

**DRAFTING ISSUES IN ESTATE PLANNING FOR  
BENEFICIARIES WITH SPECIAL NEEDS**

by

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## **Estate Planning for Beneficiaries with Special Needs**

### **A. Introduction**

Everything is more complicated for families with a loved one with a disability. From finding the right doctors, the right schools and obtaining necessary therapies and services: nothing is easy. There is a tremendous amount of misinformation and stress. Developing an estate plan is also more complicated than it is for “typical” families. Parents of children with disabilities wonder who will provide their child with care, love and financial support when they are gone. They ask themselves the following questions:

- Where will my child live?
- Who will make sure my child is well cared for?
- What services will be available for my child?
- How will my child or family pay for these services?

Increasingly, services for individuals with disabilities are delivered through the Medicaid program. Nearly all services previously delivered or supervised through the Office for People with Developmental Disabilities (OPWDD, formerly OMRDD) or the Office of Mental Health (OMH) are now billed through the Medicaid program. Access to some services, such as congregate living facilities (i.e. group homes) is restricted to individuals who qualify for Medicaid. The majority of other services are delivered by not for profit agencies which may not have established private payment mechanisms since the vast majority of individuals have their services paid for by the Medicaid program. In order to qualify for supportive housing and community services, there is an increasing need that the individual qualify for Medicaid.

There is a rapidly growing need for experienced and caring attorneys and financial professionals who can assemble a comprehensive estate and financial plan for individuals with disabilities. The need in this area stems from several factors, including the move away from institutional placements, advances in medicine which have increased the life expectancy of people with disabilities and the alarming rise in autism, a pervasive life-long disability.

The process of developing an estate plan for individuals with special needs requires more than document drafting skills. Families are looking for attorneys and financial planners who can assist them with navigation of the confusing and often counter-intuitive rules of government benefit eligibility and who can understand their world of doctors, diagnoses, therapies and services. Families are looking for attorneys and financial professionals who will continue to be available as advisors as the needs of their child or other loved one change and who can provide advice about the following:

- Government benefit eligibility
- Estate planning—Wills and Trusts, Advance Directives
- Guardianship

- Advocacy or referrals regarding education and other services

## **B. GOVERNMENT BENEFITS**

There are many government benefit programs which offer services and cash support to individuals with disabilities. Nearly all government assistance programs now impose financial restrictions upon eligibility for services. It is imperative that estate planning professionals who venture into this area have a basic understanding of the complex and ever changing financial eligibility rules for the Medicaid, SSI and Social Security Disability programs.

## **C. SUPPLEMENTAL NEEDS TRUSTS**

### **I. Introduction**

- A. A “Supplemental Needs Trust” (SNT) is an estate planning tool that permits funds to be segregated in order to meet the needs of a disabled beneficiary without impacting the beneficiary’s receipt of government means-tested programs. The SNT is a variation of a spendthrift trust in which discretion is given to the trustee to use trust funds for the benefits of a disabled individual. The purpose of a Supplemental Needs trust is for a disabled individual to maintain eligibility for means tested government benefits, particularly Medicaid and Supplemental Security Income (SSI), and still enjoy the benefit of the trust assets. See 42 USCA §1396p (d) (4), NY Soc. Sec. Law §366(2) (b) iii and NY EPTL §7-1.12.
- B. The major purpose of the trust is to provide goods and services which are not provided by Medicaid or other government programs. For example, the trust may pay for expenses such as housing, (purchasing a house or coop, paying rent, supplementing rent payments, etc.) vacations, recreation, restaurant meals, social services, legal services, etc. In addition, the trust may purchase goods, such as computer, stereos, televisions, exercise equipment, and medical equipment not covered by Medicaid. The only requirement is that the goods and services must be for the benefit of the disabled individual.
- C. There are three kinds of Supplemental Needs Trusts: Third Party, Self-Settled and Pooled trusts.

### **II. Third Party Supplemental Needs Trusts**

- A. Any individual other than the beneficiary can place funds into a Third Party SNT for the benefit of the disabled beneficiary without impacting the beneficiary’s receipt of government means-tested benefits. The trust can be *intervivos* or testamentary.
- B. In New York State, the Escher case established the principle that a Supplemental Needs Trust created by a third party is not considered a countable resource or

income for the purpose of determining Medicaid or SSI eligibility, even where the trustee has discretion to use the income and/or principal of the trust for the applicant's benefit. Matter of Escher, 94 Misc.2d 952, 407 N.Y.S.2d 106 (Surr. Ct., Bronx Co. 1978), aff'd, 75 A.D. 2d 531, 426 N.Y.S. 2d 1008 (1<sup>st</sup> Dep't 1980), aff'd, 52 N.Y.2d 1006, 438 N.Y.S.2d 293 (1981). It should be noted that the trust in the Escher case was a trust that had no specific "supplemental needs" language and that the trust specifically provided for the support and maintenance of the disabled beneficiary.

1. New York State codified Escher by enacting E.P.T.L. §7-1.12 to encourage both testamentary and *intervivos* Supplemental Needs Trusts. The "supplemental needs" language in E.P.T.L. §7-1.12 is a "safe harbor" for SNTs. Using its language will provide statutory protection to a trust, but it is more restrictive than the holding in Escher.
2. Escher held that a third-party discretionary trust would not be considered an available resource for government benefits programs providing services to the trust beneficiary, even though the grantor did not provide restrictions on the trustee's discretion to invade the trust. However, E.P.T.L. §7-1.12 places limitations on the trustee's discretion by stating that distributions for food, clothing, shelter, and health care are not permitted where such distributions would diminish the beneficiary's eligibility for government benefits. This restriction stem from the "in-kind" income rules for the SSI program which permit reduction in benefits due to certain third party payments. However, note that EPTL §7-1.12 does permit the trustee of a SNT to make payments which will reduce government benefits if the trustee makes a determination that the benefit to the beneficiary is greater than the loss of government benefits caused by the distribution.
3. Although some practitioners rely on the ruling of the Escher and its extensive progeny to support their belief that a purely discretionary trust is insulated from any attempted invasion by government officials if the trust beneficiary receives government benefits, a trust which utilizes the safe harbor language of E.P.T.L. §7-1.12 and clearly expresses the grantor's intent that the trust corpus not be counted as an available asset to the trust beneficiary will provide a court with clear evidence of the grantor's intent to protect the trust in the event that a trust beneficiary institutes proceedings to invade the trust, or is compelled to do so by a governmental entity. See E.P.T.L. 7-1.6 which provides that a court may direct invasion of a discretionary trust to provide for the support of a trust beneficiary, unless there is express contrary direction in the trust instrument.
4. Some drafters are concerned that the language of 7-1.12 may provide support to a remainderman of the trust who contests a trustee's invasion of the trust to make distributions for goods or services that would otherwise be provided by government benefits. This can be avoided by inclusion of language in the trust

which makes it clear that the trustees have discretion to make distributions which supplant government benefits if the trustees, in their sole discretion, determine that this is in the best interests of the beneficiary. The grantor should be advised to prepare a “letter of intent” or other extrinsic documentation of the grantor’s intent regarding the use of trust funds. Additionally, the drafter may include language in the trust which specifically expresses the grantor’s primary intent to provide for the needs of the lifetime beneficiary. (See below.)

