



## SUPPLEMENTAL NEEDS TRUST

Parents, guardians, and other family members who are concerned about the long-term support to be provided to a child or adult person with a developmental or other disability, are sometimes faced with very hard choices in determining how to best provide for the care and welfare of such a special needs person.

Traditionally, parents have left a portion, or even all, of their assets in the care of a guardian or other person, to be used for the care and support of their disabled son or daughter. In some cases they have created a standard “**support**” trust giving the Trustee the authority to use assets in the trust for the care, support, maintenance, and health of the disabled person. However, because of the availability of Medicaid, Social Security (Supplemental Security Income or “SSI”), and other special State/Federal aid sometimes available to a disabled person, and because of the rules associated with qualifying for such aid, some parents or other benefactors have determined that the best approach is to simply **disinherit** the disabled person so as to avoid disqualifying the special needs person from receiving State/Federal benefits. This, can create tremendous emotional pain and trauma for the parent, grandparent or other benefactor, though it is sometimes the only realistic option available.

Another alternative which has been available in recent years is to create what is commonly called a “**Supplemental Needs Trust**” or “**Special Needs Trust**” or words to that effect. This type of trust contains special provisions, the purpose of which is to provide **supplemental or non-support care** for the benefit of the special needs person without disqualifying that person from receiving Medicaid/waivered services or other State/Federal aid. If the trust was created prior to August 10, 1993, and it is not a special needs trust, it is deemed by the Department of Human Services or Social Security Administration, to be a support trust where the assets contained in the trust are “available” to the beneficiary as a “resource”, and usually will *disqualify* the person from receiving further Medicaid, Supplemental Security Income (“SSI”), or other waived services. If the trust was created after August 10, 1993, the assets in the trust came from a parent or person other than the beneficiary, in other words were funded with the parent’s or other person’s funds, then the assets in the trust will not normally be treated as a resource to the beneficiary but distributions from the trust may cause a loss of Medicaid or Social Security benefits. Thus, such trusts must be crafted with specific limiting language to avoid inclusion or treatment of the trust as an available resource for the disabled person.

I sometimes refer to these “Supplemental Needs Trusts” as “Ice Cream Trusts” since they are designed to provide the “ice cream” or dessert blessings of life rather than the primary meal. Typical provisions authorize the Trustee to use the trust assets for recreation, vacation, travel, or other special entertainment-type events, as well as special appliances such as computer games, VCR’s, TV’s, audio equipment, or other sports or recreational equipment which enhance the quality of life of the beneficiary without being viewed as providing primary support such as food, clothing, and shelter. They can also be used to provide supplemental health care, companion care, etc.

Supplemental or “Ice Cream Trusts” are not usually large in size since they are not designed to provide the primary care for the beneficiary. Many individuals who establish such trusts fund them with a small life insurance policy or portion of a policy or other assets of the parents/benefactor, while leaving other assets of the parents to other children who are not disabled. Sometimes, a second-to-die policy can be obtained by the parents which only pays a death benefit upon the last to die of both parents and such policies are usually less expensive than a typical whole-life policy on one parent or the other. Thus, a Supplemental Needs Trust could be funded upon the last to die of two parents with, for example, a \$50,000 policy at relatively nominal cost, assuming both parents are insurable at standard rates.

If a family is able to obtain more extensive life insurance and does not desire to rely upon the services or benefits available by the State, then a standard support trust could be established for the benefit of the disabled person, although, due to the cost of care, such a trust would most likely be quite large depending on the life expectancy of the beneficiary. (Merrill Lynch provides a free cost estimate for long-term care of a special needs person via a special calculator (<http://specialneedscalculator.com/sncstep1.jsp>).

If the parents unintentionally create a mandatory support trust for a disabled person then upon the death of the parents and the creation of the support trust, if the beneficiary is currently receiving Medicaid/waivered services from the State or SSA, such services may be cut off upon discovery by the State and a determination that the trust assets are an available resource. The trust would then be consumed over a period of time before the beneficiary or guardian of the beneficiary would be able to re-apply for State assistance or Social Security. Thus, the support trust is merely delaying the process of receiving State assistance and, in fact, may interfere with the current receipt of assistance and cause the beneficiary to have to re-apply later. Sometimes, it may be possible to initiate judicial proceedings to have the support trust “reformed” by court order after a judicial hearing to attempt to reform the support trust into a Supplemental Needs Trust.

In 1993, in the *Omnibus Budget Reconciliation Act*, Congress established a new form of trust to enable a person with excess assets to qualify for Medicaid notwithstanding owning excess resources. Title 42, U.S.C. § 1396p(d)(4)(A) established a provision authorizing the States to allow the person with excess resources to establish by means of their guardian, parent, grandparent, or the court, a “(d)(4)(A) Trust” which is a type of Supplemental Needs Trust utilizing the assets of the beneficiary themselves. The major qualifying factor in this special type of trust is that upon the death of the beneficiary, the remaining assets in the trust must pass to the State that has provided Medicaid services to the extent that the beneficiary has

received those services. If more than one State has provided services, then it is necessary that the proceeds of the trust upon the death of the beneficiary be divided *pro rata* in accordance with the degree to which each respective State has provided services to that beneficiary. This form of trust will enable individuals who, for one reason or another, have excess resources and, if they are unable to “spend down” those resources in a satisfactory manner, to still apply for Medicaid services by having their guardian, parent, grandparent, or the court create a (d)(4)(A) Trust.

The State of Oklahoma has available, by means of the Department of Human Services, forms which were authorized in June of 1997 entitled the “Supplemental Needs Trust” which is the basic Title 42, U.S.C. § 1396p(d)(4)(A) trust.

Because of the uniqueness of the Supplemental Needs Trust, it is essential that those seeking planning for such circumstances obtain the services of qualified legal professionals to assist in evaluating the estate planning needs of the family, as well as that of the beneficiary, establishing the documentation, trusts, or other arrangements most suitable in light of the family’s circumstances and goals for the purpose of assisting the long-term care and enhancement of quality of life of our special citizens with disabilities.

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