

**DRAFTING SUPPLEMENTAL AND SPECIAL NEEDS TRUSTS**

**By**

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**TRUSTS**

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**I. INTRODUCTION**

Elder Law and Special Needs attorneys often draft SNTs for clients and advise clients who serve as the Trustee of a Supplemental (third party ) or Special Needs (first party) Trusts. The attorney drafts person must be knowledgeable about the drafting requirements concerning these Trusts. The attorney and Trustee must be knowledgeable about government entitlements, accounting requirements, tax issues and the needs of the beneficiary. Those trustees who have been appointed by a court must also know how to comply with court oversight.

The following is a discussion of drafting issues as well of the interrelationship between the use of the trust and eligibility for government entitlements.

**II. DRAFTING SNTS**

**A. THIRD PARTY TRUSTS:**

**1. Matter of Escher**

When a person not legally responsible for the support of a disabled recipient of government entitlements wishes to provide for his or her needs, a trust fund is an

appropriate vehicle to assure a lifetime of comforts not provided through government entitlements.

The seminal case in which third party trust funds were declared to be good public policy to provide comforts, services and luxuries for disabled individuals to supplement rather than supplant their government benefits is Matter of Escher, 94 Misc. 2d 952, 407 N.Y.S.2d 106 (Surr. 1978), aff'd mem. 75 A.D.2d 531 (1st Dept. 1980), aff'd. 52 N.Y. 1006, 438 N.Y.S.2d 293 ( 1981). Escher involved an accounting proceeding to judicially settle the account of a testamentary trustee. The New York State Department of Mental Hygiene claimed reimbursement for the care it had provided to the testator's daughter, who had resided in a State psychiatric facility for approximately 30 years. Mr. Escher had executed his Will in the 1930's and had directed that the income must be paid to his daughter at least quarterly. With respect to principal, the trustees had discretion to pay out such sums as necessary to provide for her maintenance and support incurred by reason of illness or accident or other emergency. 407 N.Y.S. 2d at 108. Any assets remaining in the trust upon the death of Marie Escher would be distributed to her distributees.

The court looked to the express terms of the trust to see whether Mr. Escher's intent in creating the trust was to provide for his daughter's support and maintenance in the State psychiatric facility. Based upon the testator's knowledge of his daughter's disability, his intent to leave assets to her distributees, and the economic reality that paying the corpus to the State in 1978 would not leave any other assets from which the income beneficiary could benefit during her remaining years, the Bronx Surrogate held that the trust intent directed that the State's claim be rejected. The Court of Appeals upheld this decision.

The principles enunciated in Escher are those that underlie all third party Supplemental Needs Trust Funds. The desire to supplement the loved one's standard of living so that the vulnerable are not wholly dependent upon the benevolence of the law results in a third party's empowering the aged, blind and disabled. The government entitlement becomes a floor rather than a ceiling upon which they can attain a standard of living above the poverty level.

## **2. EPTL § 7-1.12: The Codification of Escher**

In July, 1993, the New York State legislature enacted a statute to encourage third parties to establish Supplemental Needs Trust Funds for their disabled loved ones. EPTL § 7-1.12. This statute codified the principles announced in Matter of Escher, 52 N.Y. 2d 1006( 1981).

Supplemental needs that the draftsman may provide include transportation, vocational training, insurance coverage, computers, specially equipped vans, personal care givers, vacations, a home, and any luxury or need including health care not provided through government entitlements or private insurance.

This New York State legislation encourages third parties to establish trust funds to pay for items of need not covered by governmental programs. Drafting suggestions for conforming trusts are included. EPTL § 7-1.12(a)(5), (e). Among the drafting guidelines is language that clearly states the settlor's intent in establishing the trust fund. Further suggested language includes the following: "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." Id. at (e)(3). Clarification that "the beneficiary does not have the

power to assign, encumber, direct, distribute or authorize distributions from this trust" is also suggested. *Id.* at (e)(4). Despite giving this suggested language, the legislature explicitly provides that the statutory language is not required. *Id.* at (e)(1). **Sample Testamentary Third Party Supplemental Needs Trust included in Appendix.**

**3. The following should be noted when drafting statutory third party trusts:**

**a. EPTL 7-1.6 does not apply**

New York law provides that a court having jurisdiction of a trust may direct that the principal be invaded for the benefit of an income beneficiary whose support or education is not sufficiently provided for. EPTL § 7-1.6. For trusts created prior to 1966, the income beneficiary must have an indefeasible interest in the principal or the remaindermen must all consent. EPTL § 7-1.6(a). For trusts created after 1966, the court may order such an invasion even without the remaindermen's consent if the court determines that the trust's original purpose cannot be accomplished without such invasion. This invasion may be made even if the income beneficiary is not entitled to any part of the principal, unless the trust fund explicitly limits the court's discretion. EPTL. § 7-1.6(b).

EPTL § 7-1.6 does not apply to SNTs established pursuant to EPTL § 7-1.12 to the extent that the beneficiary's government entitlements would be reduced or eliminated by application of 7-1.6. EPTL § 7-1.12(b)(2). Hence, no court will be empowered to order the invasion of the trust corpus to supplant government entitlements.

**b. There is no payback upon death**

These trust funds, established by third parties, are not subject to any claim or lien upon the death of the Medicaid recipient. N.Y. Soc. Serv. Law § 104(3).

**c. Who May Establish the Third Party Trust?**

Any person may establish a testamentary trust for the benefit of a disabled person. For inter-vivos trusts, the creator can be a person or entity other than the beneficiary's spouse, EPTL 7-1.12(a)(5)(iv), or a person with a legal obligation to support the beneficiary, *id.* at § 7-1.12(c)(1)(i). Family members or interested friends may provide for the disabled and then designate remaindermen to whom remaining trust assets will pass upon the death of the disabled beneficiary.

The above limitations on who may be the creator of a third party trust would appear to preclude parents from funding inter-vivos trusts for disabled infants. This limitation, however, specifically referencing spouses, would rather prevent a legally responsible relative from discarding extra funds into a nonpayback trust to potentially eliminate financial responsibility to the disabled individual. Thus, although parents are legally obligated to support children, it would appear that the prohibition against parents' funding an inter-vivos trust while the child is a minor would not apply to children who do not receive any government benefits, as the parents are legally obligated to support the disabled children for medical needs only while the children are under 18. In addition, children covered by a waived Medicaid program in which the parents' assets and income are not considered when reviewing the child's eligibility for benefits also would be able to have parents establish these trusts, as such parents are absolved from any financial responsibility for the Medicaid services provided.

**d. This Trust May Provide for a Termination Prior to the Death**

**of the Beneficiary:** In some instances, it is not clear that the disabled beneficiary will remain disabled or will receive government entitlements based upon need. The trust may provide for the termination prior to death if either of these situations occurs. **Suggested Language:**

**The Trust may be partially terminated prior to the death of the beneficiary under the following circumstances:**

1) **BENEFICIARY** is substantially gainfully employed for a continuous period of two years or otherwise loses eligibility for government entitlements and,

2) **HIS/HER** attending physician certifies in writing that the disability no longer limits him/her from being substantially gainfully employed and,

3) The Trustee, in his sole discretion, determines that the facts warrant early termination.

The above factors "1" and "2" shall be considered conditions precedent and the Trustee shall not partially terminate the Trust unless both conditions shall have been fulfilled. Nevertheless, the Trustee is not obligated to partially terminate the Trust if the conditions have been met; the Trustee is merely granted sole discretion in such case. The decision of the Trustee as to whether or not to terminate the Trust shall be final and binding upon **BENEFICIARY**.

If the Trustee chooses to exercise his discretion, said discretion shall be further limited as follows:

At the time the Trustee so elects, 10% of the then existing principal shall be distributed absolutely to the beneficiary. For each consecutive year of substantial gainful employment, an additional 10% of the original amount of principal may, at the Trustee's discretion, be distributed absolutely to the beneficiary. If there is a break in consecutive employment, this distribution test will be reinvoked and the requirements of subparagraphs 1 and 2 must be met anew. If there is no break in consecutive employment, in the last distribution year, the Trust shall terminate with the distribution of all accumulated income and principal to the beneficiary, as the purposes of the Trust will have been fulfilled.

#### **e. Coordination with Self-Settled First Party Payback Trusts**

If a parent establishes a third party trust with no payback to the State upon death, but the disabled child has a payback SNT, language may be included in the parent's trust directing that the trustee of the third party trust use trust assets to the extent that the payback trust is not available to provide the same goods and services.

#### **4. Spousal Testamentary Trusts**

OBRA 1993's rules for self-settled trusts apply only to inter-vivos trusts. 42 U.S.C. § 1396p(d)(2)(A). Hence spouses can establish testamentary trusts that provide for the surviving spouse's supplemental needs. The trust may allow the discretionary invasion of principal. The trust may direct that all of the income shall be provided to the surviving spouse in order to have the trust qualify for the marital exclusion and/or QTIP



status. The trust may even contain a trigger provision, preventing the payment of income or principal should the surviving spouse beneficiary become a nursing home resident. See EPTL 7-3.1(c), applicable only to inter vivos trusts. Upon the death of the beneficiary, there would be no estate recovery even if the beneficiary is a Medicaid recipient upon death.

**PRACTICE TIP:** As a trust does not satisfy the right of election, EPTL 5-1.1A, the surviving spouse may be forced to elect an outright distribution of assets if s/he is a Medicaid recipient upon the death of the "well" spouse. If a surviving spouse makes an election pursuant to EPTL 5-1.1-A, then that spouse shall be treated as having predeceased the testator for remaining probate assets. *Id.* at § 5-1.1-A(a)(4)(A). If the intent of the testator is to provide a trust with all of the estate assets so as to give the surviving spouse economic security with the testamentary trust, then the Will should provide explicitly that if the spouse exercises the right of election, then the trust shall be formed, and the remainder of the estate shall not be treated as if the surviving spouse had predeceased the testator. **SUGGESTED LANGUAGE TO AVOID HAVING A**

**TESTAMENTARY TRUST DISSOLVED AND THE REMAINDER DISTRIBUTED AS IF THE SURVIVING SPOUSE HAD PREDECEASED THE**

**TESTATOR: If my spouse should make an election pursuant to EPTL 5-1.1A, the trust created herein and administered pursuant to Paragraph FIFTH of this Last Will and Testament shall, after the distribution of the statutory share to my spouse, continue for the benefit of my spouse, and the election pursuant to EPTL 5-1.1A shall not result in the termination of such Trust as if my spouse has predeceased me, EPTL 5-1.1A(a)(4)(A) to the contrary notwithstanding.**

**PRACTICE TIP: OBRA 1993 rules DO apply for inter-vivos trusts.** Caution should be taken in using a revocable living trust to distribute assets if the intent is to provide a discretionary SNT for the surviving spouse, as it will not be established in the Last Will and Testament of the decedent.

**5. Inter-vivos versus Testamentary Third Party Trusts:**

Clients often call asking to establish an SNT for their disabled child. Should the Elder Law attorney recommend that a free standing trust be established, or should the client's customary estate plan (either a Last Will and Testament or a Revocable Living Trust) merely provide that distribution to the disabled child be paid over to the Trustee named in that instrument to hold as an ongoing SNT?

The easiest manner in which to create a third party SNT is either in a Last Will and Testament or as the remainder provision of a revocable trust which becomes irrevocable upon the death of the grantor. Free standing third party SNTs, however, are also useful:

1. When many family members wish to provide for the disabled relative, they may all execute wills which have the distribution for the disabled niece, granddaughter or daughter pour over into a free standing SNT funded with \$100 upon its establishment.
2. When a parent wishes to transfer assets to the adult children, one of whom is disabled, the trustee of an inter vivos SNT with no payback may hold the share of the disabled son or daughter. The parent would not be the Trustee in this case, as the transfer is made for the purpose of divesting the parent of the asset for Medicaid purposes. PLEASE NOTE: This is NOT intended to be a "sole benefit trust" which would NOT subject the parent to a period of ineligibility for the parent's own Medicaid eligibility.

3. The parent of an adult disabled child wishes to know that s/he has set aside a certain amount of money for the disabled child, no matter what else might happen to the parent's assets. TIP: Now that the gift tax exclusion is \$5,250,000, the need to include Crummey Powers in a trust to use annual gift tax exclusions is reduced for many clients. Families with nontaxable estates may wish to find SNTS that do not have Crummey powers, even if they must file gift tax returns.
4. Second to die life insurance is often used to fund a Supplemental Needs Trust for the benefit of the disabled child. Once again, the new estate/gift tax laws may encourage SNTS funded with annual gifts, even if there is no annual gift tax exclusion, because the families will not make taxable gifts during their lifetimes.
5. An SNT is named as the beneficiary of an IRA or pension plan.

