Planning

- The organization of all assets to maximize goals
- Directing assets to the beneficiaries of your choice
- Minimizing taxation
- Ease of administration



Vehicles

- Wills
- Trusts
- Brokerages
Accounts/Investments
- CD's
- Cash
- Retirement Plans
- Life Insurance
- IRAs
- Real Property
- Annuities
- 529 Plans
- Long-Term Care
Insurance
- Powers of Attorney
- Health Care Proxies
- Living Wills



The Legal Centerpiece of an Estate Plan Involving a Disabled Individual is:

Supplemental Needs Trust
or also referred to as a
Special Needs Trust

The legal authority for these trusts is derived from federal law Omnibus Budget Reconciliation Act of 1993 ("OBRA '93") and NY Estates Powers & Trusts Law § 7-1.12 ("EPTL").



Focus on:

Supplemental Needs Trust

- Used for Beneficiaries with Chronic or Intermittent Disabilities



Supplemental Needs Trust

May be either

Testamentary or Inter Vivos

But always Irrevocable.



Primary Regulatory Rules are found in the:

Program Operations Manual System (POMS)

Published by the Social Security Administration (SSA)



Trusts in General

A Trust is an Agreement between

- Person who Creates the Trust

“Grantor” and “Settlor”

- Person who Agrees to be Responsible for the Trust

“Trustee”



THIS TRUST AGREEMENT is entered into this ____ day of _____, 2008, between _____, of DeWitt, New York, as Settlor (the “Settlor”) and _____, of DeWitt, New York, as Trustee (the “Trustee”). The Trust is intended by the parties to take effect immediately upon signing, subject to being funded by the Settlor or any other person.



Terms of Trust

Instruct & Control the Actions of the Trustee

“Fiduciary”

Who can be a Trustee?

- Person
- Entity
- Over 18, competent, not a Felon



Supplemental Needs Trust Used to

- Allow a disabled person to continue to receive benefits despite existence of monies/assets/income that would otherwise be a disqualifying resource/income



Two Types of Supplemental Needs Trusts

- First Party
 - Pay Back
 - Self-Settled
 - Exception Trusts
- Third Party
 - Escher Trust (1978 case)
- Pooled Trusts –Alternative to SNT (for persons over age 65 and for Spend Down Trust)



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Major Differences Between 1st Party and 3rd Party SNT

Source of Money
&
Termination Requirements



The First Primary Distinction Between 1st Party and 3rd Party Trusts is the Source of the Money

- 1st Party - If the money belonged to the Disabled Person then must use a 1st Party Trust or suffer a transfer Penalty
- 3rd Party - If the money belonged to someone – anyone – other than the disabled beneficiary then can and should use a 3rd Party Trust



The Second Primary Distinction Between 3rd Party & 1st Party SNTs is the Termination Provision

1st Party Trust – must reimburse Medicaid for medical payments made on behalf of the beneficiary during life between paying balance to estate.

3rd Party Trust – remaining balance can be distributed to anyone the Settlor names as a remainderman. No reimbursement is required.



In the middle the two types of SNTs are similar – Although there are differences in reporting and accounting requirements.

Investment choices also tend to be more restricted with 1st Party Trusts.



Creation of Trusts

	1st Party	3rd Party
Who can be Grantor?	Parent, Grandparent, Guardian, Court, <u>not</u> the Disabled Person	Anyone other than the Disabled Person
With what can the Trust be funded?	Disabled person's assets, tort settlement, inherited monies	Any assets or funds that are <u>not</u> owned by the disabled person
When?	Prior to age 65 and at any time after funds are received or anticipated to be received by the disabled person	At any time – usually as part of Estate Plan



Creation of Trusts, cont'd.

	1 st Party	3 rd Party
Where are assets invested?	Bank account, brokerage, real estate-all titled in the name of the Trustee of the Trust-not individually.	Same
How do the funds get into the Trust?	If the disable covered person has Cognition then retitle by the individual otherwise by the Guardian of the property of the disabled person.	By the Grantor's Will, or by the Grantor and any other person other than the disabled person who wishes to make a gift. Note Gift Tax consequences.



Trust Language

1st Party and 3rd Party have some same or similar provisions.

- Lifetime distributions - except as specifically required by the Court
- Statement of Intent
- Administrative Provisions
- Powers Clauses
- Statement of Irrevocability
- Statement of no application of EPTL 7-1.6



Sample Distribution Language

6.2 During the life of the Beneficiary, the Trustee shall hold the property of this Agreement, IN TRUST, for the benefit of the Beneficiary, and the Trustee shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of the Beneficiary, so much of the income and principal (even to the extent of the whole) as the trustee deems advisable in the Trustee's exclusive and absolute discretion, subject to the limitations set forth below. The Trustee shall add the balance of the net income not paid or applied, to the principal of the Trust, at least annually.

6.4 None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any Federal, State, County, City, or other governmental entity for which the Beneficiary may otherwise be eligible or which the Beneficiary may be receiving.



Override Clause

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



Failsafe Clause

6.7 If the mere existence of the Trustee's authority to make distributions pursuant to the above paragraph will result in a reduction of loss of the Beneficiary's entitlement program benefits or assistance, regardless of whether the Trustee actually exercises this discretion, the preceding paragraph shall be null and void and the Trustee's authority to make such distributions shall be suspended for so long as that authority will result in a decrease or loss of entitlement to program benefits and the Trustee's authority to make distributions shall be limited as provided in paragraphs 6.2 and 6.3 above.



