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WELCOME TO THE DEVELOPMENTAL DISABILITY LEGAL NETWORK, L.L.C.

A Legal Service Provided Through

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SUPPLEMENTAL (SPECIAL NEEDS) TRUSTS FREQUENTLY ASKED QUESTIONS

WHY UTILIZE A SUPPLEMENTAL NEEDS (SPECIAL NEEDS) TRUST?

To Retain Governmental Benefits And Protect Assets Acquired Throughout A Lifetime

A Supplemental Needs Trust for individuals (sometimes referred to as a Special Needs Trust) is a highly specialized trust designed to benefit an individual who is developmentally delayed and/or has a disability. A Supplemental Needs Trust may be a "stand alone" document or it can form as part of a Last Will and Testament. A Supplemental Needs Trust enables a person with a physical or mental disability, or an individual with a chronic or acquired illness, to hold in Trust, an unlimited amount of assets for his or her benefit. In a properly-drafted Supplemental Needs Trust, the individual's assets are not considered countable assets for purposes of eligibility for certain governmental benefits. Such benefits may include Social Security Income (SSI), Medicaid, vocational rehabilitation, subsidized housing, and other government benefits based upon need. For purposes of a Supplemental Needs Trust, an individual is considered impoverished if his or her personal assets are less than \$2,000.00.

A Supplemental Needs Trust provides for supplemental and extra care over and above the support which is provided by government to improve the quality of life. The primary restriction of a Supplemental Needs Trust is it cannot provide a benefit for food or housing.

Supplemental Needs Trust had been used for years based upon cases evolving in the court decisions. In 1993, Congress created an exception under the amendments to the Omnibus Budget and Reconciliation Act of 1993 (OBRA-93) specifically authorizing the use of Supplemental Needs Trust for the benefit of individuals who are under the age of 65 years and disabled according to Social Security standards. The Social Security Operations Manual authorizes the use of Supplemental Needs Trust to hold and administer non-countable assets.

Each Supplemental Needs Trust is its own “entity” with its own Federal Identification Number (Employer Identification Number) issued by the Internal Revenue Service. The Trust is not registered under either the Settler’s or the Beneficiary’s Social Security Numbers, but a separate and distinct number. A Supplemental Needs Trust must be irrevocable. A properly-drafted Trust will include explicit directions for amendment when necessary.

WHAT ARE THE PRACTICAL FUNCTIONS OF A SUPPLEMENTAL NEEDS TRUST?

To Ensure That Your Disabled Family Member Has Every Opportunity For A Fulfilled And Happy Life

A Supplemental Needs trust can be used for “supplemental and extra care over and above what the government provides.” A properly drafted Supplemental Needs Trust will be implemented by a sliding scale. Specifically, in the unlikely event that the government provides for 100% of the disabled beneficiary’s needs the Trust will provide 0%. If there are no governmental benefits available, the Trust can provide 100%. Most beneficiaries of a Supplemental Needs Trust are between such parameters of the scale and the Trust supplements governmental benefits. However, the Trust does not replace such benefit. If a beneficiary falls into a Medicare “doughnut hole” for example, it becomes the Trust’s job to cover the shortfall.

Although there are Medicaid and Social Security Disability Insurance rules provide the Trust cannot be used for housing or food, these rules have to be interpreted carefully. For example, there is no restriction on purchasing an accessible home or making accessibility adaptations to an existing home. Also, although food is not allowable under the rules; social events such as banquets, dinner parties, birthday parties are allowable. Also, vacations and entertainments are permitted under the applicable provisions.

Supplemental Needs Trust is a continuous legal document meant to maintain eligibility for governmental benefits as well as bring enjoyment and new, positive experience to the beneficiary with a disability.

WHAT TYPE OF BENEFITS DOES A SUPPLEMENTAL NEEDS TRUST TYPICALLY PROVIDE TO CHILD OR ADULT WITH A DISABILITY?

The Trust Can Provide Supplemental Benefits Beyond Benefits Received From Governmental Assistance Programs

The Supplemental Needs Trust can be utilized to provide the needs of a person with a disability and to supplement benefits received from various governmental assistance programs such as Social Security, Medicaid, HUD, etc. Supplemental Needs Trust typically provide for the following:

- insurance
- rehabilitation
- job training
- education
- maintenance
- equipment
- transportation including vehicle purchase
- recreation
- eyeglasses
- health club
- communications equipment - I-Phone/Blackberry

Further, Supplemental Needs Trust allows the Trustee to allocate funds on behalf of the Beneficiary for the following:

- entertainment
- electronic equipment
- companion/support services
- athletic training and sports
- computer equipment
- travel/vacations
- supplemental medical treatment not provided by medicaid
- programs to promote independence and enhance self esteem

MY FAMILY IS WEALTHY AND ARE NOT CONCERNED ABOUT GOVERNMENTAL BENEFITS FOR MY DEVELOPMENTALLY DELAYED AND/OR DISABLED CHILD. WHY CREATE A SUPPLEMENTAL NEEDS TRUST?