## **B. "ESTABLISHING" SELF-SETTLED PAYBACK TRUSTS**

### **1. Incapacitated Adult Beneficiary and Article 81:**

The federal statute provides that the payback trust must be established by a parent, grandparent, legal guardian or through court order. 42 U.S.C. § 1396p(d)(4)(A). When an adult incapacitated individual's assets will fund a trust, Article 81 is often the forum utilized in which an incapacitated person's legal guardian will obtain authority to establish a trust. The Petition for Guardianship should include the application for a Supplemental Needs Trust. In most circumstances this application will be considered together with the application for the appointment of a Guardian.

Cognizant of the court's responsibility to monitor the use made of an incapacitated person's assets, the Article 81 courts will often require that the

Trustee/Guardian provide annual accountings to Court Examiners like any other Guardian. When the Guardian and Trustee are different individuals, the courts will often require that the Trustee provide an accounting to the Guardian, who will include this accounting in his/her report to the Court Examiner. Guardians serving as Trustees will execute and file a Guardian/Trustee bond, and those serving only as Trustees will file a Trustee bond unless they are financial institutions. 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 account annually and file a consent, designation and bond. **SAMPLE MORALES TRUST ANNEXED.**

**2. Adult Beneficiary with Capacity:  
a. Parent-Established Trust:**

In cases in which a guardian is not needed and a parent is available, the parent can "establish" the trust fund. **The trust would read that it is being created by "A" as parent of "B", a person with a disability.** The employer ID number would read, however, that the individual with a disability's own assets are being placed into the trust fund for IRS purposes. The payback provision remains unchanged, as is the requirement that the State regulations be followed.

As there is no Article 81 Guardian, however, this trust should not require annual accountings to the court and the final accounting to be judicially settled as in the Morales trust. Accountings may be made available to the local social services district when recertification for Medicaid is made. In addition, the other regulatory requirements of notification to the social services district also must be followed, as " a social services district or the department may commence a proceeding under section 63 of the Executive Law against the trustee of a ... ("payback") trust if the district considers any acts,

omissions, or failures of the trustee to be inconsistent with the terms of the trust, contrary to applicable laws or regulations ... or contrary to the fiduciary obligations of the trustee." 18 NYCRR § 360-4.5(b)(5)(iv).

**b. Special Proceeding to Establish a Payback Trust:**

For competent adults without parents alive, a Special Proceeding may be utilized to seek a Court Order to establish the Trust. These may be brought by Petition with Order to Show Cause or Notice of Motion in Supreme Court, or by Citation in Surrogate's Court, usually with approval of the SNT by the government agency attached.

**3. Termination Prior to Death**

The federal and state statutes authorizing payback special needs trusts are silent as to what happens if the trust terminates prior to the death of the beneficiary, either due to his/her no longer being disabled or because he/she no longer wants a trust or because he/she has relocated to another state. In particular, as the statute required the payback to the State only upon the death of the beneficiary, did that mean that the trust could dissolve during the beneficiary's lifetime and disburse remaining funds to him/her without paying back the State?

In October, 2010, the Social Security Administration issued POMS SI 01120.199 that addresses these issues. The following are provisions that must be followed in order for the trust not to be considered an available resource:

1. The Trust may not be terminated prior to the death of the beneficiary unless the State is paid back for an amount up to the total Medicaid provided the beneficiary during his/her lifetime; AND
2. The beneficiary cannot direct that the trust be terminated; AND

3. If the trust is terminated, the beneficiary, rather than others such as relatives or friends of the beneficiary, must receive remaining trust assets. SI 01120.199(F)(1).

4. The same payment of expenses permitted upon the death of the beneficiary may be paid by the trustee upon the trust's termination prior to the death of the beneficiary, i.e., taxes due from the trust and administration expenses. SI 01120.199(F)(3).

**ADVICE TO TRUSTEES:**

Trusts that do not comply with this POMS provision OR with POMS SI 01120.200-203 will be given 90 days to cure the provision before being counted as an available resource so long as the trust had been considered excepted from consideration as a resource before application of the POMS. The 90 days begin upon notification to the Representative Payee or the SSI recipient. SI 01120.199(A).

**4. Termination of Trust Upon Death of Beneficiary**

The 2009 and 2010 POMS clarified certain outstanding issues concerning the disposition of trust assets upon the death of the trust beneficiary. Taxes due from the trust to the state or federal government because of the death of the beneficiary and reasonable fees for administration of the trust estate such as accountings to the court, and completing and filing of documents may be paid prior to reimbursement to the State for Medicaid. SI 01120.203B(e)(a). Emphasis supplied. Reimbursement to the State must occur prior to payment of taxes due from the estate of the beneficiary. SI 01120.203B(3)(b). However, taxes arising from inclusion of the trust assets in the estate MAY be paid prior to reimbursement to the State. Id.

Funerals, debts owed to third parties, inheritance taxes due for remainder beneficiaries and payment to remainder beneficiaries must be paid after reimbursement to the State. *Id.* The Trust agreement may not limit reimbursement to a specific state or for Medicaid expenditures made only after the trust account was funded or established. SI 01120.203B(2)(g).

### **C. SOLE BENEFIT TRUSTS**

When a Third Party's assets fund a trust for a person with a disability under the age of 65 or a trust for a child with a disability of any age so that the Third Party will receive Medicaid benefits immediately, that trust must be used for the SOLE BENEFIT of the person with a disability, as two generations, in essence, will be receiving benefits without any transfer penalty. 42 U.S.C. § 1396p(c)(2)(B)(iv); N.Y. Soc. Serv. Law § 366(5)(d)(3)(ii)(D); 18 NYCRR § 360-4.4(c)(2)(iii)(c)(iv).

Pursuant to CMS State Medicaid Manual §3257(B)(6) at 3-3-109.1(Nov. 1994) [CMSTransmittal 64], [www.cms.hhs.gov](http://www.cms.hhs.gov), and New York Administrative Directive 96 ADM-8 at 7-8, a “sole benefit trust” must either provide a payout over the life expectancy of the disabled individual or a payback to the State upon the death of the beneficiary for Medicaid expended during his/her lifetime. It must be used SOLELY for the benefit of the disabled beneficiary during lifetime.

State laws requiring that a sole benefit trust, established with the assets of one person for the sole benefit of a person with a disability under the age of 65 in which both generations receive Medicaid, provide a payback to the State or be used on an actuarially sound basis for the beneficiary during his/her lifetime, consistent with CMS State Medicaid Manual §3257(B)(6) at 3-3-109.1(Nov. 1994) [HCFA Transmittal 64]

are more restrictive than the SSI POMS, which merely require that no one else during the lifetime of the beneficiary benefits from the trust. SI 01120.201F(2).

**ADVICE TO TRUSTEE:** If the trust was established by a Medicaid applicant for the benefit of another person with a disability under the age of 65, this is a sole benefit trust. The trust assets must be used only for the benefit of the beneficiary, and the use of the trust assets should be limited to items that directly are for the beneficiary and only the beneficiary.

### **III. ISSUES IN THE DRAFTING AND ADMINISTRATION OF SNTS**

#### **A. The Guardian/Trustee**

In Matter of Morales, N.Y.L.J. July 28, 1995 at 25, col 1-5 (Sup. Ct. Kings Co.), the Kings County Supreme Court addressed the dual role of a court-appointed Guardian and Trustee. The court required a Guardian/Trustee to account annually pursuant to Mental Hygiene Law. The court required the Trustee to file a consent, designation and bond. The court even published a sample SNT that it would authorize, and which the State and City had approved. Indeed, but for the Medicaid and SSI statutes' requiring an SNT, the Morales trustee is a trustee in name only, serving in essence as an Article 81 guardian.

What happens when the Order and Judgment is silent as to the responsibilities of a trustee? In that case, the language of the trust will determine the scope of the trustee's authority, even if the trustee is acting in a manner not authorized for guardians – i.e., paying attorneys without a court order. See Matter of Hawwa A., 9 A.D. 3D 362 (App. Div. 2 Dept. 2004).



1. If the Trustee is also the Guardian for Property Management, then the Order and Judgment Appointing Guardian likely requires the trustee to act like his/her alter ego Guardian and include the finances in the initial and annual accounts.

2. If the Trustee is not the Guardian, however, and is, for example, a financial institution, the Order and Judgment should be examined to see whether the court intended that the trust assets be included in the initial and annual reports. If the Order and Judgment is silent, and if the Trust document sets forth the requirements for accountings, then that document will control.

3. The same will apply to Trustees' Commissions. Court-ordered SNTs often require that commissions be taken only after annual accountings have been examined, upon court order. Others authorize corporate trustees to take their commissions as they customarily do.

#### **B. Use of Third Party Trusts May Affect Benefits:**

Effective in July, 1993, EPTL 7-1.12 provided a statutory framework for third party trusts to give security to families planning for the economic security of their loved ones with disabilities. The assets and income in these trusts will not be considered available to supplant government entitlements. However, although the state has no remainder interest in these trusts, the use of these trust assets MAY affect eligibility for government entitlements based on need. Drafting language may be included to reduce discretion of trustee to provide income in cash rather than in kind and may also preclude the use of trust assets for food and shelter if beneficial in a particular case.

#### **C. SNTS and MEDICAID: INCOME AND RESOURCES**

##### **1. Excess Income**

A Medicaid recipient residing in a nursing facility will pay all income but \$50/month to the facility to offset the cost of care. A Medicaid recipient residing in the community may retain

income of \$800/month. Although generally cash income above the Medicaid allowable income must be "spent down" on medical needs, Special Needs Trusts may be funded monthly with the excess income and used to pay the nonmedical bills of the Medicaid recipient who receives Community Medicaid.

Income that cannot be irrevocably assigned into a Special Needs Trust, even if one is under the age of 65, will be counted as available income when the Medicaid applicant/recipient is budgeted for chronic care Medicaid. Wong v. Doar, 571 F. 3d 247 (2<sup>nd</sup> Cir. 2009). Income that can be irrevocably assigned into the SNT is NOT income of the Medicaid recipient and should not be considered available when computing a budget for chronic care Medicaid.

## **2. Distribution of Trust Income May Affect Medicaid**

Although EPTL 7-1.12 shelters the assets of a conforming third party supplemental needs trust from being counted for purposes of government entitlements, the income provided by the trustee to the beneficiary or for the benefit of the beneficiary may result in a diminution of these benefits. Income distributed in cash to the Medicaid recipient will reduce the benefit dollar for dollar. In-kind disbursements made by the trustee for the benefit of the beneficiary are not countable for Medicaid purposes. 18 NYCRR 360-4.3(e).

### **D. SNTS and SSI ELIGIBILITY RULES: INCOME AND RESOURCES**

SSI, 42 U.S.C. § 1381, is a federal program that provides a cash stipend to the aged, blind and disabled whose available resources and income do not exceed the guidelines of the program. An individual eligible for SSI automatically qualifies for Medicaid in New York State. The resource level for SSI is \$2000 for a single individual and \$3000 for a couple or family.

For 2013, the federal benefit level for SSI for an individual residing in his own household is \$710/month. New York State provides an optional state supplement of

\$87/month, bring the amount to \$797/month. When computing the monthly SSI payment, the Social Security Administration considers other income received by the SSI recipient. Unearned income, such as that provided by a trust, given in cash to the SSI recipient, will be deducted from the SSI stipend. 20 C.F.R. § 416.1123. However, bills paid directly to the supplier of services other than food and shelter will not result in a reduction of the SSI benefit. 20 C.F.R. § 416.1103(g).

When a third party pays for an SSI recipient's food and shelter, that results in a reduction in the SSI payment of either the dollar amount paid for the food and shelter OR, in the presumed value rule, 1/3 of the SSI amount, whichever is LESS.

**ADVICE TO TRUSTEE:**

1. Payments made by a trustee to third parties or entities providing the beneficiary anything other than food and shelter for the beneficiary will NOT affect SSI.

2. As with Medicaid, income from the Trust paid directly TO the beneficiary, or to his/her guardian or legal representative is countable unearned income that reduces the SSI benefit dollar for dollar. See SI 01120.203B(1)(c).

3. Use of the Trust to pay for food and shelter will result in in-kind income to the beneficiary, reducing the SSI payment by up to 1/3 of the federal benefit amount. An SNT Trustee MAY provide food and shelter for the beneficiary, but must decide whether the consequent reduction in the SSI is beneficial to the beneficiary, in the trustee's discretion, depending upon the terms of the SNT.

