

Special Needs Trusts and Government Benefits:
What attorneys should know about special needs trusts and disability benefits.

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I. INTRODUCTION

Attorneys can come into contact with the area of special needs trusts in several contexts. A personal injury attorney may have a disabled client who needs to know if a special needs trust can preserve eligibility for government benefits. An estate planning attorney may have clients with a disabled child or family member who want to know whether a special needs trust should be incorporated into their estate plan. An attorney may advise trustees of special needs trusts who need know what should or should not be done in administering a special needs trust to protect the beneficiary's government benefits.

Financial planners and insurance sales people may have clients who want to use life insurance as a tool to provide for a disabled loved one. Without proper planning the life insurance may not provide the benefit the insured intended when the policy was purchased. Beneficiary designations for life insurance and qualified retirement plans need to be coordinated with special needs trust planning to preserve eligibility for government benefits.

“Special” or “supplemental” needs trusts are trusts designed to supplement government benefits such as Supplemental Security Income or Medicaid for disabled or elderly individuals. A special needs trust can be established with the disabled person's own assets or by a third

party for the benefit of a disabled person. A special needs trust can be an *inter vivos* trust or a trust established by through a will or other testamentary disposition.

A special needs trust is a way to shelter and preserve assets that would otherwise disqualify the trust beneficiary from government benefits that have a cap on assets. Special needs trusts are an important estate planning tool to enable elderly or disabled individuals to qualify for or preserve certain government medical or income benefits. A properly drafted trust can ensure that a beneficiary will be able to continue receiving government benefits and at the same time receive benefits from the trust. For some family members, the special needs trust provides peace of mind that a disabled loved one will be provided for even if the beneficiary never will needs to apply for needs based government benefits.

These materials will discuss which government benefit programs require a special needs trust, the drafting requirements for special needs trusts, and guidelines for trustees of a special needs trust.

II. NEEDS BASED GOVERNMENT BENEFIT PROGRAMS

To know when a special needs trust may be appropriate it is necessary to determine what benefits the beneficiary is currently receiving or may receive in the future. Some government benefit programs are limited to low-income individuals. These programs have a limit on the amount of assets or income an individual can have to qualify for benefits. Government benefit programs with a cap on assets or income are often referred to as “needs based” or “asset sensitive” programs.

The purpose of a special needs trust is to shelter assets that would otherwise disqualify the beneficiary from receiving benefits. The following is a brief summary of the most common needs based government programs:

A. SUPPLEMENTAL SECURITY INCOME (SSI)

The Supplemental Security Income or SSI program provides a guaranteed monthly income to low income disabled children and adults and non-disabled low income individuals over the age of 65. The Social Security Administration administers the SSI program. 42 U.S.C. §§ 1381-1383; 20 C.F.R. § 416. The Social Security Administration has a policy manual that is very helpful in reviewing and explaining the SSI eligibility rules. That manual website is <https://secure.ssa.gov/apps10/poms.nsf/chapterlist!openview&restricttocategory=05>

1. Disability Test

To qualify for SSI as a disabled person under the age of 65, the disability test is that the person cannot engage in any substantial gainful employment in the national economy for the next twelve months. Congress has added restrictions to this program for people whose primary

disability is substance or alcohol abuse. The disability standard for children is that the disability is sufficiently severe that they would not be able to work if the child were an adult. The disability regulations are at 20 C.F.R. § 416.901 *et seq.*

2. Income Test

The SSI recipient must have monthly income below the maximum benefit amount (for 2014, \$721). Certain income is disregarded in applying the income test: \$20 of unearned income per month and \$65 plus one half of earned income is disregarded. Income of custodial parents is usually counted as income to a disabled child under the age of 18. 20 C.F.R. § 416.1100 *et seq.*

3. Asset Test

Nonexempt assets must be less than \$2,000 for a single person and \$3,000 for a couple. Assets of custodial parents are usually counted as assets of a disabled child under the age of 18. The home, a vehicle of any value, a burial fund of \$1,500 and all household furnishings are exempt assets and disregarded in determining asset eligibility for SSI. 20 C.F.R. § 1201 *et seq.*

B. MEDICAID

Medicaid is a health benefit program for low income elderly and disabled individuals and recipients of Temporary Assistance for Needy Families (TANF) (formerly Aid to Families with Dependent Children or AFDC). The Department of Social and Health Services (DSHS) now referred to as the Washington Health Care Authority, administers the program at the state level. SSI and TANF recipients automatically receive Medicaid benefits. 42 U.S.C. § 1396 *et seq.*; 74.09 RCW. DSHS has an internal manual for its workers that have more detailed explanations of the eligibility rules. This manual is called EAZ and can be located at <http://www.dshs.wa.gov/manuals/eaz/>

Most of the asset rules for the SSI program apply to Medicaid for the disabled and elderly. The home, a vehicle with a market value of up to \$5,000, certain burial arrangements and household furnishings are exempt assets. In some cases there is no value limit for the vehicle. Nonexempt assets must be below \$2,000 for a single person or \$3,000 for a married couple. A married couple with one spouse applying for Medicaid benefits for long term care can have up to \$115,640 in nonexempt assets and there is no value limit on the car or household furnishings. The Medicaid income and assets rules are located at WAC 182.509 and WAC 182.512.

Medicaid includes coverage for hospital and doctor visits, durable medical equipment, prescription drugs, custodial nursing home care, attendant care in the home and care in assisted living facilities or adult family homes.

The Affordable Care Act (ACA) has expanded Medicaid coverage for many individuals. This Medicaid program has no asset limit. Eligibility is determined solely on household income

(Modified Adjusted Gross Income or MAGI). There is no disability or age requirement to qualify for expanded Medicaid under the ACA.

C. TEMPORARY ASSISTANCE TO NEEDY FAMILIES (TANF)

TANF is an income program for low income families with minor children. As with the SSI program, certain assets are exempt including the home, household furnishings and personal clothing, and a car with a market value under \$5,000. Additional non-exempt assets cannot exceed \$1,000. TANF is administered by the Department of Social and Health Services (WAC 388-216).

D. VETERANS DISABILITY PENSION

Low income disabled veterans who served in wartime may be eligible for a disability pension. Assets cannot exceed \$80,000. The home and one vehicle are exempt assets. The Veterans Administration administers the program. Other income offsets this benefit and the maximum income benefit for 2012 is \$12,652 per year. <http://benefits.va.gov/pension/index.asp>.

E. HOSPITALIZATION AT STATE MENTAL HOSPITAL

Traditional Medicaid does not cover psychiatric hospitalizations for people over 21 and under age 65. Some individuals who have income below 138% of adjusted gross income, are under the age of 65 and do not have Medicare insurance, may be eligible for expanded Medicaid under the ACA that includes coverage for psychiatric hospitalizations.