- C. Parents of a child with disabilities can establish a third party SNT for the child to ensure that the child is taken care of after their death. By establishing an SNT in their wills, or establishing a freestanding *intervivos* SNT created during their lifetime, the parents can provide for the child while ensuring that the child remains eligible for government benefits and without the fear that the funds must be paid back to the State to repay Medicaid benefits after the child’s death.
- D. **Medicaid Planning Tip: Transfers to a “Sole Benefit” Trust** Transfers to a disabled child or to a trust established for the “*sole benefit*” of a disabled child or a trust created for the sole benefit of any disabled person do not cause a Medicaid transfer penalty period. See 42 USCA §1396p(c)(2)(B) and NYCRR §360-4.4(c)(iii). However, there are special rules which apply to these “sole benefit” trusts for a disabled individual or child. The most crucial is that the funds remaining in the trust at the death of the disabled beneficiary must be payable to the estate of the disabled beneficiary. Additionally, the trust must either direct the trustee to expend funds from the trust in an actuarial sound manner during the lifetime of the trust beneficiary or include a provision requiring that the trustee reimburse the Medicaid program for all services provided to the beneficiary during his or her lifetime. CMS State Medicaid Manual §3257(B)(6) and 96 ADM-8 at p.7-8.
- E. **Issues for the Trustee:** In any trust, the trustees must resolve a potential conflict between the needs of the lifetime beneficiaries and the remainder beneficiaries. For a self-settled SNT, the Department of Social Services has a remainder interest and is entitled to compel accountings. New York City Department of Social Services requests the filing of annual accountings, but there is no provision in the Regulations that requires this and the failure of a trustee to do account should not affect the beneficiary’s eligibility for Medicaid. See further discussion below. For a third party SNT, it is generally advisable to draft precatory language which states that the grantor’s primary intent is for the trust assets to be used for the lifetime beneficiary, as opposed to the interests of any remainder beneficiaries:

The Grantor’s primary intent in establishing this Trust to provide for the well-being and happiness of the Lifetime Beneficiary and the Trustees are authorized, without limiting their discretion, to consider the needs of the Beneficiary as more important than the needs of the

Beneficiary's descendants or of any other individual who will inherit the proceeds of the trust upon the death of the Beneficiary.

- F. In the past, many families would disinherit the disabled loved one, with the understanding that siblings would care for their brother or sister. This is nearly always a bad idea and leaves the inheritance subject to the marital and creditor problems and poor judgment of the siblings.
- G. **Consider the Possibility of Future Disabled Beneficiaries in all Estate Plans:** At the time the estate plan is being developed, it may not be possible to know for certain whether the beneficiaries of the plan will be disabled or in receipt of government benefits. Consider drafting "trigger" provisions into **all** estate planning documents which give the trustee or executor the discretion to convert outright dispositions into a bequest in a Trust and possibly a Supplemental Needs Trust in the event that an individual is disabled at the time the inheritance is received. Sample language for a testamentary "trigger trust" for disabled beneficiaries is attached to these materials. Be aware that many corporate trustees will not agree to be trustees of an SNT and may not accept appointment as a trustee if the document contains this language. Alternatively you can have a provision to distribute to a fully discretionary trust if the beneficiary is disabled.
- H. **Flexibility:** It may not be possible to know with certainty whether the individual with disabilities will be self-sufficient or will need government benefits. Similarly, it may be difficult to project the future financial needs of the individual with disabilities as compared to the needs of the other beneficiaries of the estate plan. For this reason, it may be advisable to build flexibility into the documents to permit the trustee to dissolve the trust and/or make outright distributions of cash in the event the beneficiary becomes self-sufficient. Similarly, it may be advisable to give the trustee the power to sprinkle trust principal to other beneficiaries in the event that the disabled beneficiary has no need for the funds.
- I. **Special Issues when Drafting A Supplemental Needs Trust for a Spouse.**

**SNT for a spouse must be testamentary:** An SNT for a spouse cannot be created in an *inter vivos* trust but only under a Will. See, E.P.T.L. §7-1.12 (a)(5)(iv). As a purely discretionary SNT for the benefit of the spouse will not qualify for QTIP treatment, it may be advisable to give the executor/trustee discretion to decide whether to distribute a bequest to a spouse to an SNT or to a marital trust which will distribute all income to the spouse, and therefore qualify for QTIP treatment.

**Elective Share:** A distribution to an SNT for the spouse does not satisfy the elective share under E.P.T.L.5-1.1A. Moreover, if the spouse is beneficiary of a Testamentary Trust and is listed as a person under disability in the probate petition, the court will appoint a Guardian ad Litem for the spouse who may

recommend that the spouse take the elective share. See, Matter of Rose Mattei, 169 Misc.2d 989, 674 N.Y.S.2d 415 (Sup Ct. Nassau Co. 1996). It is likely that the court would also require service upon the Department of Social Services as an interested party as to whether the spouse should be compelled to take the elective share. Although the spouse's right to the elective share applies even in the absence of probate, it is less likely to be asserted if probate is avoided through the use of revocable trusts, beneficiary designations or other means of transferring assets outside of probate. If the disabled spouse applies for or is receiving government benefits, he or she must pursue all available assets and the failure to pursue the elective share could be considered a transfer of assets, which may cause the spouse to lose eligibility for these benefits. See, Matter of Dionisio v. Westchester Co. DSS, 244 A.D.2d 904 (Second. Dept. 1997)

Consider the following language which will prevent a trust for the benefit of a disabled spouse from collapsing pursuant to the provisions of E.P.T.L.5-1.1A(a)(4)(A) in the event that the spouse elects against the trust or estate, or is compelled to do so by a guardian ad litem or government agency:

If my husband shall make an election pursuant to New York Estate Powers and Trust Law Section 5-1.1A, the trust created herein and administered pursuant to Article THREE hereunder, shall, after the distribution of the statutory share to my spouse, continue for the benefit of my husband, and the election pursuant to EPTL Section 5-1.1A shall not result in the termination of such Trust as if my spouse had predeceased me notwithstanding the contrary provisions of EPTL Section 5-1.1A (a)(4)(A), or any successor legislation.