4. Paying for restaurants is considered food rather than recreation by the Social Security Administration. POMS SI 01120.201I(1)(d). [www.ssa.gov](http://www.ssa.gov).

**E. SNTS AND MEDICAID REGULATIONS:**

1. New York State regulations require that the Trustee of a “Special Needs Payback “ trust

a. notify the social services district of the creation or funding of the trust, id. at (iii)(a);

b. notify the social services district of the death of the beneficiary of the trust, id. at (iii)(b);

c. notify the social services district in advance of any transactions tending to substantially deplete the principal of the trust whose corpus exceeds \$100,000, i.e., 5% for trusts between \$100,000 and \$500,000; 10% for trusts between \$500,000 and \$1,000,000; and 15% for trusts over \$1,000,000, id. at (iii)(c);

d. notify the social services district in advance of any transactions involving transfers from the trust principal for less than fair market value; id. at (iii)(d);

e. provide the social services district with proof of bonding if the assets exceed \$1,000,000, unless waived by a court of competent jurisdiction, and provide proof of funding if the trust assets are less than \$1,000,000 if required by a court of competent jurisdiction. id. at (iii)(e);

2. In-kind income provided by a third party not legally obligated to support an individual receiving Medicaid does not result in countable income for Medicaid purposes. 18 NYCRR 360-4.3(e).

3. A social services district of the department may commence a proceeding under section 63 of the Executive Law against the trustee of the trust if the government considers any acts, omissions or failures of the trustee to be inconsistent with

the terms of the trust, contrary to applicable laws or regulations or contrary to the fiduciary obligations of the trustee. Id. at (iv).

4. Payments made from a trust created under a will TO the Medicaid recipient/beneficiary results in countable income in the month received. In-kind benefits received from the trust are not counted as available income or resources for purposes of determining Medicaid eligibility. 18 NYCRR 360-4.5(c).

### **ISSUES FOR THE TRUSTEE BASED ON THESE REGULATIONS**

1. Based on the regulation, notification to the local Department of Social Services does not have to be given prior to the funding of the trust.

2. Trusts established by parents or grandparents and not subject to court oversight having assets of less than \$1,000,000 do not have to have a bond in place.

3. Prior notification to the Department of Social Services in advance of transactions tending to deplete trust principal does not mean approval by the Department of Social Services.

4. What are transactions for less than fair market value? Gifts? Purchasing exempt assets that will be held outside of the trust?

5. Money paid from the trust for the benefit of the beneficiary does not result in countable income for Medicaid purposes for the beneficiary.

6. Money paid from the trust TO the beneficiary, whether it is a first party trust or a third party trust, results in countable income for Medicaid purposes.

### **F. SSI POMS**

1. An SNT may be funded with accumulated SSI. A Representative Payee may transfer SSI benefits to an SNT or fund an existing SNT. GN 00602.075(A), so long as

these are not retroactive SSI benefits for a child under 18, as these must be held in dedicated accounts. GN 00603.025(B).

2. When the Representative Payee is funding an SNT, the Representative Payee must determine that the trust is in the best interest of the beneficiary, and that it will be used exclusively for him/her and that s/he is the sole beneficiary during lifetime. GN 00602.075c(1).

3. Income irrevocably assigned to the trust from an annuity or support payments made when the beneficiary was less than 65 and which continue after the age of 65 remain protected by the trust. SI 01120.200G(1))(b).

4. Disbursements that are not cash and which do not result in in-kind support and maintenance are not income. Examples given by the POMS include payments to third parties for education, therapy, medical services not covered by Medicaid, recreation, entertainment and phone bills. Payments made to third parties for items such as household goods that are not considered a resource do not result in income for the beneficiary in the month that they are paid for. SI 01120.200E(1)(c). See also SI 01120.201I(c).

5. Additions to trust principal made directly to the trust are not income to the beneficiary if such payments have been irrevocably assigned to the SNT. SI 01120.200G(1)(b).

6 Income that, by its own provisions, may not be irrevocably assigned to the SNT include monthly payments from Social Security, public assistance (TANF or AFDC), Veterans benefits, federal employee retirement payments, and ERISA private pensions. SI 01120.200G(1)(c).

7. Payments for credit card bills are not income if the credit card was used to pay for items other than food or shelter or countable assets. SI 01120.201I(1)(d).

8. Credit card bills paid by the trust for restaurants will result in in-kind support and maintenance, subject to a 1/3 reduction. Id.

9. If the trust assets are used to pay for gift cards and gift certificates, this will be considered unearned income in the month of receipt, even if the gift certificate is to a store that does not sell food or shelter items if the individual could sell/exchange the card for cash. SI 01120.201I(1)(e).

10. Household goods, i.e., items of personal property found in or near the home used on a regular basis, are not countable resources. 20 C.F.R. 416.1216(a)(1). These items include, but are not limited to furniture, appliances, electronic equipment such as personal computers and televisions, dishes, cooking equipment, etc. 20 C.F.R. 416.1216(a)(2).

11. Personal effects include items of personal property ordinarily worn or carried by the SSI recipient, such as personal jewelry, educational or recreational items such as books or musical instruments. 20 C.F.R. 416.1216(b)(2).

12. Items acquired or held for their value, such as collectibles, gems and jewelry that is not worn or owned due to family significance are countable resources. Id.

13. Credit cards issued to the beneficiary enable the trust to be used for the benefit of the beneficiary without the trustee's going shopping with the beneficiary for all items.

**G. MUST THE TRUST BE USED FOR THE BENEFIT OF THE BENEFICIARY OR FOR THE SOLE BENEFIT OF THE BENEFICIARY**

The permissible use of trust assets vis a vis the Medicaid agency often turns on whether the trust must be used for the benefit of the beneficiary, a broad view, or

a more restrictive use of assets, for the sole benefit of the beneficiary. The federal statute, 42 U.S.C. 1396p(d)(4)(A), and New York State statute, N.Y. Soc. Serv. L. 366(2)(b)(2)(iii)(A) both direct that a self-settled “payback” trust must be established for the benefit of the beneficiary NOT for the sole benefit of the beneficiary. In contrast, the federal statute, 42 U.S.C. 1396p(d)(4)(C)(iii) and New York State statute, N.Y. Soc. Serv. L. 366(2)(b)(2)(iii)(B), direct that the individual accounts in the pooled trusts must be maintained for the SOLE benefit of the beneficiary.

While New York State’s ADM, 96 ADM-8, is consistent with the statute, the CMS interpretation of the federal statute, CMS TRANSMITTAL 64, State Medicaid Manual Section 3259.7, [www.cms.hhs.gov](http://www.cms.hhs.gov) and the SSI POMS, [www.ssa.gov](http://www.ssa.gov) as well as litigation positions taken by local Departments of Social Services objecting to some expenditures because they are not for the SOLE benefit of the beneficiary are not consistent with the statute or our New York State ADM.

## **H. WHAT DISCRETION MAY THE TRUSTEE EXERCISE?**

### **1. Court supervised trusts: Is court approval of expenditures dispositive as to actions of the Trustee?**

Trusts often are established in Guardianship proceedings pursuant to Article 81 of the Mental Hygiene Law for an infant who will be incapacitated past age 18 or an incapacitated adult. In Matter of Morales, N.Y.L.J. July 28, 1995 at 25, col 1-5 (Sup. Ct. Kings Co.), the court addressed the dual role of a court-appointed Guardian and Trustee. The court required a Guardian/Trustee to account annually pursuant to Mental Hygiene Law. The court required the Trustee to file a consent, designation and bond. The court even published a sample SNT that it would authorize, and which the State and City had approved. Indeed, but for the Medicaid and



SSI statutes' requiring an SNT, the Morales trustee is a trustee in name only, serving in essence as an Article 81 guardian.

Following the reasoning of Morales and cognizant of the court's responsibility to monitor the use made of an incapacitated person's assets, the Article 81 courts will often require that the Trustee/Guardian provide annual accountings to Court Examiners like any Guardian. When the Guardian and Trustee are different individuals, the courts will often require that the Trustee provide an accounting to the Guardian, who will include this accounting in his/her report to the Court Examiner. Guardians serving as Trustees will execute and file a Guardian/Trustee bond, and those serving only as Trustees will file a Trustee bond unless they are financial institutions.

**ADVICE TO TRUSTEE:** Approval by the court for expenditures does not mean that the Department will not challenge the expenditures in examining annual accountings. However, reliance on a court order, particularly if notice had been given to the Department, should be cited as a defense to challenges to the Trustee's actions.

## **2. May the Trustee supplant and not supplement government entitlements?**

May the trustee of an SNT utilize trust assets to provide goods and services that might otherwise be paid for by the government or which may reduce government benefits if the Trustee determines that such use of trust assets is beneficial to the beneficiary? In New York, a state statute originally enacted for third party trusts to protect their assets from being considered available resources by the government for government benefits, EPTL 7-1.12(b), provides construction standards to be applied to a conforming Supplemental Needs Trust Fund. There is a presumption that the creator of the trust intends that neither principal nor income will be used to pay for any expense that would otherwise be paid by a government entitlement, "notwithstanding any authority the trustee may have to make distributions for food, clothing, shelter or health care." Id. at (b)(1).

This limitation, however, should be read in conjunction with EPTL 7-1.6(b), which allows a court to order the use of trust principal for an income beneficiary who is likely to become a public ward. This statute had been utilized prior to the enactment of EPTL 7-1.12 by government officials to force the use of trust assets to supplant rather than supplement government entitlements. EPTL 7-1.12 explicitly exempts SNTs compliant with the statute from EPTL 7-1.6(b).

The limitation against supplanting government entitlements, then, should be enforced against the government but should not preclude the trustee from exercising discretion to provide needs that supplant government benefits but are beneficial to the beneficiary because they may be provided expeditiously or are of superior quality.

A trustee in an individual case may, thus, choose to expend moneys in a manner that could reduce SSI benefits, such as for food and shelter, in his/her own discretion, if the trustee determines that the benefit of purchasing food or shelter outweighs the cost to the beneficiary of a reduced SSI monthly stipend. The Trustee likewise may wish to hire caregivers who are not Medicaid workers due to their reliability thus supplanting a Medicaid benefit if a Trustee determines this use of trust assets to be beneficial to the beneficiary. The SNT should explicitly give this discretion to the trustee.

### **I. Effect of SNT's Home Ownership on SSI and Medicaid Benefits**

A home owned by an SNT is not a countable resource for SSI or Medicaid purposes, even if the beneficiary does not reside in the home, as it is a trust asset. SI 01120.200F(1). If a third party, such as the SNT, pays for shelter costs of the beneficiary, that will result in in-kind support and maintenance that will reduce the monthly SSI benefit, up to 1/3 of the monthly SSI payment. Shelter costs include mortgage costs, including property insurance required by the mortgage holder, real property taxes,

heating fuel, gas, electricity, water, sewer and garbage removal. SI 00835.465D(1). See 20 C.F.R. 416.1133(c).

If the trust owns the home but does not pay for housing costs, there is no reduction in SSI monthly benefits. SI 01120.200F(2). However, the purchase of the home by the trust will be considered in-kind support and maintenance (1/3 reduction of SSI) in the month of purchase. SI 01120.200F(3). The use of trust assets to purchase a home will not reduce Medicaid benefits.

If the SNT purchases a home subject to a mortgage, and the monthly mortgage payments are made by the SNT, these monthly payments result in in-kind support and maintenance, providing Shelter expenses that reduce the SSI monthly benefit by 1/3 each month in which they are made. SI 01120.200F(3)(b). If the SNT pays for shelter or household operating expenses or household costs, this results in in-kind support and maintenance. SI 01120.200F(3)(c).

If the SNT pays for accommodations to the home to make it handicapped accessible or for renovations that increase the value of the home, this does not result in in-kind support and maintenance that results in a 1/3 reduction of the SSI monthly benefit. Id. Extra mortgage payments to reduce the principal owed and extra insurance coverage not required by the mortgagee are not household costs resulting in in-kind support and maintenance when paid by the SNT. SI 00835.465D(2),(3).

#### **J. Allocation of Household Costs**

New York has no statute that mandates that the family members contribute pro rata to the cost of a home. When parents and siblings are living in a home owned by an SNT for a disabled child, the trustee should seek a court order that directs what expenses, if any, are to be borne by the parents. Successful advocates often show that the services

rendered to the child for which the other household members are not being paid far outweigh rent that could be paid to the trust. If the trust beneficiary is an adult for whom no guardian has been appointed, objections made by the Department as to the lack of rent may also be countered by showing that the beneficiary could not live alone in the house without the family's support, even if Medicaid is paying for aides.