Medicare only covers a maximum of 180 lifetime days of psychiatric hospitalization. For people who are hospitalized at Eastern or Western State Hospital, and who do not have Medicare, Medicaid or private health insurance that will cover the hospitalization, the state of Washington will determine how much the patient must contribute towards the cost of care. All assets of the patient are factored into the calculation of what the patient must pay. There is no provision for sheltering excess assets of the resident in a special needs trust to qualify for the state funded psychiatric hospitalization program (WAC 388-855-010).

F. PROGRAMS THAT ARE NOT NEEDS BASED

All of the above programs have a limit on assets in order to qualify for benefits. Some government benefits are not needs based, meaning there is no limit on the amount of assets owned by the beneficiary. In that case the receipt of an inheritance, personal injury settlement or other lump sum will not disqualify the individual from receiving benefits. The following is a list of the most common benefits that are *not* needs based:

- Social security disability income (SSDI)
- Childhood Disability Benefits (CDB)
- Social security survivors benefits

- Social security retirement benefits
- Medicare
- Veterans Compensation benefits (as opposed to Veterans Pension benefits)
- Unemployment Compensation
- Labor and Industries benefits for workers or their dependents

G. WHEN IS A SPECIAL NEEDS TRUST APPROPRIATE

If an individual is receiving or anticipating the future need for any of the government benefits described in Section II. A through E above, receiving assets outright through a gift, inheritance or personal injury settlement may result in the loss of those benefits because of the asset limits in those programs. Medical expenses are often high for many disabled individuals and they cannot obtain or afford private medical insurance. Even though some disability income benefits are low it may be a significant part of a disabled person's safety net to meet basic needs. As a result, it is often an important goal for family members to provide testamentary or life time bequests to elderly and disabled individuals while still preserving their government benefits. Individuals who become disabled but already own assets above the program limit may want to shelter those assets in a Grantor or self settled special needs trust in order to qualify for SSI and/or Medicaid benefits.

Parents and others establishing a special needs trust may be as concerned about protecting a vulnerable beneficiary as they are about preserving eligibility for needs based government benefits. The special needs trust can accomplish both goals by designating a trustee to oversee and manage trust assets.

The following two sections review the elements of two types of special needs trusts: a trust established and funded by a third party and a special needs trust funded with assets owned by the disabled person. In some ways the trusts are very similar but in other ways there are critical distinctions that must be taken into account.

III. SPECIAL NEEDS TRUST ESTABLISHED BY THIRD PARTY

The requirements for a special needs trust vary substantially depending upon whether the grantor is a third party or is the trust beneficiary and recipient of government benefits. This section discusses the requirements for a special needs trust where the grantor is **not** the trust beneficiary.

A. EXAMPLES

Typical examples of a third party special needs trust are:

- Parents who want to set up a trust in their wills for their autistic minor child. When the child turns 18 she probably will be eligible for SSI and Medicaid

benefits. At the parents' deaths their testamentary bequest to a special needs trust for their daughter will not disqualify her from receiving SSI and Medicaid if needed by the daughter.

- Parents have a son with schizophrenia who is periodically hospitalized at Eastern State Hospital. The assets they leave in a special needs trust for their son will not disqualify their son from receiving state funded psychiatric hospital care while he is under the age of 65 or receiving Medicaid assistance to pay for the psychiatric care after the age of 64.
- An elderly couple in poor health who each want to provide for the surviving spouse. It is likely the surviving spouse will need nursing home care. Each spouse leaves their estate to a special needs trust for the surviving spouse. When the surviving spouse's half of the estate has been spent down to \$2,000 he or she would be eligible for Medicaid benefits to pay for the nursing home care. The testamentary special needs trust established by the deceased spouse will not be considered an available asset. The trust can be used to pay for additional care not covered by Medicaid.
- An elderly woman would like to leave a testamentary bequest of \$20,000 to her brother who is in a nursing home where Medicaid pays for his care. By leaving the bequest to her brother in a special needs trust, the brother's benefits will continue uninterrupted. The trust can be used to pay for a private room at the nursing home and pay for a companion to come to the home to read to her brother.

An outright gift may be counterproductive if a family member or friend wants to provide for an elderly or disabled individual who is receiving needs based benefits with an asset cap. If a testamentary or *inter vivos* gift is made to a properly drafted special needs trust, the trust corpus will not be considered an available asset to the trust beneficiary.

While the trust corpus may not be considered an available *asset*, distributions from the trust may be considered *income* to the beneficiary in the month the distribution is made. This may temporarily reduce government benefits in the month of distribution only. See Section VI. below for a further discussion regarding this issue.

B. REQUIREMENTS FOR A THIRD PARTY SPECIAL NEEDS TRUST

The following are the essential requirements of a third party special needs trust:

- Trust distributions must be discretionary with the *trustee*.
- The trust should not be a general health support and maintenance trust. A mandatory support trust would be an available asset in determining eligibility for

government benefits. A marital or credit shelter trust can be drafted as a special needs trust so that the trust corpus will not be considered as an available asset but any mandatory income distributions will be included with other income of the beneficiary as part of the beneficiary's income co-payment towards the cost of care.

- The beneficiary cannot have control over the administration of the trust. The beneficiary should not have the power to remove or nominate the trustee, terminate the trust or control distributions of income or principal.

C. DRAFTING TIPS

To make it clear that the trust is not a general support trust, there should be language in the trust that the intent of the Trustor is to direct the trustee to supplement but not replace government benefits. **It is not necessary, however, to prohibit the trustee from making any distribution that will reduce or eliminate government benefits.** It is preferable to give the trustee discretion to determine if a distribution from the trust is appropriate even if it will reduce government benefits temporarily. It is also possible that it will be in the best interest of the beneficiary to forego governments at some times and have the trust replace the government benefits. Many third party special needs trusts are drafted with language that is unnecessarily restrictive and harsh in the amount of discretion given to the trustee in how trust assets should be used to benefit the beneficiary.

The following is a common but unnecessarily restrictive way to draft the supplement needs language:

The trustee shall not under any circumstances make any distributions to my daughter that will reduce or eliminate any government benefits she is receiving or may receive in the future. Under no circumstances shall the trustee pay for food, clothing or shelter from the trust estate.

The beneficiary of the above trust is Susan, a 30-year-old brain injured adult who receives SSI and Medicaid benefits. The trust was established for Susan in her father's Will. Susan has just been evicted and the trustee would like to help her with the expenses to move into a new apartment.

As drafted, the trustee would not be able to pay Susan's first and last months rent to enable her to move into a new apartment. Under the SSI rules, such a payment would reduce her SSI benefit dollar for dollar in the one month the payment was made. If the payment was made directly to the landlord, the payment of shelter would result in a reduction of approximately 1/3 of Susan's SSI benefit amount.