**J. Testamentary or Intervivos?** A Supplemental Needs Trust can be created by Will (testamentary) or as a free-standing *intervivos* trust. Obviously, there will be an additional cost incurred for the creation of a free-standing trust. However, clients should be counseled to carefully consider the following advantages of a free-standing *intervivos* trust:

1. Administration of a free-standing trust is generally simpler, less expensive and less time consuming as issuance of Letters of Trusteeship by the Surrogate's Court will not be required. Moreover, expensive and time consuming judicial accounting proceedings can be avoided as the trust document may permit informal accountings upon resignation and designation of successor trustees. Even in a relatively probate friendly jurisdiction, avoidance of mandatory court proceedings can simplify trust administration considerably.

2. Creation and funding of an *intervivos* trust can provide the trustees with experience with the administration of the trust during the lifetimes of the grantors and provide them with a better idea as to whether the chosen trustees are able to act appropriately. This can provide valuable piece of mind to the parents/grantors.
  3. For larger estates, it may be advisable to consider creation and funding of an irrevocable SNT which will contain funds which are not part of the taxable estate of the grantor. For example, parents may want to fund and create an irrevocable Supplemental Needs Trust which will be funded with life insurance. ***However, be careful. If the beneficiary of the trust is receiving government benefits, the ability to have a Crummey withdrawal right is an available asset which may result in disqualification for government benefits such as Medicaid and SSI!*** This problem can be avoided by giving withdrawal rights to a class which includes the remainder beneficiaries of the trust. See, Christofani v. Commissioner, 97 T.C. 74 (1991). Obviously, to the extent withdrawal rights are given to other beneficiaries, this will reduce the annual exclusion gifts which can otherwise be made to these individuals. Of course, with a federal gift tax exclusion of \$5,430,000 and a NY gift tax exclusion of \$3,125,000, there may be less need to include Crummey withdrawal powers in an irrevocable SNT, although the failure to include the Crummey withdrawal powers will require the filing of gift tax returns to report the gifts made to the trust.
  4. An *intervivos* trust can be the recipient of lifetime and testamentary gifts by other family members, such as grandparents and siblings. If it is likely that the trust will receive substantial distributions during the lifetimes of the grantors, the trust should generally be irrevocable and carefully drafted to avoid inclusion in the taxable estates of the grantors.
- K. **Choosing the Trustee.** The choice of an appropriate trustee for a supplemental needs trust which will last the entire lifetime of the disabled beneficiary is even more daunting than the choice of guardian for minor children. It is important to draft the trust so that the existing trustees have the ability to name a successor, in the event there is no successor already named in the document. Due to the potential conflict of interest of trustees who may also be remainder beneficiaries, it may be advisable to name trustees who are not beneficiaries to serve alone, or jointly, with the trustee who is a remainder beneficiary. Family members may not have the financial sophistication to properly handle the trust investments and responsibilities, which can be complex. A corporate trustee should be carefully considered. Consider naming trusted family members or friends who have intimate knowledge of the needs and desires of the beneficiary to be “**trust advisors**” or “**trust protectors**” who will assist the corporate trustee with making decisions about appropriate expenditures. The trust can provide for reasonable compensation to these trust advisors or protectors. The trust advisors or protectors can also be given the authority to remove a corporate trustee and name a successor trustee.

**L. The Letter of Intent:** Parents of a child with disabilities are understandably concerned that no one else could possibly understand the complex needs of their child, even when there are adult siblings who are ready and willing to take on the responsibility of serving as guardian or trustee of a special needs trust. The anxiety is more intense when immediate family members have not been intimately involved in the daily life of the family member with disabilities.

Parents can prepare a “Letter of Intent” to provide guidance to the guardians, trustees and the courts as to their hopes and desires for their child. The Letter of Intent is not legally binding, but it will provide valuable guidance to care givers and financial advisors about your wishes for the child. The Letter of Intent should be reviewed and modified on a regular basis and should to address the issues surrounding the care of the loved one. This letter should set forth detailed information regarding the individual with disabilities and the family’s wishes and concerns. At minimum, the Letter of Intent should cover:

1. Medical, educational and social history
2. Contacts
3. Social Agencies
4. Professional advisors
5. Friends and family members who are involved in the child’s care and those who should be avoided
6. Employment history or training
7. Religious training and preferences
8. Preferences and history regarding residential environment
9. Preferences and history regarding social environment
10. Behavioral issues and management
11. Final Arrangements

The Letter of Intent can also be useful evidence of the testator/grantor’s intentions regarding the use of trust funds and insulate the trustees from claims of disgruntled remainder beneficiaries.

**M. Naming a Supplemental Needs Trust as a Beneficiary of a Retirement Account:** Retirement accounts have become a major source of inherited assets. Retirement accounts pose special challenges in the drafting of estate plans with beneficiaries with disabilities.

- 1. Drafting the Trust to qualify as a Designated Beneficiary:** Most individuals who desire to provide a legacy for an individual with special needs will want to leave the inheritance to a trust, rather than outright to the beneficiary, both to preserve much needed government benefits and to provide for appropriate management of the funds. This creates a problem when the inherited assets consist of retirement funds as the account owner will want to preserve the ability to have the retirement account paid out over the life

expectancy of the beneficiary in order to reduce the income taxes which will be payable by the trust beneficiary upon each distribution from the account. In order to do this, the trust must qualify as a “designated beneficiary” under IRS regulations. If the trust does not qualify as a designated beneficiary, or if the account owner names his or her estate as the beneficiary of the retirement account, the account must generally be paid out over five years. Thus, the income taxation of the retirement account will be substantially accelerated unless the trust qualifies as a ‘designated beneficiary.’”

Although the general rule is that a designated beneficiary must be an individual, the Treasury regulations at §1.401(a)(9)-4,A-5(b) permit a trust to qualify as a designated beneficiary if the Trust passes a five-pronged test:

- a. The Trust must be valid under state law;
- b. The Trust must be irrevocable or by its terms become irrevocable upon the death of the account owner;
- c. The beneficiaries of the Trust must be identifiable from the Trust’s terms;
- d. Certain documentation must be provided to the Plan Administrator by October 31<sup>st</sup> of the year after the year of the participant’s death, and
- e. All Trust beneficiaries must be individuals.