If the Department argues that the trust must be used for the sole benefit of the beneficiary, and that having family members live rent free is not a proper use of the trust, the Trustee should counter with the argument that the trust must merely be used for the benefit of the beneficiary and that having companionship around is in the best interest of the beneficiary and hence is a proper use of the trust.

**ISSUE:** Must the Trustee appointed pursuant to Article 81 follow RPAPL in the purchase or sale of real property, or is the Trustee to use his/her discretion and not seek court approval?

Trustees appointed pursuant to Article 81 should bring RPAPL 17 applications unless the court order or SNT specifically exempts that provision. When there is no court order establishing the trust and/or no ongoing court oversight, no RPAPL would have to be brought as long as the Trustee exercises due diligence in the purchase or sale of real property owned by the Trust.

#### **K. Renovations to a Family Home Not Owned by the Trust: Who Pays?**

May the trust be used to make accommodations to the family home to meet the needs of the disabled beneficiary if the trust does not own the home? If the Department of Social Services objects to the expenditures, demonstrate what percentage of the construction costs will inure to the benefit of the owners (usually not dollar for dollar)

and what the benefit to the beneficiary will be to have these renovations. If the modifications will increase the taxes, an application to a court may be made to have the trust pay the increase in the taxes. If the trust beneficiary does not pay rent to the owners, demonstrate how the renovations have benefited the beneficiary and what the cost of comparable housing would be. If a child would otherwise be in a facility, demonstrate the cost savings to the Department by having the home renovated.

#### **L. CAR**

If the trust purchases a car, having the trust own the car will greatly increase the cost of insurance. Having the trust own the car may also make the entire trust assets vulnerable if there were an accident and insurance coverage did not meet all of the damages for which the car owned by the trust is liable.

**ADVICE TO TRUSTEE:** Obtain agreement from the Department that the car will not be owned by the trust, but if the car is sold, that the proceeds will be paid to the trust and that if the beneficiary dies, then the car will be considered a trust asset for payback purposes.

**ADVICE TO TRUSTEE:** With respect to insurance and gasoline: obtain court authorization for the use of trust assets and any allocation between an infant and family members if the car is used for anyone but the child/beneficiary. Demonstrate the benefit to the child to have the car (comfort, expanded horizons, easier transportation than public transportation) and the time the parent or family member expends in meeting the child's obligations. If the family owns another car, demonstrate that the family would not have purchased this car absent the special needs of the child.

#### **M. VACATIONS**

The cost of a vacation generally will not reach the threshold for which prior notification to the Department is required. Nonetheless, the Department may object to “family vacations” , insisting that the trust should be used for the sole benefit of the beneficiary.

**ADVICE TO TRUSTEE:** Demonstrate that the proposed vacation is to a place suitable for the beneficiary. If the family members will be acting as de facto caregivers, note their importance to the beneficiary. Also note the emotional benefit to the beneficiary to have family members with him/her, and the likelihood that there would be no vacation if the trust could not pay for the nuclear family.

**ADVICE TO TRUSTEE:** In Matter of Marmol, 640 N.Y.S.2d 969 (Sup. Ct. N.Y. Co. 1996), the court analyzed requests for expenditures of an infant’s funds in a Guardianship proceeding that did not contain an SNT. The court required that parental income and assets be revealed in order to determine whether an infant’s funds should purchase a home. The court decided that necessities remained the responsibility of the parents, but that extraordinary needs due to the child’s disability would be provided through the Guardianship funds.

#### **N. CAREGIVERS NOT PAID BY MEDICAID**

If Medicaid has approved only a certain number of hours of care, the trustee should be able to use the assets to supplement the number of hours of care. In cases where RNs are needed, it is often very difficult to obtain the RNs for the approved number of hours. Approval should be obtained for trusts with court oversight that will allow non Medicaid workers to be paid by the trust.

**ADVICE TO TRUSTEE:** Paying oneself as a caregiver without court approval or approval by the Department is a breach of fiduciary duty.

Obtain advice from an accountant as to withholding and/or whether or not the worker will be an independent contractor. Do not pay the worker in cash.

**O. MAY GIFTS BE MADE FROM SNTS?**

May the Trustee provide gifts for loved ones from the SNT? What about Christmas gifts for caregivers or other personnel? The regulations require prior Notice to DSS in advance of transactions for less than fair market value. This regulation appears to contemplate the use of trust assets to make gifts, or to purchase items not owned by the trust, such as a car.

**P. MAY THE TRUST ASSETS BE USED TO SATISFY AN OBLIGATION OF SUPPORT OF THE BENEFICIARY TO MINOR CHILDREN? MUST IT? WHAT ABOUT DISCRETIONARY SPENDING FOR A MINOR CHILD OF THE BENEFICIARY? WHAT ABOUT PRE-EXISTING DEBTS?**

In Matter of Hope Graham, Index No.: 14581-96 (Sup. Ct. Suff. Co.), the court denied an application by the Guardian/Trustee of an institutionalized parent who expressed a desire to have SNT funds utilized for her teenage daughter, a minor. The Trustee sought to apply a “Rule of Thirds”, in which SNT proceeds would be spent 1/3 for her daughter, 1/3 for the beneficiary during a period of private pay in the nursing home, and 1/3 to be retained in the extant SNT. The Trustee asked the court to apply the doctrine of substitute judgment under N.Y. Ment. Hyg. L. 81.21 to the Incapacitated Person/SNT beneficiary. Petitioner argued that 81.21(a) and (b) set forth the statutory framework for the court’s analysis as to whether or not the gift should be made. The Guardian/Trustee argued that the minor child was a dependent of the institutionalized parent/IP/SNT beneficiary. The IP constantly expressed a desire to provide for her daughter. The SNT was in the form of Morales.

The County opposed the application, arguing that the Petition violated the terms of the trust, which directed that it be used for the sole benefit of the beneficiary. The County asserted

that an SNT Trustee may never make gifts, notwithstanding the State's own regulations, as gifts would be violative of the terms of the SNT and EPTL 7-1.12. The County argued that even though the beneficiary would be a private paying individual during the ineligibility period, that the County must protect the County's remainder interest. The County further asserted that the Trustee/Guardian should not listen to an Incapacitated Person who is prohibited from directing the use of trust assets pursuant to EPTL 7-1.12. The County asked the court not only to deny the application for the gift but also to deny legal fees for the application.

The court agreed with the County and held that the terms of the trust itself forbade the use of funds in this manner. The judge denied attorney's fees sought for the application, and the trustee was not able to use the trust assets for the daughter of the incapacitated beneficiary as was the wish of the IP.

May the trustee of an SNT use trust assets of the disabled parent to pay for college costs of the son or daughter? What about support to an ex-spouse pursuant to a decree issued before the trust was funded and before a lawsuit was settled? What about child support that is in arrears and that was ordered prior to a lawsuit recovery that now funds the trust? As a self-settled trust, are prior debts of the beneficiary subject to the same rules as any self-settled trust? May/must the Trustee pay debts of the beneficiary that existed prior to the funding of the Trust?

#### **IV. SNTS AND OTHER GOVERNMENT ENTITLEMENTS**

##### **A. SOCIAL SECURITY DISABILITY**

Social Security provides a monthly income to workers who have paid into the Social Security program through the FICA tax. The monthly benefit depends upon one's earnings. Individuals who have worked and paid into the Social Security Trust Fund through the Federal Insurance Contributions Act (FICA) tax, 42 U.S.C. § 409, may



acquire insured status by having paid sufficiently into the Social Security system for the requisite number of quarters per year prior to becoming disabled. 20 CFR § 404.132. After receiving Social Security Disability for 2 years, one qualifies for Medicare.

To receive Social Security Disability benefits, one must be “currently insured”. Workers disabled after the age of 31 must have 20 quarters of coverage within the 10 year period immediately preceding the onset of their disability. 20 CFR § 404.130(d). Those disabled under the age of 31 require fewer quarters of coverage but never fewer than 6. 20 CFR § 404.130(c). Individuals over the age of 31 who become disabled after they have left work and who do not have 20 quarters of coverage within the 10 years prior to becoming disabled will not be “currently insured” and will not be able to receive Social Security Disability.

**N.B.:**

1. Social Security Disability pays regardless of one’s resources and unearned income. It is not “means-tested”, and a lawsuit recovery will not affect ongoing eligibility for Social Security Disability benefits. If one receives only SSD, an SNT is not necessary to preserve eligibility for benefits.

2. When one receives SSD for 2 years, one also receives Medicare.

3. An SNT may be used to shelter SSD income above \$761/month for community Medicaid in New York. However, for chronic care budgeting, the Social Security Disability income will be NAMI, paid to offset the cost of care.

4. There is no lien against a lawsuit recovery for SSD that the plaintiff has received, and payback to the government for SSD upon the death of the beneficiary from remaining trust assets.

**B. ADULT CHILD BENEFITS**

If a child becomes disabled prior to age 22 and if his/her parent is deceased, disabled, or retired, the child will be eligible for Adult Disabled child benefits based upon the parent's earnings. After two (2) years, the adult child will receive Medicare. The Disabled Adult Child may not be married. These are not means tested.

### **C. MEDICARE**

Individuals 65 years of age or older who are entitled to receive Social Security, widows or Railroad Retirement benefits are eligible for Medicare, 42 C.F.R. § 406.5, as are disabled individuals who have received Social Security Disability benefits for 25 months, 42 C.F.R. § 406.12 or those with Adult Disabled child benefits. Those with end-stage renal disease who require dialysis or a kidney transplant also are eligible for Medicare, regardless of age, 42 C.F.R. § 406.13, as well as those with ALS.

SNTs are often used to shelter assets for those who are dually eligible for both Medicare and Medicaid.

### **D. OFFICE OF MENTAL HEALTH BENEFITS**

In New York, those under the age of 21 and over the age of 65 in a State psychiatric hospital eligible for Medicaid will have their stays paid for by Medicaid. Those between the ages of 21 and 65 unable to pay will have their stays paid for by the State of New York. This is a means-tested program.

New York State law, EPTL 7-1.12 specifically directs that SNTs apply to all New York State entitlements for persons with disabilities, not just Medicaid. Hence, an SNT is available to preserve assets for those who enter a state facility while continuing ongoing eligibility for OMH State benefits.

### **E. SECTION 8 HOUSING**

The Department of Housing and Urban Development provides a rental subsidy for disabled individuals. 24 CFR 982.505. The amount of subsidy is calculated by determining the family's contribution based on income and family size, taking into consideration the actual cost of the housing. The family share is calculated by subtracting the amount of housing assistance payment from the gross rent. 24 CFR 982.515. Countable income for Section 8 housing subsidies include periodic payments, income from assets based on current passbook savings rate, as well as assets gifted away 2 years prior to the application or recertification for Section 8 housing. 24 CFR 5609(b).

Certain exclusions from income apply. These include gifts received, inheritances, insurance payments, and settlements for personal or property losses. 24 CFR 5.609( c). Thus, the receipt of a lawsuit settlement itself is not income calculated to reduce Section 8 housing subsidy. The interest income from that recovery, however, is not explicitly excluded. In addition, the in-kind income from an SNT may be countable income for Section 8 purposes, even though payments excluded by other federal laws are excluded as countable income for Section 8 housing subsidies, as the Medicaid and SSI programs are not listed in the regulation. *Id.* Sporadic distribution of assets rather than fixed distributions would insulate the income from being countable for Section 8 purposes.

If a person with a disability gifts assets to family members, the income that the gifted money would have generated will be imputed to the individual, reducing the Section 8 subsidy, for 2 years. The regulations do not address whether the transfer of assets into a Supplemental Needs Trust will result in a reduction of the Section 8 subsidy and seem to vary from local district to local district.

## **F. FOOD STAMPS**

Food Stamps are based upon assets tied to the SSI resource level and income that may exceed the poverty level by 150%. Pursuant to New York State law, if one transfers assets into an SNT, the transfer will not affect eligibility for Food Stamps, and the assets in the trust, as well as income accruing in the trust, if any, are not countable resources for Food Stamps. 01 INF-8. Federal law requires that the Trust be established by Court Order but New York State authorizes non-Court Ordered Trusts. Disbursements from the trust made directly to the trust beneficiary for normal household living expenses, such as rent or mortgage, or food eaten at home are counted as income. Id. A disbursement to a third party who has provided goods and services other than shelter, medical costs or childcare will not result in countable income for the Food Stamps Household.