If the trust had been drafted as follows, the trustee would have had the discretion to make the one time payment, even though it would result in loss of the SSI and Medicaid benefits in the one month the rent payment is made:

*The **primary** purpose of the Trust is to provide for Susan's special needs resulting from her disabilities. If Susan is receiving government benefits based upon need or disability, from any local, state, or federal government program, the trustee shall **have discretion** to supplement those government benefits. No disbursement shall be made for Susan that would **permanently** jeopardize eligibility for, or **inappropriately** limit the type of assistance available to her, **if she is receiving or intends to apply for local, state or federal benefit programs**. If Susan is not receiving government benefits based upon need or disability, the Trustee shall have the absolute and sole discretion to determine what disbursements shall be made from the trust estate for Susan's benefit.*

This language gives the trustee discretion to make distributions that would reduce or eliminate government benefits. This language also leaves open the option that the restriction on supplementing government benefits only applies *if the beneficiary is actually receiving government benefits*.

By not prohibiting payment for food clothing and shelter from trust assets, the trustee can exercise discretion to pay Susan's first and last month's rent. As explained below, payment of food or shelter from a special needs trust does not disqualify a person from SSI. At most it will reduce the SSI benefit amount by 1/3 plus \$20 or approximately \$260 per month. Payment from a trust for food and shelter will have no adverse impact on Medicaid benefits.

If Susan's trust has two million dollars in assets, the trustee would have the option of deciding that Susan would be better served by terminating her SSI benefit of \$721 a month and her Medicaid coverage and using trust funds to pay her a higher monthly stipend from the trust and pay for private health insurance.

If the trustee in the future decided to stop the income payments to Susan, she would again be eligible to reapply for the SSI and Medicaid coverage. Unnecessarily restrictive language can result in forcing the beneficiary to stay on government benefits without taking into account whether it is in the best interests of the beneficiary to do so.

Additional language may be helpful to give guidance to the trustee and avoid the bleak impression that all that matters is preserving every possible government benefit when the parents' primary concern is probably the quality of life their child will have after their deaths:

In making discretionary distributions for my child, the trustee shall

strive to provide Tommy with the same lifestyle I was able to provide for for him during my lifetime. The trustee shall exercise discretion to provide Tommy with the highest quality residential care and medical care that is financially feasible, taking into account Tommy's life expectancy and the size of the trust estate.

D. WILLS FOR ELDERLY COUPLES

If an elderly widow or widower needs nursing home care, his or her assets must be below \$2,000 before he or she can qualify for Medicaid benefits to help pay for that very expensive level of care. If the surviving spouse received all of the deceased spouse's assets through a typical "I Love You" Will or community property agreement, the surviving spouse will need to spend down the entire estate to \$2,000 before he or she would be eligible for Medicaid assistance. While there are options under the Medicaid program to reduce assets by gifting, that is a gradual process and it may result in up to a five-year wait before the surviving spouse could be eligible for Medicaid benefits.

If the couple had wills that left their estate to the surviving spouse in a special needs trust, and if the surviving spouse was not the trustee of this testamentary trust, one half of the assets would be immediately protected if the surviving spouse needed nursing home care. It is not a complete solution to the surviving spouse's Medicaid eligibility but it is a very simple way to protect at least half of the couple's assets.

PRACTICE TIPS: The option for a married couple to shelter the assets of the first spouse to die in a special needs trust is only available when the special needs trust is established by the spouse in a **will** but not if the special needs trust is established in a **revocable living trust**. The Medicaid rules treat a disclaimer as a gift, which would create a period of ineligibility for Medicaid. Therefore, it is not helpful to set up the spousal special needs trust as an option that requires the spouse to first disclaim their share. It is critical that any prior community property agreement transferring assets outright to the surviving spouse be revoked prior to the first spouse's death. Retirement benefit beneficiary designations should be revised to name the spouse's special needs trust as the beneficiary and life insurance beneficiary designations should be the estate of the insured or someone other than the spouse.

E. CONTINGENT OR SPRINGING SPECIAL NEEDS TRUST

In many cases the need for government benefits is not known at the time a Will is drafted. A will can include a provision that if any beneficiary is disabled at the death of the testator, that beneficiary's share shall be paid to a special needs trust. This allows for the contingency that a beneficiary may be in good health when the will was drafted but could become disabled by the time the testator dies. Similarly, a trust intended to terminate at a specified age can include a provision that the trust will be converted to a special needs trust if the beneficiary needs government benefits before the termination date of the trust.

F. CREDIT SHELTER AND QTIP SPECIAL NEEDS TRUST FOR SURVIVING SPOUSE.

For married couples with potentially taxable estates, the federal estate tax exemption equivalent amount can be held in a special needs trust that serves the added function of a credit shelter trust.

The surviving spouse should not be the trustee. While the mandatory distribution of income from the QTIP trust will usually have to be paid toward the cost of long-term care, the principal can be preserved as long as distribution authority is limited by special needs trust standards.

G. *INTER VIVOS* THIRD PARTY SPECIAL NEEDS TRUSTS

There are reasons why an *inter vivos* special needs trust may be preferable to a trust incorporated in a Will. It sometimes is easier to get a financial institution to name a trust as the beneficiary of a deferred income retirement account if the trust is already in existence and has a tax ID number. Some parents like the idea of funding the trust on a regular basis as part of a savings plan (although not for annual exclusion gifts as discussed below). If other family members want to provide in their estate plans for a disabled individual it often is easier to just reference an existing *inter vivos* trust.

A third party *inter vivos* special needs trust can be revocable until the trustor's death if the trustor is not planning to fund the trust with annual exclusion gifts. If other family members are planning to make testamentary bequests to the trust it may be preferable to make the trust irrevocable.

The trustor must be careful if he or she wants to make annual exclusion gifts to an *inter vivos* special needs trust for the benefit of a disabled or elderly person who receives needs based benefits. The necessary Crummy withdrawal powers will arguably make the amount subject to a withdrawal an available asset, thus disqualifying the beneficiary from needs based government benefits. In the month the withdrawal power is given to the trust beneficiary, the amount deposited into the trust is treated as "income" for SSI and Medicaid purposes, disqualifying the beneficiary from receiving benefits in that month. While the IRS may permit a residual beneficiary to receive withdrawal powers, the very existence of withdrawal powers in the special needs trust may cause the Social Security Administration or the Department of Social and Health Services to treat the trust as a countable resource.

Because of the problems with funding a special needs trust with annual exclusion gifts, an ILIT that purchases life insurance with annual exclusion gifts is risky when the trust is intended to also serve as a special needs trust for a beneficiary. It would be better to name other non-disabled family members as beneficiaries of the ILIT and fund the special needs trust with probate assets or other assets not purchased with annual exclusion gifts.

H. SPECIAL NEEDS TRUST AS BENEFICIARY OF RETIREMENT PLANS

If the trustor intends to fund the special needs trust with deferred income retirement plan benefits, it is important that the named beneficiary of the Plan be the beneficiary's special needs trust, not the individual directly. If the contingent beneficiary of the trust is a charity, it may accelerate the withdrawals over a five year period, not the lifetime of the beneficiary.

If a person needing to preserve eligibility for needs based government benefits receives tax deferred retirement benefits through outright beneficiary designation, the IRS has ruled in a private letter ruling that the IRA may be transferred to a first party special needs trust and held as an IRA within the trust. PLR 200620025 (2/21/2006).