A “conduit” trust requires that the trustee distribute the required minimum distribution of the retirement account to the beneficiary each year. The Trust beneficiary of a conduit trust will always qualify as the designated beneficiary. However, a conduit trust is rarely appropriate for a beneficiary with special needs as the required distributions from the trust must be distributed outright to the trust beneficiary and will disqualify the trust beneficiary from receipt of means-tested government benefits. Moreover, in most instances, the account participant will not want the beneficiary to receive a mandatory distribution of cash from the retirement account. Instead, the trust should be drafted to permit the trustee to accumulate the required minimum distributions from the trust.

If an accumulation Trust satisfies all five prongs of the test, then the Trust beneficiaries will be deemed the designated beneficiaries of the Trust. The life expectancy of the OLDEST trust beneficiary will be used to determine the applicable length of the distribution period. Remainder and contingent remainder beneficiaries will all be reviewed in determining who is the oldest beneficiary of the trust.

**Be Careful of Charitable Remaindermen:** Individuals who have children with special needs often make provisions for charitable organizations that have provided services to the child to be remainder beneficiaries of the supplemental needs trust. However, naming a charitable remainder beneficiary of a retirement account which is distributed to a supplemental needs trust will cause the trust to

fail the fifth prong of the designated beneficiary test, as a charitable organization is not an individual.

Attached to these materials is sample language which can be added to a testamentary or intervivos trust to require the trustee of the supplemental needs trust to establish separate trusts for retirement benefits and to eliminate charitable organizations and individuals who are more than ten years older than the trust beneficiary from being remaindermen of these trusts. This language will assure that the trust qualifies as a designated beneficiary and that an appropriate distribution period will be used for distribution of the retirement account to the trust.

### III Self-Settled Supplemental Needs Trusts

- A. A first party SNT, also called a “pay-back trust” is one in which the beneficiary’s own funds are used to fund the trust. The funds may come from the beneficiary’s savings, an inheritance, or proceeds from a lawsuit. Federal legislation authorizing first party SNTs is found in the Omnibus Budget Reconciliation Act of 1993 (“OBRA ’93). See 42 USCA §1396p(d)(4)(a), NY Soc. Sec. Law §366(2)(b) iii.
- B. Under federal law, in order for a trust to qualify as a “Pay Back” trust, it must:
  - 1. be for the benefit of a disabled individual under age 65. If the trust is established for an individual under the age of 65, the exception continues to apply after the individual reaches age 65.
  - 2. be “established” by the disabled individual’s parent, grandparent, legal guardian, or by a court. Under federal and state law, the SNT cannot be “established” by the beneficiary him/herself.
  - 3. have a provision for payback to the state of all Medicaid benefits expended after the death of the individual.
  - 4. be funded with the disabled individual’s assets. If the assets used to fund the trust are coming from a third party (i.e. not the beneficiary or beneficiary’s spouse), then there would be no need to have a “payback” provision.
- C. The New York State regulations require the following of a Trustee of a self-settled “Pay-Back” SNT (18 NYCRR 360-4.5(b)(5)(iii):
  - 1. Notify the social services district of the creation or funding of the trust
  - 2. Notify the social services district of the death of the beneficiary
  - 3. If the trust principal exceeds \$100,000, notify the social services district in advance of substantial depletions of the trust. Substantial depletion is

defined as a distribution in excess of 5% of trusts valued between \$100,000 and \$500,000; 10% for trusts valued between \$500,000 and \$1,000,000 and 15% for trusts valued at \$1,000,000 or more.

4. Notify the social services district in advance of any transactions involving transfers from the principal for less than fair market value
  5. Provide the social services district with proof of bonding if assets exceed \$1 million or if required by court order.
- D. If a court order is required to establish the trust, most courts are fairly rigid regarding the language which will be permitted in the trust document. See, *Matter of Morales*, N.Y.L.J. July 28, 1995 at 25, col 1-5 (Sup. Ct. Kings Co.) which required a guardian/trustee to file annual accountings and file a consent, designation and bond. Attached to these materials is a sample self-settled SNT which complies with recent requirements imposed by the Westchester County Department of Services and the Westchester County Surrogate's Court in a proceeding filed by the author of these materials. However, note that each Department of Social Services and court may have additional or different preferred or required language for inclusion in the trust. For example, the district may want the trust to obtain a court order or advance consent from the district before the purchase of a residence or an automobile. Most districts will insist that the trustee obtain a bond, even if the trust corpus is less than \$1 million dollars. In the experience of the author, most downstate courts will require a bond, even for trusts of modest value, if a court order is required to establish the trust.
- E. If a self-settled trust is drafted by an attorney, the attorney will usually take the responsibility to notify the legal department of the Department of Social Services of the creation and funding of the trust on behalf of both the trustee and the beneficiary. If funds are placed in a non-profit organization's pooled trust, the beneficiary, his or her case worker or an attorney should take the responsibility to notify the Medicaid case worker of the creation and funding of the trust.
- F. The Social Security Administration has guidance set forth in its Procedural Operating Manual regulations pertaining to SNTs. See POMS at SI 01120.200, SI 01120.201 and SI 01120.203. The statutory requirements for a pay back trust outlined in the SSI Program Operating Manual at POMS SI 01120.203 are fairly straightforward.
1. In addition to the basic requirements, such as that the beneficiary be under age 65 and the trust contain specific language to reimburse the State agency after the beneficiary's death, notification of SSA is required as to the creation and funding of the trust (CFR 416.708: a continuing duty to inform SSA as to changes in income, resources or other conditions.) The report is due as soon as the event occurs; the report is late if made more than 10 days after the first day of the following month. 20 CFR 416.714.