Use of Override Provision

- Intermittent Illness
- Working with the disability



Some Provisions Will be Different

- Termination
- Trustee Appointment and Bonding
- Accounting
- Tax Provisions
- Gifting Provisions



Sample Termination – 1st Party

Unless sooner terminated by the exhaustion of corpus, this Trust shall terminate upon the death of Beneficiary. The Trustee shall notify the State of New York and the Onondaga County Department of Social Services of Beneficiary's death, and shall distribute any principal and accumulated interest that then remains in the Trust as follows:

(a) The Onondaga County Department of Social Services, or other appropriate Medicaid entity within New York State, shall be reimbursed for the total Medical Assistance provided to the Beneficiary during the Beneficiary's lifetime, consistent with federal and state law. If the Beneficiary received Medicaid in more than one state or county, then the amount distributed to each state shall be based on each state's or county's proportionate share of the total amount of Medicaid benefits paid by all states on behalf of the Beneficiary.

(b) All remaining principal and accumulated income shall be distributed to the Beneficiary's estate.



Sample Termination – 3rd Party

Unless sooner terminated by the exhaustion of corpus, this Trust shall terminate upon the death of the Beneficiary. Upon the death of the Beneficiary, the Trustee shall distribute the remaining principal and accumulated income remaining in the Trust to the then living issue of the Beneficiary, in equal shares, *per stirpes*; but if none, then to the then living issues of the parent of the Beneficiary who is a child of the Settlor, in equal share, *per stirpes*, but if none, then to the Settlor's then living issues, in equal share, *per stirpes*; provided, however, that any share set apart for an individual who is beneficiary of any trust established by the Settlor which is then in existence shall be added to and be administered as part of the principal of such trust as if an original asset thereof.



Sample Trustee Appointment – 1st Party

3.2 The Settlor nominates 1st and 2nd (Corporate) as the initial Co-Trustees of this Trust. In the event that 1st fails to qualify or ceases to act, 3rd shall act as successor Trustee for 1st. In the event that 3rd fails to qualify or ceases to act; 2nd (Corporate) shall continue to act solely as Trustee.

3.3 In the event that it becomes necessary to petition the court to appoint a successor Trustee, the petition for appointment of a successor Trustee shall be served with notice upon the Department of Social Services and any other individual or agency that shall be designated for notice by the Court.



Sample Trustee Appointment – 3rd Party

4.2 The initial Trustee of this Trust shall be 1st. In the event that 1st fails to qualify or ceases to act, 2nd shall act in the 1st place. In the event that 2nd fails to qualify or ceases to act, 3rd shall act in 2nd place.

4.3 Attorney, or, in the event Attorney fails to act, the Manager of Law Firm, shall have the authority to appoint a successor Trustee to fill any vacancy in office under this Trust; provided, however, that the parent of the Beneficiary who is not a child of the Settlor shall not be entitled to act as Trustee. Lawyer may appoint lawyer (or Law Firm) may appoint one of its members or a designee, as lawyer or Law Firm, in its sole discretion, as the case shall determine.



Sample Accounting – 1st Party

3.5 The Trustee shall provide an annual accounting to the Beneficiary's legal representative, Department of Social Services and the Court having jurisdiction of this matter. Such accounting shall be made in the form and manner required under Section 81.31 of the Mental Hygiene Law, and shall include schedules of (1) income and principal distributions during the reporting period, (2) receipt of income and principal during the reporting period, and (3) assets remaining on hand at the end of the reporting period.

3.6 The Court shall have continuing jurisdiction over the performance of the duties of the Trustee, the interpretation, administration, and operation of this Trust, the appointment of a successor Trustee and all other related matters.



Sample Accounting – 3rd Party

1.5 Each then acting Trustee shall provide an annual accounting to the Beneficiary and the Beneficiary's legal representative, if any, and to the Settlor, if then living.



Trust Distributions

- No Difference between 1st Party and 3rd Party Trusts
- Here Difference is Type of Benefit
 - SSI vs. Medicaid



SSI

Distributions Prohibited

Cash
Shelter
Food
Covered Medical

Distributions Permitted

Clothing
Insurance – renter's
Cable
Cell Phone
Internet
Travel
Entertainment
Education
Furniture



Medicaid

Distributions Prohibited

Cash

Items covered by Medicaid

Must Make All Distributions

Solely for the benefit of the beneficiary

To 3rd party vendor directly



Consequences for Failing to Comply

- May suffer a reduction of SSI
- May lose Medicaid for one or more months



Tax Issues

- Income Tax and Tax ID Number
 - Grantor Trust – Income and Cap Gain taxed to beneficiary always
 - Qualified Disability Trust – (protects from Tax \$3,100 if modified AGI is <\$142,700)
- Estate/Gift Tax
 - Crummey Notices for 3rd Party Trust
 - Right to withdraw funds
 - Do not give to disabled person
- Estate/Gift Tax – only if value of Trust exceeds \$1 million
 - Effects Trustee selection
 - Grantor cannot serve



Trustee Selection

- Who should act?
- What is the job description?
- What about Corporate Trustee?
- What about Co-Trustees?
- Consider Fiduciary Insurance.



Trustee Language for Corporate Trustees Regarding Care Provision

“My Trustee is encouraged to consider retaining the service of a Professional Care Manager to assist in providing the required care for the Beneficiary. The role of the Care Manager is to coordinate other agencies or professionals, home health aids or personal care providers, or homemakers or any other services that the Care Manager and my Trustee believe are in the best interest of the Beneficiary. The primary purpose of the Trust is to provide funds to be spent on behalf of the Beneficiary. It is my intention to benefit the Beneficiary to the fullest extent possible, rather than the Remaindermen. My Trustee shall pay all cost in connection with the Care Manager.”



Investments

- Size of Trust
- Standard of Investment Care
 - Prudent Investor
- Use of Insurance to Fund Trust



Related Concerns

- Guardianship
- Health Care Proxy
- Power of Attorney
- Will



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