To Protect Your Disabled Family Member

Other types of Spendthrift or Family Trusts aren't the proper vehicle for Special Needs individually because they don't address the specific needs of the disabled beneficiary or his future lifestyle. Even in situations where a family may have significant assets and resources to assist a disabled family member, a Supplemental Needs Trust should be established to address these unique issues.

Assets placed in the Trust remain non-countable assets and allow the beneficiary to qualify for available governmental benefits and programs. You have paid taxes all your life. Why sacrifice governmental services that might be available to your family member now and in the future.

Also, Trust funds are not subject to creditors or seizure. Therefore, if the disabled beneficiary should ever be sued in a personal injury or other type of lawsuit or incurred substantial debt, the beneficiary is not a “deep pocket” because monies placed in the Trust are not subject to a judgment, garnishment and/or seizure.

IF HAVING MONEY CAUSES PROBLEMS FOR MY DISABLED SON, WHY CAN'T I JUST LEAVE THAT MONEY TO HER SISTER SO THAT SHE CAN CARE FOR HIM.

Leaving Money To Others Can Create Serious Problems

“Disinheritance” was commonly used before the use of Supplemental Needs Trusts and was officially recognized by Congress and the Courts. Disinheritance was a means of providing for a disabled or ill person. However, it puts the assets at risk a non-disabled sibling holding assets for the benefit of a disabled sibling could be subject to such liabilities such as judgments from a bankruptcy and other debts.

Asset transfers, particularly of the beneficiary’s own funds, other than to Supplemental Needs Trusts are usually considered “Transfers for purposes of benefit qualification,” and are subject to a 60 month “look back” period for Medicaid eligibility. Accordingly, the disabled beneficiary might not be eligible to receive benefits for up to five (5) years after the date of transfer. **Transfers to Supplemental Needs Trusts are exempt from this “look back” and do not cause a disqualification for such governmental benefits.** In such circumstances, the assets meant to benefit the disabled or developmentally delayed person can go to pay the judgment creditors or the estranged spouse of the non-disabled sibling. Using a Supplemental Needs Trust guarantees that the funds will be held only for the benefit of the disabled or developmentally delayed person, and not for any other purpose whatsoever.

WHAT MUST A SUPPLEMENTAL NEEDS TRUST SPECIFY?

Supplemental Needs Trusts Need Special And Defiant Language To Be Legal And Valid

Initially, the Trust should specifically state that it is intended to provide “supplemental and extra care” over and above that which the government normally provides. The Trust must state that it is not intended to provide a basic support.

A properly drafted Supplemental Needs Trust should reference the Social Security Operations Manual and the relevant portions from within the Manual that authorize the creation of the Trust. It must contain the required language regarding payback to Medicaid. The Trust should also have

language explaining the relationship to the Omnibus Budget and Reconciliation Act (OBRA-93) provisions which authorize the creation of the Supplemental Needs Trust.

WHEN IS IT APPROPRIATE TO FORM A SUPPLEMENTAL NEEDS TRUST?

A Supplemental Needs Trust Is A Valuable Estate Planning And Investment Tool

A Supplemental Needs Trust can be established at any time before the beneficiary's 65th birthday. It is common to create a Supplemental Needs Trust early in a child's life as a long term vehicle for holding assets to benefit the family member with a disability. This particularly applies to parents who wish to leave funds for a child's benefit after the parents death. The Supplemental Needs Trust is the proper and most efficient estate-planning vehicle for parents of children with a disability. The cost of the creation of the Trust is tax deductible.

Additionally, the individual with a disability or chronic illness may receive funds from third party sources, such as a personal injury settlement or from relatives or friends, Social Security back payments and/or insurance proceeds as long as it is placed into a Supplemental Needs Trust.

IS THERE AN OBLIGATION TO REPAY MEDICAID OR OTHER STATE AND FEDERAL FUNDING SOURCES IN A SUPPLEMENTAL NEEDS TRUST?

There May Be Repayment Obligations In Some Situations

A properly drafted Supplemental Needs Trust will address the issue concerning repayments to Medicaid or other such sources. The United States Congress requires that repayment language must be included in all Supplemental Needs Trust regardless as to whether or not repayment is required.

The amendments to the Omnibus Budget and Reconciliation Act of 1993 (OBRA-93) requires that a payback be made to Medicaid, but only under certain specific circumstances, as detailed as follows.

- A Supplemental Needs Trust that is funded by parents or other third party sources will not be required to pay back Medicaid.
- A Trust which is funded by a personal injury settlement with an accompanying court judgment requiring the funds to be placed in the trust.

The only assets within the Trust that are subject to the repayment obligation are those assets which originally belonged to the disabled individual him or herself that are transferred into the Trust. Examples of assets which would belong to the disabled individual originally belonging to the disabled or developmentally delayed individual, could be such assets as earnings from a job, certain Social Security back payments and personal injury recoveries which are not Court-ordered into the Trust. In such case, the disabled individual's estate then might be liable for an amount equal to the Medicaid used during the lifetime of the disabled or chronically ill individual.