2. Payment of funeral expenses are prohibited until repayment of Medicaid is made. Thus, it is recommended that a prepaid burial contract be purchased.
  3. SSA allows the trustee to have the specific power to hire lawyers, accountants and other professionals to assure that the trust runs smoothly.
- G. How the disabled individual obtained the assets is irrelevant. The source of funds could be a settlement from a personal injury case, an inheritance, or an already-existing asset of the disabled individual. The Trust may also be funded with income. See addendum to 96 ADM-8, also see Joseph R.N. v. DeBuono (NDNY 92.C.V. 0948) February 25, 1998 settled by stipulation and so ordered.
- H. Like third-party trusts, the purpose of a self-settled SNT is to provide goods and services which are not provided by Medicaid or other government programs, such as: housing, (purchasing a house or coop, paying rent, supplementing rent payments, etc.), vacations, recreation, restaurant meals, social services, legal services, etc. In addition, the trust may purchase goods, such as: computers, stereos, televisions, exercise equipment, and medical equipment not covered by Medicaid. The only requirement is that the goods must be for the benefit of the disabled individual.
- I. The statutory language does not specifically require the distribution to be for the sole or exclusive benefit of the disabled individual. However, the Social Security Administration has determined that the distributions must be used for the sole benefit of the disabled individual.
- J. **Establishment by a Parent:** The recent 8<sup>th</sup> Circuit decision in Draper V. Colvin (Decision #13-2757 issued March 3 2015) (annexed to these materials) held that parents who created a self-settled SNT with proceeds of the settlement of a personal injury action for their daughter with traumatic brain injury did not properly establish the trust. The trust listed as its funding source only the proceeds of the settlement and was funded with those proceeds on the same day that the trust was signed. The Social Security Administration issued a notice to the trust beneficiary that she had been overpaid SSI benefits because the trust assets were budgeted as available to her. An ALJ and District Court upheld the agency action, and the parents obtained a court order *nunc pro tunc* while the matter was on appeal which retroactively named the court as the settlor of the trust. The 8<sup>th</sup> Circuit upheld the denial of SSI benefits. Although it is not clear that Social Security offices in the New York region would have denied benefits under similar circumstances as the Draper case, it would appear to be good practice to have the Schedule A of the Trust reference a minimum funding of the trust with assets of the parents, before funding the trust with the assets of the disabled beneficiary.
- K. **Choosing a Trustee:** The statute places no limit on who may be the trustee. A corporate trustee may be advisable if the Trust is large enough, although there is

no amount at which a corporate trustee is required. An individual co-trustee is often advisable to address the personal needs of the beneficiary. It is not unusual for the court to impose a requirement for a corporate trustee, or co-trustee when a self-settled trust is established by a court-appointed guardian or by a court.

1. Most individuals would prefer to have a family member or close friend as trustee of their self-settled trust. However, some judges have been reluctant to appoint family members, particularly parents, as trustees. For example, a judge may be concerned that the parents lack sufficient experience or financial sophistication. Moreover, the parents' remainder interest in the trust could conflict with the "pay-back" provision in favor of the state. Another conflict of interest could arise where expenditures made "on behalf of" the disabled individual directly or indirectly benefit the parent – such as home improvements, computers, recreational items, etc.
2. Most judges seek to safeguard against such potential conflicts by:
  - a. Bonding - This may create a problem as the trustee preferred by the trust beneficiary or preferred by family members might not qualify for bond, and posting of bond may be seen as needlessly depleting trust assets.
  - b. Court supervision;
  - c. Compulsory annual accounting – less intrusive, than requiring the trust assets to be held jointly with the court, but can be an onerous burden on the trustees, and often will require legal and accounting fees.
  - d. Appointment of a professional co-trustee – co-trustee's commission to be paid from trust assets. Corporate trustee will usually only agree to serve if the court order and trust document guarantee compensation according to its usual schedule of rates.
  - e. Prior court approval of distribution of principal – most restrictive, and appears to frustrate the legislative intent of OBRA '93 to encourage use of trust funds for disabled individuals.

**L. "Payback" to the State**

1. OBRA '93 provides that the payback to the state must be made after the death of the individual. There is no question that the state is entitled to repayment before any distributions to remainder beneficiaries are made. However, the trustee may pay the cost of administering the trust, including attorney's fees and trustee commissions before paying back the state.
2. Following the payment to the state, any additional assets remaining in the trust, if any, are distributed to the beneficiary's estate.
3. In November 2008, the Court of Appeals issued a decision in Matter of Abraham XX, 11 NY3d 429, which clarified that the state is entitled to

payback of all Medicaid provided during the lifetime of the beneficiary and is not limited to Medicaid provided after the establishment of the Trust.

4. Social Security POMS provisions promulgated in 2010 permit the trust to be terminated during the lifetime of the beneficiary, but the trustee must first pay back all Medicaid provided to the trust beneficiary. The trust should contain language which specifies that if the trust is terminated during the lifetime of the beneficiary, the trustee must first pay back the full value of all Medicaid benefits paid to the trust beneficiary. See POMS SI 01120.199.

## SAMPLE “TRIGGER TRUST” LANGUAGE FOR WILLS

G. Notwithstanding any provision contained in this Will to the contrary, if at any time my executor, or any trustee hereunder, in such fiduciary’s sole and absolute discretion, determines that any beneficiary under this Will, or under any of the Trusts created hereunder, has a severe and chronic or persistent disability and is or may in the future be in need of any means-tested governmental assistance, such beneficiary’s interest shall not be paid directly to such individual but shall instead be held and managed, as provided herein:

1. My fiduciary shall hold such share in a separate trust for the benefit of such beneficiary. The initial trustee of such trust shall be the executor of this Will, or if a trust for such beneficiary is otherwise created herein, the trustee of such trust, although the executor or trustee, as the case may be, shall have the authority to designate a successor trustee, co-trustee, or a successor of successors in such office to act one at a time or together with co-fiduciaries. The provisions of this Will regarding resignation and appointment of successor fiduciaries shall also apply to resignations and appointments of fiduciaries under this paragraph G.

2. My trustees shall collect the income therefrom and, after deducting all charges and expenses properly attributable thereto, shall, at any time and from time to time, apply for the benefit of the beneficiary, so much (even to the extent of the whole thereof) of the net income and principal of the trust as my Trustees, in their sole discretion shall deem advisable subject however, to the limitations set forth below. My trustees shall add to the principal of the trust the balance of net income not so paid or applied.

3. It is my intention to create for such beneficiary a Supplemental Needs Trust which conforms to the provisions of Section 7-1.12 of the New York Estates, Powers and Trusts law, or any successor statute thereto. Consistent with that intent, it is my desire that before expending any amounts from the net income and/or principal of the trust, my trustees consider the availability of all benefits from government or private assistance programs for which such person may be eligible and that, where appropriate and to the extent possible, my trustees endeavor to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of such individual.

4. None of the income or principal of the 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 such person may otherwise be eligible or which such person may be receiving.

5. I direct that the provisions of Section 7-1.6 of the New York Estates, Powers and Trust Law , as the same may be amended or any successor statute thereto, shall not be available to require any invasion of principal by the Trustees or any court.

6. The beneficiary shall not have the power to assign, encumber, direct, distribute or authorize distributions from the trust.

7. Notwithstanding the above provisions, my trustees may make distribution to meet the beneficiary's need for food, clothing, shelter or health care even if such distributions may result in an impairment or diminution of such person's receipt or eligibility for government benefits or assistance, but only if my trustees determine that (i) such beneficiary's needs will be better met if such distribution is made, and (ii) it is in the beneficiary's best interests to suffer the consequent effect, if any, on such person's eligibility for or receipt of government benefits or assistance; provided, however, that if the mere existence of my trustees' authority to make distributions pursuant to this subparagraph shall result in the beneficiary's loss of government benefits or assistance, regardless of whether such authority is actually exercised, this paragraph shall be null and void and my trustees' authority to make such distributions shall cease and shall be limited as provided above, without exception.