#### **G. HEAP**

An SNT is not considered an available resource when determining eligibility for emergency HEAP. 01 INF-8. Income spent for a specific purpose is exempted from being considered countable income for HEAP unless it is used to pay for everyday living expenses, which are considered available income for eligibility for HEAP. Id.

#### **XI CONCLUSION**

EPTL 7-1.12 and OBRA 93 are now 20 years old. These statutes have helped countless individuals with disabilities preserve their benefits while retaining the benefit of funds either left to them via a third party trust or which they fund themselves. Understanding the interrelationship between the entitlement programs and the trusts helps the attorney draft documents to meet the client's needs.

**Morales trust**  
**TRUST AGREEMENT**

This TRUST AGREEMENT made this \_\_\_\_ day of \_\_\_\_\_, 2013, by and between GUARD, as Guardian of the Property of AIP, and GUARD and CO-TRUSTEE, as Co-Trustees, is established pursuant to an Order of the Supreme Court, State of New York, Bronx County. The Guardian and Co-Trustee, GUARD, currently resides at. Her telephone number is . The Co-Trustee, CO-TRUSTEE, maintains offices at

**TRUST PURPOSE**

1.0 **Trust Name:** The Trust shall be known as the AIP Supplemental Needs Trust.

1.1 **Purpose of Trust:** The Beneficiary of the Trust is AIP. 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 New York State EPTL § 7-1.12, N.Y. Soc. Serv. Law §366, and 42 U.S.C. § 1396p(d)(4)(A) and 42 U.S.C. § 1382b(e).

1.2 **Declaration of Irrevocability:** The Trust shall be irrevocable and may not at any time be altered, amended or revoked without Court approval.

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 Co-Trustees' discretion, the payment or application of the trust principal to or for the benefit of AIP, or any beneficiary for any reason whatsoever.

**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 Co-Trustees shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of the Beneficiary, in-kind, so much of the income and principal (even to the extent of the whole) as the Co-Trustees deems advisable in her sole and absolute discretion subject to the limitations set forth below. The Co-Trustees shall add the balance of net income not paid or applied to the principal of the Trust.

2.1 **Availability of Other Benefits:** Consistent with the Trust's purpose, before expending any amounts from the net income and/or principal of this Trust, the Co-Trustees shall consider the availability of all benefits from government or private assistance programs for which the Beneficiary may be eligible. The Co-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, unless the Co-Trustees, in their sole and absolute discretion determines that such use of trust assets is beneficial to the beneficiary..

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, and Shelter:** Notwithstanding the above provisions, the Co-Trustees may make distributions to meet the Beneficiary's need for food, clothing, shelter, health care, or other personal needs, even if those distributions will impair or diminish the Beneficiary's receipt or eligibility for government benefits or assistance only if the Co-Trustees determine that the distributions will better meet the Beneficiary's needs, and it is in the Beneficiary's best

interests, 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 Co-Trustees actually exercise this discretion, the preceding paragraph (2.4) shall be null and void and the Co-Trustees' authority to make these distributions shall terminate and the Co-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 Co-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 Co-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: The Trust shall terminate upon the death of BENEFICIARY. The Co-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.

3.1 Reimbursement to the State: The New York State Department of Health, or other appropriate Medicaid entity within New York State shall be reimbursed for the total Medical Assistance provided to AIP during the lifetime of the beneficiary, as consistent with Federal and State Law. If AIP 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.

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.

### **CO-TRUSTEES**

4.0 Co-Trustees: GUARD and CO-TRUSTEE are appointed Co-Trustees of this Trust.

4.1 Consent of Co-Trustees: The Co-Trustees shall file with the Clerk of the court, Bronx County, a "Consent to Act" as Co-Trustee, Oath and Designation, duly acknowledged.

4.2 Bond: The Co-Trustees shall be required to execute and file a bond and comply with all applicable law, as determined by the Supreme Court, Bronx County.

4.3 Resignation: A Co-Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) the Supreme Court, --County; (ii) the Guardian of the Beneficiary, if any; (iii) the Successor Trustee; (iv) the Beneficiary; (v) the surety; and (vi) the LOCAL DEPARTMENT OF SOCIAL SERVICES. The Trustee's resignation is subject to approval of the Supreme Court, ---County.

4.4 Discharge and Final Accounting of Co-Trustees: No Co-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 §81.33 of the Mental Hygiene Law, and obtaining judicial approval of same. The Final Accounting shall be delivered to the LOCAL DEPARTMENT OF SOCIAL SERVICES

4.5 Annual Accounting: The Co-Trustees shall file during the month of May in the Office of the Clerk of the County of---, an annual report in the form and manner required by §81.31 of the Mental Hygiene Law, and such annual accountings shall be examined in the manner

required by §81.32 of the Mental Hygiene Law. Such annual accounting shall also be sent to the LOCAL DEPARTMENT OF SOCIAL SERVICES and, TO THE LOCAL Social Security Administration OFFICE, If the Co-Trustees do not receive written objections to the annual accounting within 90 days of its service upon DSS, such accounting shall be deemed approved by the DSS.

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

4.7 Powers of Co-Trustees: In addition to any powers which may be conferred upon the Co-Trustees under the law of the State of New York in effect during the life of this Trust, the Co-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 Co-Trustees, so as to confer upon the Co-Trustees the broadest possible powers available for the management of the Trust assets. In the event that the Co-Trustees wish to exercise powers beyond the express and implied powers of EPTL Article 11, the Co-Trustees therefor shall seek and must obtain judicial approval.

4.8 Appointment of a Successor Trustee: Appointment of a successor Trustee not named in this Trust shall be upon application to the Supreme Court, ---County, with Notice to the LOCAL DEPARTMENT OF SOCIAL SERVICES

4.9 Commissions of Co-Trustees: The Co-Trustees shall be entitled to commissions pursuant to SCPA 2309 upon the review of the annual accounting each year.

## **MISCELLANEOUS PROVISIONS**

5.0 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, and or other federal benefit programs.

5.1 Notifications to Social Services District: The Co-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 tend to substantially deplete the trust principal (as defined in that section), and in advance of transactions for less than fair market value. For all required notification and each time court approval is sought for any matter hereunder, the Co-Trustees shall give written notice to the Department of Social Services at least 30 days in advance of required notification and requests for court approval.

5.2 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.

5.3 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.

5.4 Headings: Any headings 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.

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



**TRUST AGREEMENT  
PARENTAL TRUST IN MORALES FORMAT  
PAYBACK BUT NO COURT ORDER: ADULT BENEFICIARY**

This TRUST AGREEMENT made this \_\_\_ day of \_\_\_\_\_, 2013, is established by and **between** \_\_\_\_\_, as Parent of NAME, as Grantor [*EITHER PARENT HAS PART OWNERSHIP OF FUNDS OR POA TO AUTHORIZE FUNDING*] and \_\_\_\_\_, as **Trustee**. The Grantor currently resides at \_\_\_\_\_. The Trustee currently resides at \_\_\_\_\_. The Beneficiary currently resides at \_\_\_\_\_.

**TRUST PURPOSE**

1.0 Trust Name: The Trust shall be known as the NAME Supplemental Needs Trust.

1.1 Purpose of Trust: The Beneficiary of the Trust is NAME. 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 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).

1.2 Declaration of Irrevocability: The Trust shall be irrevocable and may not at any time be altered, amended or revoked.

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 NAME, or any beneficiary for any reason whatsoever.

**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 Trustee shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of the Beneficiary, in-kind, so much of the income and principal (even to the extent of the whole) as the Trustee deems advisable in their sole and absolute discretion subject to the limitations set forth below. The Trustee shall add the balance of net income not paid or applied to the principal of the Trust.

2.1 Availability of Other Benefits: Consistent with the Trust's purpose, before expending any amounts from the net income and/or principal of this Trust, the Trustee shall consider the availability of all benefits from government or private assistance programs for which the Beneficiary may be eligible. The Trustee, where appropriate and to the extent possible, shall endeavor to maximize the collection and facilitate the distribution of these benefits for 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, unless the Trustee, in his sole and absolute discretion, shall determine that such use of trust assets is beneficial to the beneficiary.

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 and Shelter: 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 those distributions will impair or diminish the Beneficiary's receipt or eligibility for government benefits or assistance, if the Trustee determines 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 Trustee actually exercises this discretion, the preceding paragraph (2.4) shall be null and void and the Trustee's authority to make these distributions shall terminate and the Trustee's 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 Trustee's 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 Trustee shall execute documents necessary to accept additional contributions to the trust and shall designate the additions on an amended Schedule A of this Trust.

2.7 Employment of Professionals and Other Caregivers: The Trustee shall have discretion, if necessary, to use income and/or principal from the Trust to hire professionals to assist BENEFICIARY. It is contemplated that the class of professionals and other caregivers that may be needed to assist BENEFICIARY will be social workers, custodians, legal counsel, aides, housekeepers, accounting professionals, feeders, therapists and any medical professionals or personnel who would not otherwise accept or be paid for fully by government entitlements, vocational and rehabilitation workers, and investment counsel.

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

3.0 Disposition Of Trust On Death of Beneficiary: The Trust shall terminate upon the death of NAME and the Trustee shall distribute any principal and accumulated interest that then remain in the Trust pursuant to paragraphs 3.1 and 3.2 of this Trust.

3.1 Reimbursement to the State: The New York State Department of Health, or other appropriate Medicaid entity within New York State shall be reimbursed for the total Medical Assistance provided to NAME during the lifetime of the Beneficiary, as consistent with Federal and State Law. If NAME 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.

3.2 Distribution After Reimbursement to the State: All remaining principal and accumulated income shall be paid to the legal representative of the Estate of the Beneficiary.

### **TRUSTEE**

4.0 Trustee: \_\_\_\_\_ shall serve as Trustee of this Trust. \_\_\_\_\_ is appointed Successor Trustee.

**4.1 Bond: The Trustee shall be required to execute and file a bond at such time as the corpus of the Trust exceeds \$1,000,000.**

4.2 Resignation: A Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) the Beneficiary; (ii) the Guardian of the Beneficiary, if any; (iii) and any Successor Trustee, and (iv) the local Department of Social Services.

4.3 Discharge and Final Accounting of Trustee: No Trustee shall be discharged and released from office and bond, except upon filing of a Final Accounting and delivering same to the surety and to the Beneficiary and, to the local Department of Social Services.

4.4 Annual Accounting: The Trustee shall file during the month of May with the local Department of Social Services, with the Beneficiary, and with the local Social Security Administration Office, an annual accounting of all expenditures made and income earned herein.

4.5 Powers of Trustee: In addition to any powers which may be conferred upon the Trustee under the law of the State of New York in effect during the life of this Trust, the Trustee 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 Trustee the broadest possible powers available for the management of the Trust assets.

4.6 Appointment of a Successor Trustee: The last Trustee serving hereunder may name a Successor Trustee.

4.7 Compensation of Trustee: A Trustee shall be entitled to such compensation as may be allowable under the laws of the State of New York. In addition, the Trustee shall be entitled to be reimbursed for reasonable expenses incurred by the Trustee in the administration of this Trust.

### **5.0 MISCELLANEOUS PROVISIONS**

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, and or other federal benefit programs.

5.2 Notifications to Social Services District: The Trustee 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 in advance of transactions for less than fair market value, and in the case of trusts exceeding \$100,000, in advance of transactions that tend to substantially deplete the trust principal (as defined in that section).

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 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.

5.5 Headings: Any headings 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.

5.6 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.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ---

-----X

In the Matter of the Application of

---

**PETITION TO CREATE  
A SPECIAL NEEDS  
TRUST**

To Create a Special Needs Trust  
Pursuant to NY EPTL § 7-1.12 and  
Soc. Serv. Law §366 (2)(b)(2)(iii)(A)

Index No.

-----X  
TO THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF --- :

The Petition of --- respectfully alleges:

**PETITIONER**

**FIRST:** --- resides at---

**SECOND:** Petitioner was born on ---and is currently --- years old.

**DISABILITY**

**THIRD:** Petitioner suffers from ---and is a disabled person pursuant to the Social Security Act. She is unable to perform substantial gainful activity. She receives Supplemental Security Income as a person with a disability. Social Security notice annexed hereto as Exhibit A.

**FOURTH:** Although Petitioner has a physical disability, she has no cognitive impairments.

**GOVERNMENT BENEFITS**

**FIFTH:** Petitioner receives SSI, Medicaid and Food Stamps.

**NEED FOR A SUPPLEMENTAL NEEDS TRUST  
IN ORDER TO MAINTAIN ELIGIBILITY FOR  
GOVERNMENT BENEFITS BASED ON NEED**

**SIXTH:** Petitioner is a legatee of the Trust created by her father, ---now deceased. The Trust assets consist of --- FAMILY TRUST annexed hereto as Exhibit B.