I. SPECIAL NEEDS TRUST AS INCOME BENEFICIARY OF A CRAT OR CRUT

Rev. Rul. 2002-20, 2002-17 I.R.B. 704 provides that required income distributions from a Charitable Remainder Annuity Trust or a Charitable Remainder Unitrust can be made to a special needs trust for the income beneficiary. The special needs trust can give the trustee authority to make distributions that will supplement, but not supplant, government benefits. The special needs trust may also provide for a Medicaid payback provision upon the death of the beneficiary, which would be necessary if the CRUT or CRAT grantor was also the income beneficiary. However, the special needs trust must either provide that any residual upon the death of the income beneficiary be paid to the estate of the income beneficiary (which could result in a Medicaid lien), or that the income beneficiary at least be given a testamentary general power of appointment.

J. INCOME TAX CONSIDERATIONS

A special needs trust will be subject to trust income rules in the Internal Revenue Code §§ 641-692. Any undistributed income will be taxed at the higher compressed tax rate. When a special needs trust is the beneficiary of a Retirement Plan any undistributed minimum mandatory distributions will be taxed at the higher trust rate also. Unlike beneficiaries of other types of trusts, beneficiaries of a special needs trust need to consider the impact on benefits if income is distributed out to the disabled person just to avoid trapping the income at the trust tax level. Cash distributions outright to a beneficiary may result in losing both SSI and Medicaid benefits. Purchasing goods and services directly from a provider or purchasing exempt assets may protect eligibility for benefits and minimize trust income taxes. In some tax years, there may not be sufficient purchasing opportunities from the trust estate to distribute out the net trust income by making purchases for the beneficiary's benefit.

K. WHAT IF THE BENEFICIARY MOVES TO ANOTHER STATE

The SSI and Medicaid programs are federal so eligibility rules are relatively consistent in other states. There are some variations in the Medicaid program for each state and both programs typically defer to state law regarding the validity of a trust. Any third party trust should include a provision giving the trustee power to amend the trust to be sure it meets the trustor's intent

to protect eligibility for government benefits and to meet any state law requirements if the beneficiary moves to another state.

The trustor needs to decide if situs should remain in Washington State or give the trustee authority to change the situs to another state if appropriate.

L. POWER TO REMOVE TRUSTEE

Because most special needs trusts will last for the beneficiary's lifetime, the trustor may have concerns about the suitability of the nominated trustee over a long time period. The trust can include a provision to name a person who has the power to remove and substitute trustees in the future. Typically the person designated to remove/replace a trustee has the power to substitute trustees without proving good cause or cause is defined to include issues such as incompatibility or excessive fees. The trustor needs to decide if the person given the authority to remove/replace a trustee should be given the power to substitute himself or herself as the successor trustee.

IV. SPECIAL NEEDS TRUST ESTABLISHED BY DISABLED PERSON

A. SSI AND MEDICAID GRANTOR SPECIAL NEEDS TRUSTS

Under certain circumstances a disabled person may transfer his or her own assets into a special needs trust to preserve eligibility for SSI and Medicaid benefits. **SSI and Medicaid are the only two programs that provide the option of allowing a disabled person to shelter assets with a special needs trust.** There is no comparable provision for recipients of other needs based programs such as TANF, Veterans disability pension benefits or state mental hospital treatment to transfer their own assets into a special needs trust to stay within the benefit program asset cap.

The trust rules for the SSI and Medicaid program provide for two important protections to preserve eligibility for benefits:

- There is no transfer penalty or period of ineligibility for government benefits created by transferring assets into the trust.
- The assets in the trust are not considered available to the recipient of the government benefits, thereby pushing the recipient above the asset limit.

The Medicaid trust rules are at 42 U.S.C. § 1396p(d)(4)(A); WAC 182-516-0100. The SSI trust rule is at 42 U.S.C. § 1382b(e). The Social Security Administration has not adopted C.F.R. rules for trusts but their POMS manual, SI 01120.200 contains many of the program's requirements for special needs trusts.

The trust rules discussed in this section apply to trusts established *after August 10, 1993*. For trusts established prior to that date, the requirements listed in Section C through F below do not apply. The requirements that the trust be irrevocable, that the grantor not have discretion to mandate distributions, that the trust not be a general support trust and the grantor not be the trustee or be able to select the trustee would still apply to grantor/beneficiary special needs trusts established before August 11, 1993.

B. EXAMPLES

Typical circumstances where a person with disabilities may need to transfer assets into a special needs trust to qualify for Medicaid or SSI:

- The person receives a settlement in a personal injury action.
- The person receives an outright inheritance (the deceased person failed to heed the advice discussed in section III above and did not create a testamentary special needs trust). If the testator has already died, it is too late to amend the will under TEDRA to avoid the outright distribution to the disabled person. The Court of Appeals decision in *Testamentary Trusts of Riddell*, 138 Wn. App. 485 (Div. 2, May 8, 2007) said TEDRA could be used to revise a Will to establish a special needs trust but did not address the issue of whether the revised trust must be a grantor trust that includes the requirements of 42 U.S.C. § 1396p(d)(4)(A).
- The person becomes disabled and wants to start receiving Medicaid or SSI benefits but has assets that exceed the \$2,000 asset cap.

C. AGE REQUIREMENT

The option of an SSI/Medicaid recipient transferring his or her own assets to a special needs trust without any period of ineligibility for benefits is generally only available to people who are under the age of 65 when the trust is established.

There is an option for an SSI/Medicaid recipient over 65 to transfer assets into a pooled trust, managed by a nonprofit organization under 42 U.S.C. § 1396p(d)(4)(C) but the transfer into the trust will cause a period of disqualification for SSI and Medicaid benefits under the Medicaid and SSI transfer of asset rules.

D. ENTITY/INDIVIDUAL WHO “ESTABLISHES” THE TRUST

The trust must be established by a *parent, grandparent, guardian* or the *court* even though the disabled person is the grantor. In the past year the Social Security Administration has rejected special needs trust on the basis that it was not clear who established the trust. In the case of a

court established trust, the court order should state explicitly that the Court requires the establishment of the trust. If the order states that the court “approves” or “declares” the trust, the Social Security Administration may reject the trust. The trust beneficiary should not be the party petitioning the court to establish the trust.

In some states a trust is not valid until it is funded. Therefore, for a parent-established trust or grandparent-established trust, it is recommended that the parent/grandparent establish the trust and then deposit an initial nominal amount into the trust. After the nominal funding by the parent, the disabled grantor can provide the primary funding into the trust with the personal injury settlement, inheritance, etc.

E. MEDICAID REIMBURSEMENT

The trust must provide that, at the earlier of, the end of the disability, the termination of the trust or the death of the beneficiary, Medicaid must be reimbursed for all Medicaid benefits paid during the beneficiary’s lifetime. Unlike the Medicaid lien rules that only apply to Medicaid benefits paid after the age of 55, this reimbursement obligation will apply to all Medicaid benefits paid during the entire lifetime of the beneficiary. There is no comparable repayment provision for SSI benefits paid to the beneficiary.