8. Upon the death of the beneficiary, any balance remaining in the trust being held for such individual shall be distributed to the surviving issue of the beneficiary *per stirpes*. If no issue of the beneficiary is surviving, the balance of the trust shall be distributed to my issue who survive such deceased beneficiary, *per stirpes*.

9. Notwithstanding the above provisions of this Paragraph G, if my spouse is determined by my executor to be a person who suffers from a severe and chronic or persistent disability as defined by Section 7-1.12 of the New York Estates Powers and Trust Law, and if any bequest, whether outright or in trust, to my spouse is a bequest qualifying, or elected to qualify for the estate tax marital deduction, then, the provisions of this Paragraph G shall apply; provided however, that the trustee shall collect the income therefrom, and after deducting all charges and expenses properly attributable thereto, pay or apply for the benefit of my spouse, all of the net income therefrom, at least quarterly. My executors shall, in their sole and absolute discretion, determine whether to elect to qualify any portion of this trust for the Federal estate tax marital deduction. If my executors shall elect to have any part or all of any trust hereunder qualify for such marital deduction, notwithstanding any other provisions of this Will or this Paragraph G, none of the powers or discretions granted or made to my executors and trustees by this Will shall be exercisable or enforceable in such manner as to disqualify such portion or all of the trust for which such election has been made from the marital deduction allowable in determining the federal estate tax on my estate.

10. If my spouse should make an election pursuant to Section 5-1.1A of the New York Estates Powers and Trust Law, or be required to make such an election in order to obtain or continue receipt of government benefits, the trust created and administered pursuant to this Article shall, after the distribution of the statutory share to my spouse, continue for the benefit of my spouse and the election pursuant to Section 5-1.1A shall not result in the termination of such trust as if my spouse had predeceased me.

## **SAMPLE LANGUAGE REGARDING TRUST NAMED AS BENEFICIARY OF RETIREMENT ACCOUNT**

(A) Notwithstanding any provision contained in this Trust agreement to the contrary, if at any time any portion of a trust or separate trust hereunder (the “original trust”) is a beneficiary of, or consists of or receives payments from any “individual retirement account”, “qualified retirement plan” or similar tax-deferred retirement arrangement or annuity (hereinafter, “Retirement Plan”), then the trustees shall divide the trust into two separate trusts of equal or unequal value such that the assets of one trust will consist entirely of the non-Retirement Plan assets, and the second trust will consist solely and entirely of the Retirement Plan assets, and if there is more than one Retirement Plan, there shall be an additional separate trust created for each such Retirement Plan, and the trustees shall hold and administer the same in all respects as separate trust funds, upon the same terms and provisions as the original trust; provided, however, notwithstanding any provisions of the original trust, as of the date of Grantor’s death, any person who would be a remainder or contingent beneficiary of such trust or portion and who would be counted as a beneficiary for purposes of Treasury Regulation Section 401(a)(9)-5, A-7, shall not be a contingent or remainder beneficiary of such trust or portion if his or her age is ten (10)<sup>1</sup> or more years older than the age of the individual who is the primary or income beneficiary of such trust or portion at the time of Grantor’s death, and any such older contingent or remainder beneficiary shall be treated, solely for purposes of the separate trust or portion which is the beneficiary of a Retirement Plan, as if he or she predeceased Grantor. In addition, if a charitable organization which is a remainder or contingent beneficiary would be considered a beneficiary of such trust or portion for purposes of Treasury Regulation Section 401(a)(9)-5, A-7, then such charitable organization shall be treated, solely for purposes of the separate trust or portion which is the beneficiary of a Retirement Plan, as if such organization was not in existence at Grantor’s death.

(B) The trustees must withdraw from such Retirement Plan, in each calendar year, and deposit into the Trust, the minimum distribution amount which is required to be withdrawn from such share under Section 401(a)(9) of the Internal Revenue Code, or other comparable Internal Revenue Code provisions or other applicable law. The trustees are authorized to elect the manner of payment from the Retirement Plan and to extend the pay-out period for as long as possible. However, this paragraph shall not be deemed to limit the absolute discretion of the trustees to withdraw from such Retirement Plan in any year more than the minimum distribution amount.

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<sup>1</sup> Depending upon individual circumstances, the ten year age restriction may be changed at the discretion of the client or the drafting attorney.

**SAMPLE COURT ESTABLISHED SELF-SETTLED  
SUPPLEMENTAL NEEDS TRUST**

**DAVID HARTLEY  
SUPPLEMENTAL NEEDS TRUST**

This TRUST AGREEMENT made this 27<sup>th</sup> day of August, 2014, by and between MARY HARTLEY and DAVID HARTLEY, as parents and Court-appointed Guardians of DAVID HARTLEY, as Settlers, and MARY HARTLEY and DAVID HARTLEY, as Trustees, is established pursuant to an Order of the Surrogate's Court, State of New York, Westchester County. The Settlers and Trustees, MARY HARTLEY and DAVID HARTLEY, currently reside at 555 Smith Street Harrison, New York 10604. The beneficiary currently resides at 555 Smith Street Harrison, New York 10604.

In consideration of the mutual covenants contained herein, the Trustees hereby agree to hold IN TRUST those assets scheduled herein or later acquired as permitted by this instrument for the uses and purposes set forth herein and subject to the terms and conditions set forth.

**TRUST PURPOSE**

1.0 Trust Name: The Trust shall be known as the DAVID HARTLEY SUPPLEMENTAL NEEDS TRUST.

1.1 Purpose of Trust: The Beneficiary of the Trust is DAVID HARTLEY (DOB: 2/4/85). The purpose of the Trust is that the Trust's 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 the Beneficiary may otherwise be eligible or which the Beneficiary may be receiving. The Trust is intended to conform with the New York State EPTL §7-1.12, N.Y. Soc. Serv. Law §366, 42 U.S.C. §1396p(d)(4)(A) and 42 U.S.C. §1382b(e). DAVID HARTLEY is disabled as defined in the Social Security Act at 42 U.S.C §1382c (a)(3)(A).

1.2 Declaration of Irrevocability: The Trust shall be irrevocable and may not at any time be altered, amended, assigned or revoked except to maintain the Beneficiary's eligibility for and receipt of government benefits and only upon an order of the Court, on thirty days prior written notice served upon the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 and/or any other appropriate Medicaid entity within New York State or any other state(s).