**SEVENTH:** Petitioner seeks this Court's authority to establish a Supplemental Needs Trust that complies with New York Law and Federal Law, 42 U.S.C. §1396p(d)(4)(A); N.Y. Soc. Serv. Law §366 (2)(b)(2)(iii)(A) in order to maintain eligibility for benefits based on need. As this trust must be established by a parent, grandparent, guardian, or a Court, Petitioner seeks this Court's order to establish the trust. *See id.* She has no parent or grandparent alive and has no need of a Legal Guardian.

**EIGHTH:** The proposed Supplemental Needs Trust contains a "payback" provision by which Medicaid will be reimbursed, upon the death of the beneficiary, for medical services provided to the beneficiary during her lifetime. There will be annual accountings to the -- County Department of Social Services. A copy of the proposed Special Needs Trust is annexed hereto as Exhibit C.

**PROPOSED TRUSTEE**

**NINTH:** Petitioner nominates ---as Co-Trustees of the Special Needs Trust

**TENTH:** ---is a college graduate employed as---. ---is a college graduate employed as---. They are the Co-Executors of the Estate of their father,---

**REQUEST THAT A BOND BE DISPENSED WITH**

**ELEVENTH:** Petitioner requests that a Trustee Bond be dispensed with, as the trust corpus is less than \$1,000,000.00. New York State Law requires bonding only in Trusts with a Corpus that exceeds \$1,000,000.00. 18 N.Y.C.R.R. 360-4.5(b).

**PERSONS ENTITLED TO NOTICE**

**TWELFTH:** The following persons are entitled to notice in this proceeding. Their names, telephone numbers, and their addresses are as follows:

**THIRTEENTH:** That no request for this relief has previously been made to this or any court of competent jurisdiction.

WHEREFORE, Petitioner prays:

1. That this Court establish the Special Needs Trust annexed to this Petition;
2. That this Court dispense with the filing of a bond;
3. That the Petitioner have such other, further or different relief in the premises as may be just.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF

-----  
In the Matter of the Application of

---

For the Appointment of a Guardian for Personal Needs  
and Property Management of

---

An Alleged Incapacitated Person  
-----

TO THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF

The Petition of --- respectfully alleges:

**PETITIONER**

**FIRST:** --- resides at

**SECOND:** --- is the mother of ---.

**ALLEGED INCAPACITATED PERSON**

**THIRD:** --- was born on and is 8 years of age. She lives with the Petitioner at

**FOURTH:** --- suffers from a birth injury which manifests itself in physical, cognitive and emotional impairments. She has seizure disorder, cannot sit upright or walk, and has problems with digestion of food. She requires assistance with all activities of daily living. As she cannot participate in these proceedings, the Petitioner asks that her presence at any proceeding be dispensed with. She attends school at UCP. IEP annexed hereto as Exhibit A.

**POWERS SOUGHT**

**EIGHTH:** Petitioner seeks the following Property Management Powers pursuant to § 81.21(a):

**NINTH:** Petitioner seeks the following Personal Needs powers pursuant to N.Y. Mental Hygiene Law § 81.22(a).

**PROPOSED EXPENDITURES**

**NINETEENTH:** Petitioner seeks to make the following expenditures on behalf of --- to enhance her life:

- A. Vehicle – An accommodated van or SUV is needed to transport --- to school, physicians’ appointments, and activities. Given ---’S restrictions and allowing for future growth,
- B. Insurance, gas, and maintenance for vehicle is needed.
- C. Monthly stipend of \$2,500.00 per month to --- as the primary caregiver of ---. Because of the unpredictability and frequency of ---’S seizures and the general frailty of her

health, --- has found it increasingly difficult to maintain steady employment. She works for a window distributor but is often absent due to --- health needs

--- must constantly monitor --- because she has seizures at least 2-3 times per week. She then must pick her up from school and thus cannot maintain steady employment. --- is completing her Associate's Degree in Business Administration. Every day, --- performs all activities of daily living for ---, due to her special needs. She must bathe her, prepare her meals and snacks and feed her, dress her, toilet her and perform all activities of daily living. She may never be left alone. If these services were not provided by ---, the cost to --- would greatly exceed \$2,500.00 per month. Personal Statement on ---'S care annexed hereto as Exhibit D.

D. Vacations to visit family and other destinations suitable for ---, including travel to the therapies, set forth herein below. \$5,000.00 per year.

E. Oxygen Treatment in hyperbaric chamber. This therapy is not covered by Medicaid, but is a valuable and necessary therapy for --- as it stimulates activity in the brain. \$125/oxygen session, one or two sessions per day, five times per week equals 20-40 sessions, \$2,500.00 to \$5,000.00, plus \$150.00 to consult with MD.

F. Three-week annual session at Therapy, Inc.'s for --- to undergo their intensive therapy program. The program consists of innovative physical and occupational therapy, along with generating plans of care and a home exercise program.

G. HIPPO Therapy (physical therapy through horses) and equestrian lessons.

H. Aqua Therapy and swimming lessons.

I. Adaptive Equipment such as a gait trainer, adaptive stroller, tricycle, seat cushions, corner sitter, bed, wheelchair, recreational equipment.

J. Health insurance for --- who has no coverage of her own; ---'S well-being is dependent on her mother.

Estimates annexed hereto as Exhibit E.



## **PAYBACK SNT WITHIN INFANT COMPROMISE ORDER**

This TRUST AGREEMENT made this \_\_\_\_\_ day of \_\_\_\_\_, 2013, by and between ---, as Parent of ---, as Grantor, pursuant to an Order of the Supreme Court, State of New York, ---County, NAME OF CASE, Index No., dated \_\_\_\_\_, and between \_\_\_\_\_BANK, as Trustee. The beneficiary, \_\_\_\_\_, currently resides at ---. Trustee \_\_\_\_\_BANK currently maintains offices at ---

### **TRUST PURPOSE**

1.0 Trust Name: The Trust shall be known as the \_\_\_\_\_ SPECIAL NEEDS TRUST.

1.1 Purpose of Trust: The Beneficiary of the Trust is ---. 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 New York EPTL §7-1.12, New York Soc. Serv. Law §366, 42 U.S.C. §1396p(d)(4)(A) and 42 U.S.C. §1382b(e).

1.2 Declaration of Irrevocability: The Trust shall be irrevocable and may not at any time be altered, amended or revoked.

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 Trustees' discretion, the payment or application of the trust principal to or for the benefit of ---, or any beneficiary for any reason whatsoever.

## USE OF INCOME AND PRINCIPAL

2.0 Administration Of Trust During Lifetime of Beneficiary: The property shall be held in trust for the beneficiary, and the Trustee shall collect income and *shall apply for the benefit of the beneficiary, in-kind, so much of the income and principal as set forth in the annexed ICO or as the Trustee deems advisable and in the best interests of the beneficiary in its sole and absolute discretion for the supplemental needs of the beneficiary subject to the limitations set forth below.* The Trustee shall add the balance of net income not paid or applied to the principal of the Trust.

2.1 Availability of Other Benefits: Consistent with the Trust's purpose, before expending any amounts from 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, and Shelter: Notwithstanding the above provisions, the Trustees may make distributions to meet the beneficiary's need for food, shelter, health care, or other personal needs, even if those distributions will impair or diminish the beneficiary's receipt or eligibility for government benefits or assistance only if the Trustees determines that the distributions will better meet the beneficiary's needs, and it is in the beneficiary's best interests, notwithstanding the consequent effect on the beneficiary's eligibility for, or receipt of benefits. *Any expenditure in excess of \$10,000 shall be subject to the approval of the Supreme Court, \_\_\_ County which authorized this Trust or the court, if any, having jurisdiction over the legal guardian of the beneficiary. [N.B. Some courts may set this standard; others give total discretion]*

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 exercises 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 property and indicate such additions on an amended Schedule A of this trust.

2.7: Purchase of annuity or life insurance policies: The Trustees shall not purchase an annuity or life insurance policies with trust principal or income unless the applicable instrument names the trust as the annuitant of the annuity(ies) and names the trust as the beneficiary of any such annuity(ies) and life insurance policy(ies).

2.8 Purchase of a Structured Settlement: The Trustees shall not purchase structured settlement with trust principal or income unless the applicable instrument names the trust as the payment recipient, and names the trust as the beneficiary of any such structured settlement.

## **DISTRIBUTION UPON DEATH OF BENEFICIARY**

3.0 Disposition Of Trust On Death Of Beneficiary: The Trust shall terminate upon the death of beneficiary 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.

3.1 Reimbursement to the State: The New York State Department of Social Services, or other appropriate Medicaid entity within New York State, shall be reimbursed for the total Medical Assistance provided to beneficiary during the lifetime of the beneficiary, as consistent with Federal and State Law, **less \$40,000 paid in satisfaction of the lien imposed against the lawsuit** \_\_\_\_\_. If the 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.

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.

### **TRUSTEE**

4.0 Trustees: \_\_\_\_BANK is appointed Trustee of this Trust

4.1 Consent of Trustee: The Trustee shall file with the Clerk of the Supreme Court, \_\_\_\_County, a "Consent to Act" as Trustee, Oath and Designation, duly acknowledged.

4.2 Bond: The filing and execution of a bond is hereby dispensed with so long as ---BANK is serving as Trustee.

4.3 Resignation: A Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) the Supreme Court, ---County; (ii) the Guardian of the beneficiary, if any; (iii) the beneficiary; (iv) the Successor Trustee; (v) the local Department of Social Services; and (vi) the court, if any, having jurisdiction over the legal Guardian, if any, of the beneficiary. The resignation is subject to the approval of the Supreme Court, ---County or the court if any having jurisdiction over the legal guardian of the beneficiary..

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 manner required by §1719 of the New York State Surrogate's Court Procedure Act with the local Department of Social Services.

4.5 Annual Accounting: \_\_\_\_BANK as Trustee shall file an initial accounting and annual accountings during the month of May for the preceding year of all money or other property belonging to \_\_\_\_ which has funded the Trust, in the form and manner required by §1719 of the New York State Surrogate's Court Procedure Act, with the local Department of Social Services and with the Social Security Administration *and with \_\_\_\_\_ who is appointed Referee/Court Examiner to review the Annual Accounting.*

4.6 Continuing Jurisdiction: The Supreme Court, ---County, or the court, if any, having jurisdiction over the legal Guardian of the beneficiary, shall have continuing jurisdiction over the

performance of the duties of Trustees, the interpretation, administration and operation of this Trust, the appointment of a successor Trustees and all other related matters.

4.7 Powers of Trustees: In addition to any powers which may be conferred upon the Trustee 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 *et. seq.*, of 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. Purchase of an interest in real property shall be upon application to a court of competent jurisdiction pursuant to RPAPL Section 17. In the event that the Trustees wish to exercise powers beyond the terms of this Trust Agreement, the Trustees shall seek and must obtain judicial approval therefor. The Trustees shall be held to a standard of reasonable care, diligence, and prudence.

4.8 Appointment of a Successor Trustee: Appointment of a successor Trustee not named in this Trust shall be upon application to the Court with Notice to the local Department of Social Services. In the event the corporate Trustee, \_\_\_BANK, is unable to serve or, having served, is no longer able to serve, then the Court shall appoint a corporate trustee licensed to do business in the State of New York as successor trustee upon notice to all interested parties. The corporate - Trustee shall continue to serve until a successor corporate Co-Trustee or independent Co-Trustee is appointed and accepts such appointment and is approved by the Court to which application shall be promptly made.

4.9 Commission of Trustees: \_\_\_BANK as Trustee shall be entitled to commissions as set forth in its published rates in effect from time to time without further Order of the court.

### **MISCELLANEOUS PROVISIONS**

5.0 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, and or other federal benefit programs.

5.1 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, proof of bond, if required, 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. For all required notification and each time court approval is sought for any matter hereunder, the trustee shall give written notice to the Department of Social Services at least 30 days in advance of required notification and requests for court approval.

5.2 Notification to State Department of Social Services: Notification shall be given to the Commissioner of the New York State Department of Social Services of the funding of the Trust Fund and of the death of 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 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.

5.5 Headings: Any headings 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.

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

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

Dated:

GRANTOR

\_\_\_\_\_, as Parent of \_\_\_\_\_

Dated:

TRUSTEE:

\_\_\_\_\_

## **SOLE BENEFIT TRUST**

This TRUST AGREEMENT made this \_\_\_ day of \_\_\_\_\_, 2013, is established by and between GRANTOR, as Grantor and TRUSTEE, as Trustee. The Grantor currently resides at \_\_\_\_\_.  
The Trustee currently resides at \_\_\_\_\_.  
The Beneficiary, BENEFICIARY, currently resides in \_\_\_\_\_.