It is not common for a Trustee or a disabled individual to ask a court to direct certain assets into the Trust. In that event, those assets may not be subject to the repayment provision of OBRA-93.

CAN ANY LAWYER CREATE A SUPPLEMENTAL NEEDS TRUST?

Just As Most Family Physicians Are Not Cardiologist, Most Attorneys Are Not Proficient In Supplemental Needs Trust

A family or person seeking to create a Supplemental Needs Trust is advised to utilize the services of an attorney who is proficient in disability issues. A Supplemental Needs Trust can very easily be “invaded” by government if the Trust is invalidated due to the lack of proper language throughout the Trust. This government scrutiny and invasion is more likely given the budget difficulties of state and federal government. A poorly written Trust can cause a loss of benefits, assets, or other financial and legal hardships for the Beneficiary or the Trustee, including civil litigation.

You must assume the Attorney you select is especially familiar with Supplemental (Special Needs) Trust. Many estate planning attorneys are not aware of this area of the law. Using a law firm that is proficient in Special Needs issues assures you that the attorney is familiar with the government benefits systems, the appropriate creation of the Trust, and ultimately the defense of the Trust in the event that it should be challenged by a court, the Social Security Administration or Medicaid.

CAN I SET UP A TRUST FOR MY DISABLED SISTER?

Yes, But Not Specifically

The United States Code section which authorizes Supplemental Needs Trusts states that “a parent, grandparent or guardian” is authorized to establish a Supplemental Needs Trust, Siblings, caregivers or friends are not mentioned at all. However, the law does not forbid siblings and others from setting up Supplemental Needs Trusts. The law does not specify state whether the “guardian” mentioned must be Court-appointed or can be a “guardian-in-fact,” such as care-taking sibling. The United States Court does permit an interested third party (such as a sibling) to establish the Trust under certain circumstances. A well-written Supplemental Needs Trust established by someone other than a parent, grandparent or legal guardian should include a explanation to this particular provision of the law. In addition, the courts in most states have recognized the right of a sibling, friend or caregiver to establish a Trust. Some attorneys are hesitant to create Supplemental Needs Trust under such circumstances because benefits providers and agencies often create difficulties due to their lack of knowledge of the provisions for creating these type of Trust. Be cautious, and work with a lawyer familiar with these specialized issues to ensure the Trust is properly drafted.

POOLER TRUST - NO "MEDICAID PAYBACK"

Pooled Trust May Not Be Appropriate For Every Satisfaction, Why May Not Be Better Than Supplemental Need

"Pooled" or Cooperative Master Trusts are a special form of Supplemental Needs Trust which can be established by not-for-profit organizations or groups on behalf of their membership (for example, a group home may create one for its residents). In theory, Cooperative Master Trusts are an excellent device to aid the disabled. In practice, they have many drawbacks.

Initially, Cooperative Master Trusts are no longer exempt from the Medicaid repayment rules. Medicaid has implement recent rule changes that specifically state that funds placed in Cooperative Master Trusts are subject to the 36-to-60 month asset transfer or "look back" period under certain specific circumstances; Therefore, transferring funds to a Cooperative Master Trust MAY disqualify a beneficiary from benefits for up to five years.

The money that is placed in a Cooperative Master Trust is used generally to address the needs of all the members of the group, not just the specific needs of your disabled family member. Once you place your money in the pool, it usually cannot be withdrawn or returned to you. Generally you cannot direct where the proceeds of the Trust will go if your family member leaves the group for any reason. Your money typically remains in the pool to assist future members. **Before investing in a Cooperative Master Trust, determine from the Trust Representative about this issue.** A stronger, better-managed Cooperative Master Trust may be able to return funds to you should your disabled family member no longer be a member of the pool.

You do not have control over how the money is administered. Accordingly, your family member may not get all the services he or she needs. Management of Pooled trusts is often given over to Accountants, Professional Trustees, Financial Planners, or financial institutions. Due to their rarity, Cooperative Master Trusts are frequently mismanaged and many have often failed, leaving the group members without funds.

Cooperative Master Trusts can work well if you find one that is properly drafted and supervised. However, if you are willing to relinquish control of your assets to others, you are well advised to seek out a group that you know well and trust, and can serve the special needs of the beneficiary. Further, Trust should have an established track record of successful Trust management.

IS THIS THE SAME AS A GUARDIAN TRUSTEE.

Not Necessarily

Parents often assume that because they are their children's caregivers that they are also their lifetime guardians. This is not correct. Every person over the age of eighteen (18) is presumed to have the legal rights of an adult no matter their abilities.

In order to be someone's Tutor or Guardian, a parent or sibling must go to Court and petition to become responsible for that person in an interdiction proceeding. They must demonstrate to the Court that the disabled person is unable to act responsibly on their own behalf.

Merely setting up a Trust and becoming a Trustee, or being someone's Representative Payee for Social Security purposes does not make you a Tutor or Guardian even if you may have effective control of the disabled person's finances and provide for all their needs. If you feel one is necessary, consult an Attorney familiar with Guardianship law to determine which is proper for your circumstances.

For More Information Regarding Special Needs Trusts Please Call

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