1.3 EPTL §7-1.6: EPTL 7-1.6 or any successor statute, or any similar statute of any other jurisdiction, shall not be applied by any court having jurisdiction of an inter-vivos or testamentary trust to compel, against the Trustee's discretion, the payment or application of the

trust principal to or for the benefit of DAVID HARTLEY, except for the repayment of Medicaid pursuant to the provisions of Article 3.1 of this Agreement.

### **USE OF TRUST INCOME AND PRINCIPAL**

2.0 Administration of Trust During Lifetime of Beneficiary: The property shall be held in trust for the Beneficiary, and the Trustees 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 Trustees deem advisable in their sole and absolute discretion subject to the limitations set forth below. The Trustees shall add the balance of net income not paid or applied to the principal of the Trust. Without limiting the foregoing, none of the income or principal of this Trust shall be paid directly to the Beneficiary.

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

2.2 Use of Income or Principal: None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish any governmental benefits or assistance for which the beneficiary may be eligible or which the beneficiary may be receiving.

2.3 Power to Execute or Assign Distributions: The Beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this Trust.

2.4 Food, Clothing and Shelter: Notwithstanding the above provisions, the Trustees may make distributions to meet the Beneficiary's need for food, clothing, shelter, health care, or other personal needs, even if these distributions will impair or diminish the Beneficiary's receipt or eligibility for government benefits or assistance only if the Trustees determine that the distributions will better meet the Beneficiary's needs, and it is in the Beneficiary's best interest, notwithstanding the consequent effect on the Beneficiary's eligibility for, or receipt of benefits.

2.5 Nullification of §2.4: However, if the mere existence of this authority to make distributions will result in a reduction or loss of the Beneficiary's entitlement program benefits, regardless of whether the Trustees actually exercise this discretion, the preceding paragraph (2.4) shall be null and void and the Trustees' authority to make these distributions shall terminate and the Trustees' authority to make distributions shall be limited to purchasing supplemental goods and services in a manner that will not adversely affect the Beneficiary's government benefits.

2.6 Additions to Income and Principal: With the Trustees' consent, any person may, at any time, from time to time, by Court order, assignment, gift, transfer, Deed or Will, provide income or add to the principal of the Trust created herein, and any property so added shall be held, administered and distributed under the terms of this Trust. The Trustees shall execute documents

necessary to accept additional contributions to the trust and shall designate the additions on an amended Schedule A of this trust.

### **DISTRIBUTION UPON DEATH OF BENEFICIARY**

3.0 Disposition of Trust on Death of Beneficiary: Unless sooner termination by application to this court and upon thirty days notice to the Westchester County Department of Social Services and/or any other appropriate Medicaid entity, this Trust shall terminate upon the death of DAVID HARTLEY and the Trustees shall distribute any principal and accumulated interest that then remain in the Trust pursuant to paragraphs 3.1 and 3.2 of this Trust, after the payment of taxes due from the Trust to the State(s) or Federal government because of the death of the Beneficiary; and reasonable fees for administration of the trust estate such as an accounting of the Trust to the Court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust. Notwithstanding the foregoing, the Trust shall survive the death of the Beneficiary for the purpose of collecting outstanding funds payable to the Trust.

3.1 Reimbursement to the State: the Trustee shall pay to the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, and/or any other appropriate Medicaid entity within New York State, and/or any other state(s) all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of Medical Assistance paid on behalf of the Beneficiary during her lifetime, as consistent with Federal and State law. If such Beneficiary received Medicaid in more than one state, then the amount distributed to each state shall be based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on behalf of the Beneficiary.

Upon early termination of the Trust, the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, and/or any other appropriate Medicaid entity within New York State, or any other state(s) shall receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of Medical Assistance paid on behalf of the Beneficiary during her lifetime, as consistent with Federal and State law. If such Beneficiary received Medicaid in more than one state, then the amount distributed to each state shall be based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on behalf of the Beneficiary. After Medicaid reimbursement, the Trustee shall distribute any income and principal that then remain in the Trust to the Beneficiary. No entity other than the Trust Beneficiary may benefit from the early termination of the Trust.

3.2 Distribution after Reimbursement to State: All remaining principal and accumulated income shall be paid to the legal representative of the Estate of the Beneficiary, in his or her fiduciary capacity.

### **TRUSTEES**

4.0 Trustee: MARY HARTLEY and DAVID HARTLEY are appointed Trustees of this Trust. ELIZABETH SUMMERS is appointed Successor Trustee.

4.1 Consent of Trustee: The Trustees shall each file with the Clerk of the Court, Westchester County, a "Consent to Act" as Trustee, Oath and Designation, duly acknowledged.

4.2 Bond: The Trustees shall be required to execute and file a bond in an amount of the fair market value of all liquid assets held in trust and comply with all the applicable laws, as determined by the Surrogate's Court, Westchester County. The Trustee(s) shall obtain said bond from a bonding company that is authorized and licensed to do business within the State of New York. Proof of such bonding shall be filed with the Clerk of the County of Westchester, Westchester County Department of Social Services and/or any other appropriate Medicaid entity upon the signing or funding of the trust, whichever is later, and upon each annual renewal, with proof of payment of the bond premium demonstrating that such bond is in full force and effect.

4.3 Resignation: A Trustee may only resign by approval of the Court, pursuant to SCPA §715, on written notice, to (i) the Clerk of the Surrogate's Court, Westchester County; (ii) the Guardian of the Beneficiary, if any; (iii) the Successor Trustee; (iv) the Beneficiary and (v) service upon Westchester County Department of Social Services, c/o the Westchester County Attorney's Office, Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, 10601 and/or any other appropriate Medicaid entity. The Trustee's resignation is subject to the approval of the Surrogate's Court, Westchester County, and the Trustee shall continue to serve until discharged by the court in accordance with the following provisions of this document.

4.4 Discharge and Final Accounting of Trustee: No Trustee shall be discharged and released from office and bond, except upon filing a Final Accounting in the form and in the manner required by Article 22 of the Surrogate's Court Procedure Act including the service of a copy of said Final Accounting on the Westchester County Department of Social Services, c/o the Westchester County Attorney's Office, Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, 10601; and/or any other agency providing medical assistance benefits to the beneficiary; any Successor Trustee; and obtaining judicial approval of the account.

4.5 Annual Accounting: The Trustee shall file with the Clerk of the Surrogate's Court of Westchester County an annual account in the form and manner required by SCPA Section 1719, including the service of a copy on the Westchester County Department of Social Services, c/o the Westchester County Attorney's Office, Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, 10601; and/or any other agency providing medical assistance benefits to the Beneficiary.