### **TRUST PURPOSE**

- 1.0 **Trust Name:** The Trust shall be known as the BENEFICIARY Supplemental Needs Trust.
- 1.1 **Purpose of Trust:** The Beneficiary of the Trust is BENEFICIARY. 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 New York State EPTL § 7-1.12, N.Y. Soc. Serv. Law §366, and 42 U.S.C. § 1396p(c)(2)(B)(iv).
- 1.2 **Declaration of Irrevocability:** The Trust shall be irrevocable and may not at any time be altered, amended or revoked.
- 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 BENEFICIARY, or any beneficiary for any reason whatsoever.

### **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 Trustee shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of the Beneficiary, in-kind, so much of the income and principal (even to the extent of the whole) as the Trustee deems advisable in his sole and absolute discretion subject to the limitations set forth below. The Trustee shall add the balance of net income not paid or applied to the principal of the Trust. **Notwithstanding the discretion given to the Trustee, the Trustee shall each year expend \_\_\_% of the Trust assets for the benefit of the Beneficiary such that all disbursements shall be actuarially sound based upon a \_\_\_year life expectancy of the Beneficiary who is \_\_\_ years of age at the date of the establishment of this Trust.**

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

2.2 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 unless, in the sole and absolute discretion of the trustee, such use of income and/or principal is beneficial to the beneficiary.

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

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

2.5 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 Trustee actually exercises this discretion, the preceding paragraph (2.4) shall be null and void and the Trustee's authority to make these distributions shall terminate and the Trustee's 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 Trustee's 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 Trustee shall execute documents necessary to accept additional contributions to the trust and shall designate the additions on an amended Schedule A of this trust.

2.7 Use of Trust Income and Principal for Comforts, Luxuries, Necessities and Service Providers: It is the intent of the grantor that the trust assets be utilized to maximize the potential and enjoyment of life of the beneficiary. The trustee may utilize trust assets for the sole benefit of the beneficiary by providing education, services, vacations, transportation, recreation, aides not otherwise provided through government entitlements, accountants, attorneys, social workers not otherwise provided through government entitlements, medical personnel and treatments not otherwise provided through government entitlements, equipment not otherwise provided through government entitlements, companions and feeders. This list is intended to be illustrative rather than exclusive, and the grantor gives to the trustee discretion as to the use of these funds so as to enhance the life of the beneficiary.

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

3.0 Disposition Of Trust On Death Of Beneficiary: The Trust shall terminate upon the death of BENEFICIARY and the Trustee, after paying any estate tax, income tax or gift tax which may be due for the trust and/or the Beneficiary, and after paying the funeral expenses of the Beneficiary, shall distribute any principal and accumulated interest that then remain in the Trust pursuant to paragraph 3.1 of this Trust.

3.1 All remaining principal and accumulated income shall be **paid to the legal representative of the Estate of the Beneficiary** **QUERY: ANY OTHER NAMED BENEFICIARY???** **OR if NO actuarially sound distribution then prior to payment to legal representative of the estate of the beneficiary, reimbursement be made to the Department of Health or the Medicaid agency of the State or States that provided Medicaid to the beneficiary for an amount up to the total Medicaid expended during lifetime of the beneficiary.**

### TRUSTEE

4.0 Trustee: TRUSTEE shall serve as Trustee of this Trust. SUCCESSOR TRUSTEE shall serve as Successor Trustee.

4.1 Bond: The Trustee shall not be required to execute and file a bond.

4.2 Resignation: A Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) the Beneficiary; and (ii) any Successor Trustee.

4.3 Discharge and Final Accounting of Trustee: No Trustee shall be discharged and released from office except upon filing of a Final Accounting and delivering same to the legal representative of the Estate of the Beneficiary.

4.4 Annual Accounting: The Trustee shall file during the month of May with the Successor Trustee and with the beneficiary an annual accounting of all expenditures made and income earned herein. The income tax return filed for the trust shall be acceptable as such accounting. The fees for such accounting shall be properly payable by the Trustee from trust income and/or principal.

4.5 Powers of Trustee: In addition to any powers which may be conferred upon the Trustee under the law of the State of New York in effect during the life of this Trust, the Trustee 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 Trustee the broadest possible powers available for the management of the Trust assets.

4.6 Appointment of a Successor Trustee: The last Trustee serving shall appoint a Successor Trustee.

4.7 Compensation of Trustee: The Trustee shall be entitled to such compensation as may be allowable under the laws of the State of New York. In addition, the Trustee shall be entitled to be reimbursed for reasonable expenses incurred by the Trustee in the administration of this Trust.



## **5.0 MISCELLANEOUS PROVISIONS**

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, and or other federal benefit programs.

5.2 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.

5.3 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.

5.4 Headings: Any headings 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.

5.5 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.

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

## TESTAMENTARY SPOUSAL SNT

THIRD: If my spouse, \_\_\_\_, should survive me, then I give, devise and bequeath all of the rest, residue and remainder of my estate, both real, personal, and mixed whatsoever the same may be, and wheresoever located to my spouse, \_\_\_\_, in Trust, however, to be held, administered pursuant to paragraph FIFTH of this Last Will and Testament.

**FOURTH: If my spouse should make an election pursuant to EPTL 5-1.1A, the trust created herein and administered pursuant to Paragraph FIFTH of this Last Will and Testament shall, after the distribution of the statutory share to my spouse, continue for the benefit of my spouse, and the election pursuant to EPTL 5-1.1A shall not result in the termination of such Trust as if my spouse has predeceased me, EPTL 5-1.1A(a)(4)(A) to the contrary notwithstanding.**

FIFTH: The Trust so established by paragraph THIRD shall be known as the "\_\_\_\_ TRUST" and shall be administered subject to the following instructions:

a) Testamentary Purpose: Because of the nature of the age and needs of my spouse, \_\_\_\_, hereinafter referred to as "the beneficiary", at the time of the execution of this Will, it is my intent that the special provisions of this Trust be strictly enforced. It is my intent that the beneficiary shall receive all government entitlements for which the beneficiary would otherwise be entitled but for the bequests hereunder. I recognize that in view of the vast costs involved in caring for an aging person, a direct bequest to the beneficiary would be rapidly dissipated. It is in awareness of this reality that I create this testamentary trust. I intend this Trust to conform with EPTL 7-1.12. To the extent possible, I intend that this Trust supplement rather than supplant government entitlements.

It is my intent to create a supplemental needs trust which conforms to the provisions of section 7-1.12 of the New York Estates, Powers and Trusts Law. I intend that, **to the extent possible**, the trust assets be used to supplement, not supplant, impair or diminish, any benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving. Consistent with that intent, **it is my desire that**, before expending any amount from the net income and/or principal of this trust, the trustee consider the availability of all benefits from government or private assistance programs for which the beneficiary may be eligible and that, where appropriate and to the extent possible, the trustee endeavor to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the beneficiary.

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

b) Income: The Trustee shall hold, invest and reinvest the Trust estate, collect the income therefrom, **[optional] and pay or apply all of the net income therefrom to or for the use of the beneficiary at least quarterly.** The Trustee shall endeavor to distribute income to the beneficiary without reducing or eliminating any government entitlement or payment which the beneficiary would otherwise receive **unless the trustee, in his sole and absolute discretion determines such use of income to be beneficial to the beneficiary.** Income shall include any and all payments made to this Trust from any Individual Retirement Account or moneys held in Qualified Plans, whether pursuant to the Minimum Distribution Rules under Section 401(a)(9) of the Internal Revenue Code of 1986, as amended (the "Code") or such greater amount as the Trustee may elect to receive.

**Consistent with the intent of this trust fund, the Trustee shall distribute [all] income in kind or in cash in the following manner:**

FIRST: For costs of administration of the Trust including payment of all taxes and professional fees.

SECOND: For a housekeeper. The Trustee may pay a housekeeper to care for the beneficiary and perform chores which are not provided by home care workers pursuant to Medicare, Medicaid and Medicare supplemental policy benefits.

THIRD: For needed medical care not paid for by private health insurance or not paid for by government entitlements for which the beneficiary would otherwise be eligible but for the existence of this Trust.

FOURTH: For transportation, entertainment, visitation by family members, and any other need and/or luxury the beneficiary may require.

FIFTH: For professionals and other caregivers. It is anticipated that the class of professionals or caregivers will be social workers, accountants, attorneys, physical or recreational therapists, occupational therapists, speech therapists, feeders, companions, aides, or personal care attendants or private duty nurses not otherwise provided by government entitlements.

SIXTH: For shelter costs of the beneficiary. For purposes of this Trust, this shall mean any taxes, mortgage payment, maintenance charges, rents or any other expenses which will maintain the beneficiary in the housing of the beneficiary's choice. Shelter costs shall also include, but not be limited to, items for the purpose of maintaining the shelter such as repairs, utilities, cable television, and telephone. However, to the extent possible shelter costs shall not include the charges of any medical facility, health related institution, skilled nursing facility, hospital or rehabilitation facility that would otherwise be paid through government entitlements. Private room differentials are properly payable by this Trust.

SEVENTH: For health insurance. The Trustee may purchase whatever health insurance is available .

This above list is intended to be illustrative rather than exhaustive. Any income that cannot be distributed for the above needs, comforts and services shall be distributed outright to the beneficiary at least quarterly.

c) Principal: If the income from the Trust, together with any other income and resources possessed by the beneficiary, including all government benefits, is insufficient to provide for the needs or luxuries of the beneficiary, in the sole opinion of the Trustee, the Trustee is authorized to invade the principal for the beneficiary to the extent necessary to meet such needs or provide such luxuries. The Trustee is strictly prohibited from invading the principal of the Trust if such act will serve to deny, discontinue or reduce a government benefit which the beneficiary would otherwise receive **unless the trustee, in his sole and absolute discretion determines such use of principal to be beneficial to the beneficiary.** No judge of any Court shall have the power to order the invasion of principal in contravention of this provision. This provision is intended to negate and eliminate any discretion granted to any Court by §7-1.6 of the Estates Powers and Trusts Law (E.P.T.L.).

So long as all of the income from the trust is distributed to or for the benefit of the beneficiary, none of the income, to the extent possible, 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.

d) Additions to Income and Principal: With the Trustee's consent, any person may, at any time, from time to time, by 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.

e) Assignment: **No income or principal payable or to become payable under this Trust shall be subject to anticipation or assignment by the beneficiary or her guardian or to attachment by or to the interference or control of any creditor of the beneficiary or her Guardian or to be taken or reached by any legal or equitable process in satisfaction of any debt or liability of the beneficiary prior to its actual receipt by the beneficiary.**

f) Termination upon Death: This Trust shall terminate upon the death of \_\_\_\_, and after all funeral and other expenses of the beneficiary are paid, the Trust principal and all accumulated income shall be distributed pursuant to paragraph FOURTH of this Last Will and Testament.

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**TESTAMENTARY THIRD PARTY TRUST**

**Joan Lensky Robert, Esq.**

**FIFTH:** The Trust so established by paragraph FOURTH shall be known as the \_\_\_\_\_ TRUST" and shall be administered subject to the following instructions:

A) **Testamentary Purpose:** Because of the nature of the disability of my child, \_\_\_\_\_, hereinafter referred to as "the beneficiary", at the time of the execution of this Will, it is my intent that the special provisions of this Trust be strictly enforced. It is my intent that the beneficiary shall receive all government entitlements for which the beneficiary would otherwise be entitled but for the bequests hereunder. I recognize that in view of the vast costs involved in caring for a disabled person, a direct bequest to the beneficiary would be rapidly dissipated. It is in awareness of this reality that I create this testamentary trust. I intend this Trust to conform with the requirements set forth in Matter of Escher, 52 N.Y.2d 1006 and EPTL 7-1.12. I intend that this Trust supplement rather than supplant government entitlements.

It is my intent to create a supplemental needs trust which conforms to the provisions of section 7-1.12 of the New York Estates, Powers and Trusts Law. I intend that the trust assets be used to supplement, not supplant, impair or diminish, any benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving. Consistent with that intent, it is my desire that, before expending any amount from the net income and/or principal of this trust, the trustee consider the availability of all benefits from government or private assistance programs for which the beneficiary may be eligible and that, where appropriate and to the extent possible, the trustee endeavor to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the beneficiary.