Federal law does not permit this repayment requirement to be conditioned upon the Medicaid agency submitting a timely creditor’s claim to the trustee. If a structured settlement is funding all or a portion of the special needs trust the structure should not name an individual as the residual beneficiary unless it is subject to the State of Washington’s claim. In many states the State Medicaid agency requires that the Medicaid agency be named as the residual beneficiary to guarantee enforcement of this reimbursement right.

F. SOLE BENEFIT OF DISABLED PERSON

To avoid a Medicaid transfer of asset penalty, the trust must be for the sole benefit of the Medicaid recipient. DSHS no longer requires that the trust terminate by the recipient’s actuarial life expectancy. Because of this “sole benefit” requirement, gifts should not be made from the trust to third parties. The Social Security Administration has rejected some trusts where the document includes a list of disbursement options that the Administration has concluded are not for the sole benefit of the beneficiary.

G. IRREVOCABLE

The trust must be irrevocable. SSI defers to state law on the issue of whether a grantor/beneficiary trust can be irrevocable. In Washington, the case of *Lucas v. Velikanje*, 2 Wn.App. 888 (Div. III 1970), held that the only way a trust, created by the trust beneficiary, can be irrevocable is to have a specifically named residual beneficiary. The Social Security Administration is currently taking the position that under Washington law a grantor trust can be irrevocable since Washington revoked the Doctrine of Worthier Title.

H. OTHER REQUIREMENTS FOR A GRANTOR SPECIAL NEEDS TRUST

As with third party special needs trusts, the beneficiary cannot be the trustee or have the power to remove the trustee. The trustee should have the sole discretion to determine what disbursements are appropriate. The trustee should be directed to supplement government benefits if appropriate but, again, the trust language should not be overly restrictive as to what disbursements are allowed or mandate that the beneficiary remain eligible for benefits.

I. INCOME TAXATION OF SELF SETTLED SPECIAL NEEDS TRUSTS

Most self-settled special needs trusts will be considered Grantor trusts for purposes of income taxation. The fact that trust income is reported on the grantor's income tax return with a K-1 form should not affect how the government agency views the disabled person's income for purposes of eligibility. The SSI and Medicaid programs takes a simplistic view that "income" to the disabled person is money paid directly to him or her, not income reported on the beneficiary's income tax return but not directly accessible by the beneficiary.

The IRC at §§ 673-677 sets forth many circumstances where a trust will be considered a grantor trust. Most of the retained powers to retain grantor trust status conflict with the Medicaid/SSI requirements for a special needs trust. One of the retained powers in the Code, the power to reacquire trust property on substitution of other property of equivalent value, would not conflict with the Medicaid/SSI special needs trust requirements. IRC § 675(4)(C). If the trustee is not an adverse party to the grantor, e.g. is not a residual beneficiary, giving the trustee authority to control beneficial enjoyment of trust income or principal should result in grantor trust status. IRC §§ 674, 676 and 677.

J. GIFT TAXES

Because the trust must be irrevocable there is a risk that a taxable gift was made at the time the trust was established. This is an important consideration to the extent the trust estate is likely to exceed the applicable federal credit. A gift tax would be due and payable to the extent the value of the property exceeded the applicable unified credit. IRC § 2702. At the grantor's death the value of the trust assets at the time of death are included in the grantor's estate because of the retained right to possession and enjoyment of the trust estate. IRC § 2036. There would not be double taxation on these assets however because the federal estate tax return only requires that taxable gifts be added to the value of the estate to the extent the gifts are not otherwise includable in the decedent's estate.

Funding the trust will not be treated as a completed gift if the grantor reserves a testamentary power of appointment to change the interests of the remainder beneficiaries. This would make the gift incomplete at the time the trust was formed. Reg. § 25.2511-2(c) provides in part:

A gift is also incomplete if and to the extent a reserved power gives the

donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard.

The other possible retained powers to avoid gift treatment would create problems with the requirements in the SSI and Medicaid rule that the grantor not have control over the trust estate during his or her life expectancy.

K. TRANSFERRING EXISTING IRA TO SPECIAL NEEDS TRUST

Until recently it has been problematic to transfer an IRA to a self settled special needs trust. The traditional wisdom was that the IRA must be cashed in, deferred income taxes paid, and the net remainder then paid into the trust. In a Private Letter Ruling issued on May 22, 2006, PLR 200620025, the Service held in a factually similar case that an IRA transferred to a grantor special needs trust was not a taxable transfer. That case involved a special needs trust established under the same Medicaid statute discussed in this section.

The reasoning in the PLR should also apply not just to an inherited IRA but an IRA in the name of a disabled person who needs to qualify for Medicaid benefits, but there is not yet a published PLR on that fact pattern.

V. POOLED SPECIAL NEEDS TRUSTS

A. REQUIREMENTS FOR POOLED TRUST

In addition to the (d)(4)(A) special needs trust discussed above, another option for sheltering assets is a pooled special needs trust or (d)(4)(C) trust. The trust must meet the following requirements:

1. The trust must be established by a non-profit association.
2. The trust must have separate accounts maintained for each beneficiary but for purposes of management and investment of funds the trust pools the accounts.
3. The trust must have accounts established solely for the benefit of disabled individuals by a parent, grandparent, legal guardian, the court *or the disabled individual*. Unlike the (d)(4)(A) special needs trust, a competent adult can open up their own pooled trust account without court authorization or authorization from a parent or grandparent.
4. The accounts must provide that any funds remaining at the death of the beneficiary can remain with the nonprofit association or go to reimbursement

Medicaid for the beneficiary's lifetime Medicaid benefits and any remainder than paid to the beneficiary's designated beneficiaries.

There is no age limit for opening an account in a pooled trust (the beneficiary can be over age 64). If the beneficiary is over age 64 there is a transfer of asset penalty for funding the trust. For every \$721 of money transferred to the pooled trust there is one month loss of SSI benefits but with a cap of 36 months. For every \$7,994 of transferred to the pooled trust there is a loss of one month of institutional Medicaid benefits, but with a cap of 60 months. For a penalty period of less than 5 years, the penalty period does not begin to run until the beneficiary is otherwise eligible for Medicaid.

B. EXAMPLES OF POOLED SPECIAL NEEDS TRUSTS

1. Lifetime Opportunities Trust (LOT)

The Division of Developmental Disabilities of the Department of Social and Health Services has established a pooled (D(4)(C) pooled trust for people eligible for services with that Division. The trust is administered by the ARC of Washington. <http://www.ddlot.org/>.

2. Lifetime Advocacy Plus

This nonprofit organization operates a pooled trust for disabled individuals. Their contact number is 206-367-8055.

VI. COURT RULE 98.16W

In some cases, a grantor/beneficiary special needs trust discussed in Section IV. above will be established under Washington Court Rule 98.16W. This rule applies to the settlement of claims of a minor or an incapacitated adult. A disabled adult who is mentally competent should not be affected by the requirements of this court rule.