4.6 Continuing Jurisdiction: The Surrogate's Court, Westchester County, shall have continuing jurisdiction over the interpretation, administration and operation of this Trust, and all other related matters.

4.7 Powers of Trustees: In addition to any powers which may be conferred upon the Trustees under the law of the State of New York in effect during the life of this Trust, the Trustees shall have all those discretionary powers mentioned in EPTL §11.1.1 et seq., or any

successor statute or statutes governing the discretion of a Trustee, so as to confer upon the Trustees the broadest possible powers available for the management of the Trust assets. In the event that the Trustees wish to exercise powers beyond the express and implied powers of EPTL Article 11, the Trustees therefore shall seek and must obtain judicial approval, on thirty days prior written notice served upon the Westchester County Department of Social Services and/or any other appropriate Medicaid entity.

4.8 Appointment of a Successor Trustee: Appointment of a Successor Trustee not named in this Trust shall be upon application to the Surrogate's Court, Westchester County upon such notice the Court may direct. If Westchester County provides benefits to the Beneficiary, then the thirty days prior written notice shall be served upon the Westchester County Department of Social Services, c/o the Westchester County Attorney's Office, Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, 10601, and/or any other appropriate Medicaid entity.

4.9 Compensation of Trustee: The Trustees shall be entitled to such compensation as may be allowable under SCPA §2309, whether the Trustee is an individual or corporation for the management and protection of the Trust estate. In addition, the Trustees shall be entitled to be reimbursed for reasonable expenses incurred by the Trustees in the administration of this Trust. The necessity and reasonableness of such additional compensation and disbursements shall be established to the satisfaction of the Surrogate's Court, Westchester County, in the annual accountings.

### **MISCELLANEOUS PROVISIONS**

5.0 Miscellaneous Provisions: The Trustees shall not purchase an annuity or life insurance policy with Trust principal or income unless the applicable instrument names the Trust as the annuitant of the annuity and names the Trust as the beneficiary of any such annuity and life insurance policy. Any annuity purchased shall provide that the Trust shall be the sole beneficiary thereof and the annuity must commute at the termination of the Trust and be paid to the Trustee, in his/her fiduciary capacity of this Trust. The payee of any annuity or life insurance policy purchased by the Trust must be the Trustee of the Trust in his/her fiduciary capacity.

An order of the Court is required prior to the purchase or sale of a home, or any real estate. And thirty days prior written notice of the purchase and/or sale of any real estate, the payment of a mortgage or supplemental rent shall be served upon the Westchester County Department of Social Services and/or any other appropriate Medicaid entity. Any housing purchased shall be an asset of the Trust and the instrument conveying any such house, or real estate shall identify the Trust as the owner of housing, and the respective percentages of ownership of the Trust and any other party contributing to the purchase of the housing, if any; and to pay a percentage of operating costs based upon the number of residents in the housing or percentage of ownership of the housing. Upon termination of the Trust, the Trust is to be reimbursed for the Trust's share of ownership of the real property and the Trust is to be reimbursed with the proceeds of the sale.

If applicable to meet the needs of the Beneficiary and upon an order of the Court, the Trustee is authorized to purchase or lease a vehicle suitable for the transportation of the Beneficiary, on thirty (30) days prior written notice served upon Westchester County Department of Social Services and/or any other appropriate Social Services District. If a vehicle is purchased in the name of the

Trustee, the purchase shall be conditioned on reimbursing the Trust in the event said vehicle is sold or traded in for another vehicle. In addition upon the death of the Beneficiary and/or termination of the Trust the vehicle is to be sold and the Trust is to be reimbursed with the proceeds of the sale.

5.1 Governing Law: This Trust Agreement shall be interpreted and the administration of the Trust shall be governed by the laws of the State of New York; provided, however, that Federal law shall govern any matter alluded to herein which shall relate to or involve government entitlements such as SSI, Medicaid or other federal benefit programs.

5.2 Notifications to Social Services District: The Trustees shall provide the required notification to the Social Services District in accordance with the requirements of Section 360-4.5 of Title 18 of the Official Regulations of the State Department of Social Services, and any other applicable statutes or regulations, as they may be amended. These regulations currently require notification of the creation or funding of the Trust, the death of the Beneficiary, and in the case of trusts exceeding \$100,000, in advance of transactions that substantially deplete the trust principal (as defined in that section) and in advance of transactions for less than fair market value. A copy of such notice shall also be sent to the Westchester County Department of Social Services, c/o the Westchester County Attorney's Office, Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, 10601; and/or any other agency providing medical assistance benefits to the Beneficiary.

5.3 Savings Clause: If it is determined that any provision hereof shall in any way violate any applicable law, such determination shall not impair the validity of the remaining provisions of the Trust.

5.4 Spendthrift Clause: To the extent permitted by law, no interest of any beneficiary in the income or principal of this trust shall be subject to pledge, assignment, sale or transfer in any manner, nor shall any beneficiary have the power in any manner to anticipate, charge or encumber his or her interest, nor shall the interest of any beneficiary be liable while in possession of the Trustee for debts, contracts, liabilities, engagements, or torts of the Beneficiary; provided, however, that this exemption shall not apply in any respect to payments made on behalf of the Beneficiary for medical assistance provided by the New York State Department of Health, Westchester County Department of Social Services, and/or any entity providing medical assistance in the State of New York or any other state(s).

5.5 Usage: In construing this Trust, feminine or neuter pronouns shall be substituted for those of the masculine form and vice versa, and the plural for the singular and vice versa in any case in which the context may require.

5.6 Headings: Any heading or captions in the Trust are for reference only, and shall not expand, limit, change, or affect the meaning of any provision of the Trust.

5.7 Binding Effect: This Trust shall be binding upon the estate, executors, administrators and assigns of the Grantor and any individual Trustee, and upon any Successor Trustee.

5.8 Trust Assets: The initial assets to be funded into the Trust consist of the net recovery amount available for Petitioners to fund the Trust is expected to be approximately THREE HUNDRED SEVENTY THOUSAND SEVENTY-FIVE DOLLARS representing the beneficiary's Net Settlement Amount from a personal injury lawsuit.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the day and year noted above.

\_\_\_\_\_  
MARY HARTLEY - Settlor

\_\_\_\_\_  
DAVID HARTLEY – Settlor

\_\_\_\_\_  
MARY HARTLEY – Trustee

\_\_\_\_\_  
DAVID HARTLEY – Trustee



## **SCHEDULE A**

1. Net proceeds from settlement of personal injury lawsuit in the amount of approximately \$370,000.