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

B) **Income:** The Trustee shall hold, invest and reinvest the Trust estate, collect the income therefrom, and pay or apply so much of the net income therefrom **to or for the use of** the beneficiary as the Trustee in his sole discretion shall determine is beneficial to the beneficiary. In using such income, the Trustee, in his sole discretion, may pay or apply the same to or for the use of the beneficiary in such manner as he shall from time to time deem advisable taking into consideration the best interest and welfare of the beneficiary. Any net income not distributed shall be added to the principal.

However, the Trustee is strictly prohibited from distributing income to the beneficiary if such distribution would serve to reduce or eliminate any government entitlement or payment which the beneficiary would otherwise receive **unless the trustee, in his sole and absolute discretion determines such use of income to be beneficial to the beneficiary by providing goods and services which are not identical with those provided through government entitlements.** The income shall thus be used for those items of need of the beneficiary that will not be paid for by government entitlements. It is my intent that the beneficiary enjoy the maximum advantages of life and at the same time receive government entitlements. It is my intent to supplement rather than supplant government entitlements.

Income shall include any and all payments made to this Trust from any Individual Retirement Account or moneys held in Qualified Plans, whether pursuant to the Minimum Distribution Rules under Section 401(a)(9) of the Internal Revenue Code of 1986, as amended (the "Code") or such greater amount as the Trustee may elect to receive.

C) **Principal:** If the income from the Trust, together with any other income and resources possessed by the beneficiary, including all government benefits, is insufficient to provide for the needs of the beneficiary, in the sole opinion of the Trustee, the Trustee is authorized to invade the principal for the beneficiary to the extent necessary to meet such needs. The Trustee is strictly prohibited from invading the principal of the Trust if such act will serve to deny, discontinue or reduce a government benefit which the beneficiary would otherwise receive **unless the trustee, in his sole and absolute discretion determines such use of income to be beneficial to the beneficiary by providing goods and services which are not identical with those provided through government entitlements.** **No judge of any Court shall have the power to order the invasion of principal in contravention of this provision. This provision is intended to negate and eliminate any discretion granted to any Court by §7-1.6 of the Estates Powers and Trusts Law (E.P.T.L.).**

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 **unless the trustee, in his sole and absolute discretion determines such use of income to be beneficial to the beneficiary by providing goods and services which are not identical with those provided through government entitlements.**

D) **Additions to Income and Principal:** With the Trustee's consent, any person may, at any time, from time to time, by 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.

E) **Housing:** It should be a priority of the Trustee to ensure proper housing for the beneficiary. The Trustee shall have discretion to invade the principal or distribute income for the purpose of securing appropriate housing, subject to the restrictions set forth herein. My Trustee is encouraged to invest in property in whatsoever form as will maintain \_\_\_\_\_ in a "homestead" (as the same is currently defined in applicable Social Services Law and Regulations), or in a home-like environment. If an appropriate home-like environment cannot be established for \_\_\_\_\_, the homestead in which \_\_\_\_\_ resides at the time of my death shall, if possible, be retained as a home until an appropriate homestead or home-like environment can be established.

F) **Other Needs and Luxuries:** It is my intent that the beneficiary enjoy the therapeutic benefits of education, vocational training, hobbies, vacations, modes of transportation, equipment, and any other need and/or luxury the beneficiary may have to enjoy life to the fullest. The Trustee shall use income and/or principal for these purposes, subject to the restrictions set forth herein.

G) **Visitation to and by Family Members:** The Trustee shall, in his discretion, provide income and/or principal to \_\_\_\_\_ and/or to any member of the family who needs payment for travel arrangements in order to visit \_\_\_\_\_. It is my wish that family members visit with \_\_\_\_\_ at least once a year, and the Trustee is instructed to encourage family members by providing travel expenses for \_\_\_\_\_ and by providing reasonable reimbursement, if necessary, for payment of travel arrangements for this purpose.

H) **Purchase of Insurance:** The Trustee has discretion to use income to purchase whatever insurance is necessary to make \_\_\_\_\_ financially secure, including purchasing private health insurance, life insurance, liability insurance, homeowner's insurance, renter's insurance and automobile insurance. The private health insurance may be purchased if it will result in providing for payment to those medical professionals or medical providers who would otherwise not accept government entitlements.

Life insurance may be purchased by the Trust on the life of an insured person who chooses to provide financial support for \_\_\_\_\_ in a manner consistent with the provisions of this Trust. Any insurance purchased with premiums paid from this Trust Fund shall be an asset of the Trust.

I) **Employment of Professionals and Other Caregivers:** The Trustee shall, if necessary, use income from the Trust to hire professionals to assist \_\_\_\_\_. It is contemplated that the class of professionals that may be needed to assist \_\_\_\_\_ will be social workers, custodians, medical professionals who would not otherwise accept government entitlements, legal counsel, accounting professionals, investment counsel, physical therapists, occupational therapists, recreational therapists, feeders, housekeepers, attendants, and aides.

J) **Trustee's Fee:** The Trustee shall be entitled to receive for services rendered as Trustee hereof, the commissions to which the sole Trustee is entitled under the

laws of the State of New York in effect at the time such commissions become payable, or, in the case of a corporate fiduciary, its normal and customary fee. At the Trustee's discretion, the fee may be waived. All annual commissions shall be payable without the approval of any Court.

**K) Termination upon Death:** This Trust shall terminate upon the death of \_\_\_\_\_, and after all funeral and other expenses of the beneficiary are paid, the Trust principal and all accumulated income shall be **distributed to the issue of \_\_\_\_\_, or if there are no issue, to \_\_\_\_\_.**

**L) Partial Termination Prior to Death:** The Trust may be partially terminated prior to the death of the beneficiary under the following circumstances:

1) \_\_\_\_\_ is substantially gainfully employed for a continuous period of two years and,

2) HIS/HER attending physician certifies in writing that the disability no longer limits him/her from being substantially gainfully employed and,

3) The Trustee, in his sole discretion, determines that the facts warrant early termination.

The above factors "1" and "2" shall be considered conditions precedent and the Trustee may not partially terminate the Trust unless both conditions shall have been fulfilled. Nevertheless, the Trustee is not obligated to partially terminate the Trust if the conditions have been met; the Trustee is merely granted sole discretion in such case. The decision of the Trustee as to whether or not to terminate the Trust shall be final and binding upon \_\_\_\_\_.

If the Trustee chooses to exercise his discretion, said discretion shall be further limited as follows:

At the time the Trustee so elects, 10% of the then existing principal shall be distributed absolutely to the beneficiary. For each consecutive year of substantial gainful employment, an additional 10% of the original amount of principal may, at the Trustee's discretion, be distributed absolutely to the beneficiary. If there is a break in consecutive employment, this distribution test will be reinvoled and the requirements of paragraphs L 1) and 2) must be met anew. If there is no break in consecutive employment, in the last distribution year, the Trust shall terminate with the distribution of all accumulated income and principal to the beneficiary, as the purposes of the Trust will have been fulfilled.

**M) COORDINATION OF USE OF TRUST ASSETS WITH ASSETS HELD IN SPECIAL NEEDS TRUST ESTABLISHED PURSUANT TO COURT ORDER:** If assets remain in the Special Needs Trust for \_\_\_\_\_ established pursuant to Order of the Supreme Court, \_\_\_\_\_ County, the trustee of the testamentary trust created hereunder for the benefit of \_\_\_\_\_ shall, to the extent possible, use trust assets for the benefit of \_\_\_\_\_ after the assets in the court-ordered Supplemental Needs Trust have been exhausted or for goods and services that the trustee of the court-ordered Supplemental Needs Trust is not authorized to provide for the beneficiary.



### THIRD PARTY INTERVIVOS TRUST AGREEMENT

This TRUST AGREEMENT made this \_\_\_ day of \_\_\_\_\_, 2013, is established by and between GRANTOR, (**Someone without legal support obligation of beneficiary**) as Grantor and TRUSTEE, as Trustee. The Grantor currently resides at---. The Trustee currently resides at ---.***ISSUE: MAY A PARENT OF A MINOR CHILD WHO IS NOT APPLYING FOR MEDICAID BENEFITS SERVE AS GRANTOR? OR THE PARENT OF A MINOR CHILD APPLYING FOR WAIVERED SERVICES???***

#### TRUST PURPOSE

1.0 Trust Name: The Trust shall be known as the BENEFICIARY Special Needs Trust.

1.1 Purpose of Trust: The Beneficiary of the Trust is BENEFICIARY. 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 New York State EPTL § 7-1.12, and with any similar statute in any State in which the beneficiary is receiving Medicaid or other federal or State government entitlements.

1.2 Declaration of Irrevocability: The Trust shall be irrevocable and may not at any time be altered, amended or revoked.

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 BENEFICIARY, or any beneficiary for any reason whatsoever.

#### 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 Trustee shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of the Beneficiary, in-kind, or in cash, so much of the income and principal (even to the extent of the whole) as the Trustee deems advisable in the sole and absolute discretion of the Trustee. The Trustee shall add the balance of net income not paid or applied to the principal of the Trust.

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

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 and Shelter: 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 those distributions will impair or diminish the Beneficiary's receipt or eligibility for government benefits or assistance if the Trustee determines that the distributions will better meet the Beneficiary's needs, and it is in the Beneficiary's best interests, 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 Trustee actually exercises this discretion, the preceding paragraph (2.4) shall be null and void and the Trustee's authority to make these distributions shall terminate and the Trustee's 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 Trustee's consent, any person may, at anytime, 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 Trustee shall execute documents necessary to accept additional contributions to the trust and shall designate the additions on an amended Schedule A of this Trust.

2.7 Other Needs and Comforts: The Trustee has discretion to use income and/or principal to insure that the beneficiary enjoy the therapeutic benefits of education, vocational training, hobbies, vacations, modes of transportation, entertainment, and any other need and/or comforts the beneficiary may require to maximize the Beneficiary's life. This discretion shall include the use of income for needed medical care not paid for by private health insurance or government entitlements. This provision shall include the purchase of any equipment, treatment, computer, services or goods that would enhance the quality of life of the Beneficiary.

2.8 Employment of Professionals and Other Caregivers: The Trustee shall have discretion, if necessary, to use income and/or principal from the Trust to hire professionals to assist BENEFCIARY. It is contemplated that the class of professionals and other caregivers that may be needed to assist BENEFCIARY will be social workers, custodians, legal counsel, aides, housekeepers, accounting professionals, feeders, therapists and any medical professionals or personnel who would not otherwise accept or be paid for fully by government entitlements, vocational and rehabilitation workers, and investment counsel.

## **DISTRIBUTION UPON DEATH OF BENEFICIARY**

3.0 Disposition Of Trust On Death of Beneficiary: The Trust shall terminate upon the death of BENEFICIARY and all remaining accumulated income and principal shall be distributed to **individuals named by grantor (NO PAYBACK)**

**TRUSTEE**

4.0 Trustee: TRUSTEE shall serve as Trustee of this Trust. ---is appointed Successor Trustee if TRUSTEE is unable or unwilling to serve.

4.1 Bond: The named Trustees shall not be required to execute and file a bond. Any Trustee not named herein shall be required to execute and file a bond for the value of this Trust.

4.2 Resignation: A Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) the Beneficiary; (ii) the Guardian of the Beneficiary, if any; (iii) any Successor Trustee; (iv) the Grantor; and (v) the local Social Services agency.

4.3 Discharge and Final Accounting of Trustee: No Trustee shall be discharged and released from office and bond, except upon filing of a Final Accounting and delivering same to the Beneficiary, the Guardian of the Beneficiary, if any, the Grantor, and any Successor Trustee.

4.4 Annual Accounting: The Trustee shall file during the Grantor, the Beneficiary, the Guardian of the Beneficiary, if any, and if requested, with the local Social Services agency, an annual accounting of all expenditures made and income earned herein..

4.5 Powers of Trustee: In addition to any powers which may be conferred upon the Trustee under the law of the State of New York in effect during the life of this Trust, the Trustee 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 Trustee the broadest possible powers available for the management of the Trust assets.

4.6 Appointment of a Successor Trustee: The last Trustee serving hereunder may name a Successor Trustee.

4.7 Compensation of Trustee: A Trustee shall be entitled to such compensation as may be allowable under the laws of the State of New York. In addition, the Trustee shall be entitled to be reimbursed for reasonable expenses incurred by the Trustee in the administration of this Trust.

**5.0 MISCELLANEOUS PROVISIONS**

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 related to ro involve government entitlements such as SSI, Medicaid, and or other federal benefit programs.

5.2 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.

5.3 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.

5.4 Headings: Any headings 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.

5.5 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.

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