If a trust is being set up in a case which comes under the court rule, there are requirements for the special needs trust that are in addition to the requirements imposed by the SSI and Medicaid programs. Those requirements include the following:

1. The court must approve the trust, the selection of trustee, and any successor trustee;
2. There will be ongoing court supervision of the trust. The court typically requires periodic accountings prepared by the trustee.
3. No family member or potential residual beneficiary of the trust may serve as the sole trustee;

4. The court will determine if the trustee must post a trustee bond and block accounts above the bonded amount;
5. If a family member or potential residual beneficiary is co-trustee, he or she shall not *“exercise discretionary authority over individual expenditures from the trust that would bring direct or indirect benefit to that individual.”*

The requirements of CR 98.16W apply to trusts established prior to and after August 11, 1993.

In order to track annual accountings, the trust and annual accountings should be filed in a cause of action with a probate tracking number (year-4-). In some cases the settlement under the court rule has already been filed under a probate tracking number or there may be an existing guardianship action. In that case future accountings can probably be filed in the same matter without a new cause of action. If the only cause of action is the civil personal injury action (year-2-), the trust will need to be filed as a new probate matter and annual accountings filed in that new cause of action.

In the case of *Mark Anthony Fowler Special Needs Trust*, 160 Wn.App. 1001 (2011) the court reversed a probate court ruling that the trustee reallocate investments. The probate court’s power to review and approve annual accountings does not give it authority to order the trustee to reallocate investments where the trustee did not breach any fiduciary duties.

In the case of *Anderson v. Dussault, et al.*, 177 Wn.App. 79 (2013) the appellate court held that a beneficiary of a court supervised special needs trust could not raise objections to court approved annual accountings several years after the accountings were approved. This case is now on appeal to the State Supreme Court.

VII. TRUST EXPENDITURES AND TRUSTEE DUTIES

There are responsibilities in serving as trustee of a special needs trust that go beyond the fiduciary obligations applicable to all trustees. If the trustee makes a mistake that causes the beneficiary to lose government benefits the government agency will probably assess an overpayment and demand repayment of benefits paid in the past.

A. DETERMINE AND CONFIRM GOVERNMENT BENEFITS

In order to properly administer a special needs trust the trustee should confirm at least annually what government benefits are being paid to the beneficiary and if so, how that affects disbursements from the trust. It is easy to confuse Medicare and Medicaid or SSI and SSDI. The trustee should review the Department of Social and Health Services award letters for Medicaid and the Social Security Administration notices for income benefits to be sure what benefits are being received by the beneficiary.

B. NOTIFYING GOVERNMENT AGENCY

If a recipient of government benefits is the beneficiary of a special needs trust, the applicable government agency should be notified regardless of whether the trust is established by a third party or the disabled individual. The agency will probably request a copy of the trust. The Social Security Administration administers the SSI program and the Health Care Authority (HCA) and Department of Social and Health Services (DSHS) administer Medicaid, TANF programs and state funded care at the state mental hospitals. The notification should make it clear whether a third party or the person receiving government benefits funded the trust.

If a recipient of TANF is the beneficiary of a third party trust, the recipient must ask the trustee to make the trust estate available. If the trustee refuses, the trust will not be an available asset. A statement from the trustee to that effect should be included when notifying DSHS of the trust.

In the case where a disabled person received an inheritance or settlement and is placing the proceeds in a special needs trust, there may be one month of ineligibility for SSI - the month the trust was funded. Even though the funds were paid directly into a special needs trust, the inheritance or settlement is "income" to the recipient in the month received, under the SSI rules, and the amount of "income" disqualifies the recipient from SSI for that one month. This issue does not arise in the case where a third party establishes a special needs trust for the SSI recipient.

To be sure relevant government agencies are notified of a special needs trust the trustee should either take responsibility for this or confirm that another party provided the notification. The trustee should also advise the government agency if the trustee intends to make distributions that will reduce or terminate government benefits on a temporary or permanent basis. (See discussion in Section C below.)

The Social Security Administration and DSHS will occasionally request that the trustee submit an accounting to review disbursements and whether the disbursements should have reduced or terminated the benefits.

C. TRUST DISBURSEMENTS

A properly drafted special needs trust will mean the trust estate will not be counted as an available *resource*. Depending upon how and what disbursements are made from the trustee to the beneficiary, benefits may be reduced or terminated if the disbursement is treated as *income* to the beneficiary. If a trustee is unfamiliar with government benefit rules the trustee would be well advised to periodically consult with a government benefits specialist to confirm whether disbursements will affect benefits.

1. Cash: Cash payments from the trustee to the beneficiary will reduce needs based government income benefits dollar for dollar. Benefits will be reduced in the month the cash is received. The cash may also result in Medicaid not covering some medical bills up to the dollar value of the distribution.
2. Food and shelter: If the trustee pays a third party directly for food or shelter, the payment is treated as in-kind support and maintenance and SSI benefits will be reduced by one-third plus \$20 (approximately \$260 in 2014). The one-third reduction is the same whether the trustee supplies food *and* shelter or just one of the two. Supplied food or shelter from the trust may be beneficial in some cases since the SSI recipient can receive several hundred dollars of value in in-kind distributions and only lose \$260 of income. Medicaid benefits are *not* reduced if the trustee supplies food, clothing or shelter. Supplied shelter, food and clothing will reduce TANF benefits dollar for dollar.
3. Purchasing exempt assets: If the trust purchases an exempt asset such as a house, vehicle or a handicapped modified van, clothing or household furnishings, the purchase will not reduce or terminate government benefits for SSI, Medicaid or TANF. A vehicle of any value is exempt under the SSI rules; for Medicaid not connected to SSI and TANF, the equity value of the vehicle cannot exceed \$5,000. Whether the trust or the individual should own the exempt asset is a practical decision not an eligibility decision. If the trust owns a vehicle, it may be difficult to obtain car insurance. If the trust owns a residence, the property tax reduction for disabled and elderly homeowners is not available.
4. Medical treatment or services not covered by Medicaid: The trustee can pay for services not covered by Medicaid. This could include paying for a private room in a nursing home where the basic care is covered by Medicaid; paying for a more state-of-the-art wheelchair than the basic wheelchair covered by Medicaid; paying for additional psychiatric visits beyond the number authorized by Medicaid; paying for treatment that Medicaid refuses to cover on the basis that it is “experimental” or paying for alternative medical treatment not covered by Medicaid such as acupuncture, massage therapy or vitamin/food supplements.
5. Travel/entertainment/hobbies: As long as the trustee pays the provider of services directly for travel, entertainment, hobbies, etc., the disbursement would not be treated as income to the recipient.
6. Training and education: As long as the trustee pays the educational or training facility directly for services, the disbursement would not be treated as income to the recipient.
7. Payment of bills or obligations: The trustee can pay bills of an SSI recipient directly to the creditor including car insurance, tax liabilities, etc. with the caveat that if the

bill is for food, clothing or shelter for an SSI recipient the payment should result in a one third reduction in the SSI benefit amount. If the trustee pays a credit card bill of the beneficiary that includes cash withdrawals that has the same affect on SSI and Medicaid as paying cash directly to the beneficiary.

8. Non-essential utilities: The trustee can pay for phone service, phone cards, cell phones, cable, or internet connections. Payment for essential utilities such as heat and electricity are “shelter expenses” that can result in a one-third reduction in the SSI benefit amount.
9. Loans: If the trustee makes a bona fide loan to an SSI, Medicaid or TANF recipient the loan is not treated as income. The trustee should have a written repayment agreement if the trust is going to loan cash to the beneficiary.
10. Car related expenses: The trustee can pay for car insurance, car repairs and gas credit cars in the name of the beneficiary.
11. Reimbursement: If the beneficiary pays out of pocket for an expense and then requests reimbursement from the trust, the Medicaid and SSI programs treat the reimbursement as the equivalent of paying cash directly to the beneficiary.
12. Payments that Benefit a Third Party: If the trust is a grantor, first party trust, the Social Security Administration is starting to scrutinize closely payments that may primarily benefit a third party, not the SSI recipient/beneficiary. Payments to family caregivers and payment of family members to travel to visit the beneficiary have been challenged in some regions as “not for the sole benefit” of the beneficiary.
13. Gift Cards: Because cash given to the beneficiary is income that reduces SSI and Medicaid benefits, in many cases gift cards can be used as a substitute for cash so the beneficiary can make purchases without shopping with the trustee. If the gift card is for a store that sells food, that will be treated as in-kind support and result in a one third reduction in the SSI benefit amount for that month.
14. Paying Credit Card Bills. If the trustee is going to pay a credit card bill for a beneficiary it is important to determine if there are any cash withdrawals on the credit card. In that case, paying the credit card bill is equivalent to giving the trustee cash. If the credit card bill includes food or shelter expenses, paying the bill may result in the SSI program treating the paying as in-kind support and maintenance and result in a one third reduction in the SSI benefit amount.

D. PURCHASING A HOME WITH TRUST ASSETS

Since the residence is an exempt asset, it is not required that the home be held as a trust asset. If the SSI/Medicaid recipient owns the home outright the home will not be subject to the

Medicaid reimbursement provisions in the trust. On the other hand there will be a Medicaid lien against the home for long term care Medicaid benefits received after the age of 55. If the trust owns the home and the trustee pays for the taxes, insurance and utilities the beneficiary will take a 1/3 reduction in the SSI benefit amount because of the in-kind support and maintenance.

E. TRUSTEE CONTROL

The trustee must be careful not to relinquish control of the trust to the beneficiary or give the beneficiary direct access to the trust. The trustee should never give the beneficiary a trust credit card or give the beneficiary access to any portion of the funds through a pin number or as a co-signor of a trust account.

F. RCW REQUIREMENTS

The statute of limitation provisions in RCW 11.96A.070 would apply to the trustee of a first party or third party special needs trust. To be able to rely on the three year statute of limitations provisions in RCW 11.96A.070, the trustee reports must include the information specified in RCW 11.96A.070(b)(i) – (viii). The trustee can also get finality with accountings by complying with the reporting requirements in RCW 11.106.020 et seq.

For court supervised trusts, the Trustee's Accounting Act, RCW 11.106 et seq., provides that a court order approving an accounting is final and the beneficiary must appeal the order in a timely manner if he/she intends to challenge the accounting. A 2013 amendment to the Trustee's Accounting Act deleted the provision that the act did not apply to trusts created by order of the superior court or federal court.

The trustor should consider whether situs for the trust should remain in Washington, keeping in mind where the beneficiary and trustee may reside in the future. The trustor may want to give the trustee power to change situs to another state in the future. RCW 11.98.005.

Under the provisions of RCW 11.97.010, the trust document will determine notice and reporting requirements to beneficiaries. The legislature repealed the 2012 amendment to RCW 11.97.010 that included non-waivable requirements for annual reports and notice to beneficiaries and remainder beneficiaries. With court supervised trusts, court orders will determine notice and reporting requirements. If a trustee wants to rely on the statute of limitation protections in RCW 11.96A.070, the trustee will need to comply with the reporting requirements in RCW 11.96A.070(b).

G. EXAMPLES:

1. Joan receives SSI and Medicaid. She is the beneficiary of a third party SNT that receives a \$20,000 distribution from a Retirement Plan. The trustee pays the landlord directly for

her rent of \$1,000 per month and distributes \$8,000 to an attendant for additional caregiver hours not covered by the Medicaid program. Joan will lose \$260 of her SSI check because she receives in-kind support with the rent payment. There will be no reduction in Joan's Medicaid benefits even though her rent is paid by the trust. The trust has no retained income and Joan has taxable income of \$20,000 from the trust that will be reported on her 1040 tax return.

2. Tom is mentally ill and receives SSI and Medicaid benefits. His parents left him \$100,000 in a SNT, earning annual income of \$6,000. The trust purchased a computer for Tom, pays his Internet connection bill on a monthly basis and pays a case manager to visit him on a weekly basis to check on his medication management. The distributions for the year exceeded the \$6,000 of trust income. Tom will continue to get his full SSI check and complete Medicaid coverage. The trust has no retained income and Tom will have taxable income from the trust equal to the disbursements made for his benefit.
3. Sarah is the beneficiary of a 2 million dollar SNT established by her parents. She was on SSI and Medicaid during a period of severe depression. She was involuntarily committed last year to Western State for a month, which was paid by the State. Sarah has responded well to new medications and is hoping to go back to work. Sarah would like more independence and the trustee is not concerned about financial mismanagement by Sarah. The trustee has decided to exercise her discretion to make a cash payment to Sarah every month of \$2,000 for her general support and to purchase a private health insurance policy for Sarah. Sarah will lose her SSI and Medicaid because of the cash distributions to her. If Sarah has another psychiatric breakdown, the trustee can exercise its discretion to again withhold all cash payments and have Sarah reapply for SSI and Medicaid.
4. Bert and Gladys had SNT provisions in their wills. Bert died first and his half of the community property went into a SNT for Gladys' benefit, administered by their two daughters. Gladys subsequently needed nursing home care costing \$11,000 per month. When the assets in Gladys name were spent down to \$2,000, she was able to apply for Medicaid to help with the cost of her care. The trustees use the SNT established in Bert's Will to pay the supplemental charge for a private room in the nursing home and to pay for an attendant to visit Gladys when the daughters are out of town.
5. Sally is 25 and was in a serious automobile accident that left her a quadriplegic. She received a personal injury settlement of 1.5 million dollars. She receives 8 hours per day of attendant care paid by the Medicaid program. The court established a special needs trust for her benefit. The trust will be used to pay for a handicapped modified van for Sally, remodeling of her parents' home to make it handicapped accessible and to pay for additional attendant care not covered by the Medicaid program. She is going to Sweden to have an experimental surgery procedure performed that is not covered by Medicaid. At Sally's death any assets remaining in her trust will be paid back to the State of Washington for Medicaid benefits paid during her lifetime with any remainder

to go to her named beneficiaries. Sally would like to make a gift of some of the settlement proceeds to her sister but understands that the trust can only be used for her sole benefit so the gift is not an option.

APPENDICES

1. Sample Special Needs Trust in Will:

Article 5. Special Needs Trust for Linda Smith.

Section 5.1 Trustee. I appoint SCOTT SMITH as trustee of the trust established under this Article. If SCOTT is unable or unwilling to serve, I appoint SARAH TURNER as successor trustee.

Section 5.2 Trust Estate. The trust estate shall consist of the property received by my trustee for administration under this Article for the benefit of LINDA SMITH and shall include the proceeds, investments, and reinvestments of that property. This trust is intended to be a discretionary third party trust under the SSI and Medicaid benefit programs and shall contain no assets or income received from LINDA. My trustee shall hold all the property in trust for the purposes and on the conditions set forth in this Article, and at no time shall such property become available to LINDA or be placed in her possession or come within the control of her Guardian, except as otherwise provided in this Article. This trust shall be known as the "Linda Smith Testamentary Special Needs Trust."

Section 5.3 Protection from Creditors. No right, title, interest, or equity in any of the trust estate or the income or increase thereof shall vest in LINDA until actual payment to her by my trustee, and no part of either principal, interest, or increase shall be liable for LINDA's debts or shall be subject to attachment or seizure by any creditors of LINDA. LINDA shall not have any power to convey, mortgage, pledge, or otherwise dispose of, encumber, or anticipate the principal, income, or increase of said trust estate.

Section 5.4 Irrevocability. The trust created hereunder shall be irrevocable. No person shall have the power to alter, amend, revoke, or terminate the trust or any of its terms or to designate the persons who shall possess or enjoy the trust property or the income therefrom, except as expressly provided herein.

Section 5.5 Distributions During Linda Smith's Lifetime. The trustee shall hold, administer, and distribute the trust estate as follows:

5.5.1 Purpose of the Trust. The primary purpose of the Trust is to provide for LINDA SMITH's special needs resulting from her disabilities. If LINDA is receiving government benefits based upon need or disability, from any local, state, or federal government program, the trustee shall have discretion to supplement those government benefits. No disbursement shall be made for LINDA that would permanently jeopardize eligibility for, or inappropriately limit the type of assistance available to her, if she is receiving or intends to apply for local, state or federal benefit programs. The trustee may elect, however, at the trustee's discretion to forego government benefits if the trustee determines it would be in LINDA's best interest to do so. If LINDA is not receiving government benefits based upon need or disability, the Trustee shall have the sole discretion to determine what disbursements shall be made from the trust estate for her benefit. Consistent with these limitations, the trustee may provide such resources and experiences as will contribute to and make LINDA's life as pleasant, comfortable, and happy as possible. It is my intention that this trust be used primarily to benefit LINDA and not to benefit the residual beneficiaries. Any income not distributed in a calendar year shall be accumulated and added to principal at or prior to the end of such year.

5.5.2 Manner of Distributions. Where appropriate to preserve other benefits LINDA is receiving, distributions from the trust shall be direct payments to the persons or entities who supply goods or services to her. If LINDA is not receiving needs based government benefits, the trustee shall

have discretion to either make direct distributions to LINDA or make direct payments to the persons or entities supplying goods or services to her.

5.5.3 Power to Amend Trust. If the terms of this trust can be amended to retain or allow eligibility for needs-based programs, the trustee shall have authority to make such amendments as are necessary for this purpose.

Section 5.6 Termination of Trust and Residual Beneficiaries.

5.6.1 Termination. The trust shall terminate at the earlier of the following: the distribution of all principal and income or the death of LINDA and the distribution of the trust estate as directed herein.

5.6.2 Residual Beneficiaries. In the event of the death of LINDA, subject to possible funeral expense payments for her, any then-remaining principal shall be held, administered, and distributed as provided in Article 4 as though LINDA had died before me.

2. Additional language to consider including in special needs trust if appropriate:

- Expenditures include by way of illustration but not limitation, expenses for: dental or medical care not covered by existing insurance or benefit programs, durable or adaptive medical equipment, tutoring and education including private primary or secondary education programs, post-secondary schooling and training, rehabilitative training or therapy, the purchase of exempt assets including a home, advocacy on LINDA's behalf, case management, job coaching and other employment support, travel, recreation, entertainment, and taxes.
- At all times the trustee shall strive to provide SOPHIE with the highest quality medical/residential care available, social activities and educational and training opportunities so that she can live as independently as possible as an adult.
- It is my desire that the trustee strive to use trust assets to maintain to the greatest extent possible the same lifestyle that I provided to SOPHIE before my death and to ensure that she will have adequate support throughout her lifetime.
- In exercising discretion, the trustee shall be guided by any Letter of Intent that my wife and I prepared before our deaths.

- If SOPHIE is able to support herself as an adult with substantial gainful employment, the trustee shall be generous in providing her with as much financial independence as the trustee deems appropriate under the circumstances.
- The Trustee shall have discretion to terminate this trust and distribute the trust estate to MARK free of trust if he is at least thirty-five years old, has been employed full time for at least five years and has had no psychiatric hospitalizations during that five year period.

3. Language in Will to establish contingent special needs trust if beneficiary receiving government benefits:

Section 7.4 Beneficiary Receiving Public Benefits. If any beneficiary under this Will or a trust created under the terms of this Will, is then receiving or, in the sole determination of the Personal Representative or trustee, is likely eligible to receive, within one year, government benefits based on disability or financial need, the Personal Representative or trustee is expressly authorized to withhold outright distribution to such beneficiary and instead to place the beneficiary's share in a separate trust to be held and administered as follows:

7.4.1 Trustee. The Personal Representative or currently serving trustee shall select a suitable trustee for any trust under this Section.

7.4.2 Distributions. The trustee shall have the discretion to pay to or apply for the benefit of the beneficiary as much of the net income and principal of the trust as the trustee deems necessary or advisable for assistance with care, support, education, and activities that supplement other government benefits which would ordinarily be received by or are being or will be received by the beneficiary. The trustee shall have the sole discretion to determine what disbursements shall be made for the beneficiary's benefit, and this trust shall not be considered a general support trust. Any net income not distributed shall be accumulated and added to principal. The trustee's discretion shall include the discretion to withhold any distributions to or for the benefit of the beneficiary, if any such distribution would inappropriately jeopardize eligibility for, or limit the types or amounts

of assistance available to, the beneficiary under the Medicaid, Supplemental Security Income Program, Temporary Assistance for Needy Families, or other government programs based on the beneficiary's disability or financial need.

7.4.3 Termination. The trustee shall terminate the trust upon the beneficiary's death or upon the trustee's sole determination that it would be in the best interest of the beneficiary to terminate the trust. Upon the termination of the trust, the trustee shall distribute the trust estate to the beneficiary if the beneficiary is then living. If the trust terminates upon the death of the beneficiary, the trustee shall distribute the remaining trust estate as provided in Article 5 above, as though the beneficiary had died before me.